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

Date of decision: 24th May 2022

\+ CRL.A. 1372/2019

MANTOO SHARMA ..... Appellant

Through: Ms. Aishwarya Rao & Ms. Mansi Rao, Advocates (DHCLSC).

versus

STATE ..... Respondent

Through: Mr. Ashish Dutta, APP for the State with S.I. Deepak Kumar Yadav, P.S.: Uttam Nagar.

\+ CRL.A. 1228/2019

BEERPAL ..... Appellant

Through: Mr. Harsh Prabhakar, Advocate (DHCLSC) with Mr. Anirudh Tanwar, Mr. Harjeet Singh Sachdeva, Mr. Dhruv Chaudhry, Ms. Shikha Garg & Mr. Jay Kumar Bharadwaj, Advocates.

versus

STATE ..... Respondent

Through: Mr. Ashish Dutta, APP for the State with S.I. Deepak Kumar Yadav, P.S.: Uttam Nagar.

\+ CRL.A. 1252/2019

MOHD. NASEEM @ SAMIM ..... Appellant

Through: Mr. Sumeet Verma, Advocate with Mr. Mahinder Pratap Singh, Advocate.

versus

STATE ..... Respondent

Through: Mr. Ashish Dutta, APP for the State with S.I. Deepak Kumar Yadav, P.S.: Uttam Nagar.

+ CRL.A. 1262/2019

NARESH @ ANNA ..... Appellant

Through: Mr. Maninder Singh, Senior Advocate with Mr. Sumer Kumar Sethi, Ms. Aekta Vats & Ms. Anshika Batra, Advocates.

versus

STATE ..... Respondent

Through: Mr. Ashish Dutta, APP for the State with S.I. Deepak Kumar Yadav, P.S.: Uttam Nagar.

+ CRL.A. 1349/2019

JAIPAL ..... Appellant

Through: Mr. Sumeet Verma, Advocate with Mr. Mahinder Pratap Singh, Advocate.

versus

STATE ..... Respondent

Through: Mr. Ashish Dutta, APP for the State with S.I. Deepak Kumar Yadav, P.S.: Uttam Nagar.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

Overview

By way of the present judgment, we propose to dispose of a batch of five criminal appeals, whereby the five appellants impugn judgment of conviction dated 26.08.2019 and sentencing order dated 29.08.2019, by which the learned Additional Sessions Judge-05 (West), Tis Hazari Courts, Delhi has convicted all five appellants for

offences under sections 302/354 read with section 34 of the Indian Penal Code, 1860 ('IPC'); and has sentenced them for the offence under section 302 IPC to rigorous imprisonment for life and to fine of Rs. 10,000/- each, with a default sentence of rigorous imprisonment for 06 months; and for the offence under section 354 IPC, they have been sentenced to rigorous imprisonment for 05 years with fine of Rs. 5,000/- each, with a default sentence of rigorous imprisonment of 02 months. The benefit of section 428 of the Code of Criminal Procedure 1973 ('Cr.P.C.') has been given to all appellants. For clarity the particulars of the criminal appeals are as under :

A1	Mantoo Sharma vs. State	CRL.A. No. 1372/2019
A2	Beerpal vs. State	CRL.A. No. 1228/2019
A3	Mohd. Naseem *alias* Samim vs. State (also referred to as Wasim by witness)	CRL.A. No. 1252/2019
A4	Naresh *alias* Anna vs. State	CRL.A. No. 1262/2019
A5	Jaipal vs. State (also referred to as Jitender and Satender by witness)	CRL.A. No. 1349/2019

Brief Facts

2. The case of the prosecution is that on the intervening night of 28/29.03.2014 the appellants molested and murdered one Sukhmati wife of Jogeshwar (deceased/victim). The allegation is that some of the appellants made the deceased consume liquor; and subsequently molested her and then hit her on the head with a beer bottle and with pieces of brick and stone, which led to her death.

3. On a call being received on 29.03.2014 at 07:10 A.M. at P.S.: Uttam Nagar, West Delhi regarding a 'male' dead body having been found at Safeda Park within its jurisdiction, a First Information Report bearing FIR No. 315/2014 dated 29.03.2014 came to be registered under section 302 IPC at P.S.: Uttam Nagar, West Delhi, which further led to the arrest of Mantoo Sharma (A1), Beerpal (A2), Mohd. Naseem *alias* Samim (A3) and Jaipal (A5) on 04.04.2014 and subsequently, to the arrest of Naresh *alias* Anna (A4) on 06.05.2014.

4. The investigation culminated in the filing of a final report/chargesheet dated 05.07.2014 under section 173 Cr.P.C. against all five appellants, leading to their eventual conviction.

5. In support of their allegations, the prosecution produced 24 witnesses, while the defence marshalled 03 witnesses. Of the 24 witnesses, the prosecution later dropped 02 witnesses, being the husband and son of the deceased. A summary of the main witnesses produced and their connection with the incident is as follows :

Witness No.	**Witness Name**	**Purpose/Relevance**
PW-1	Monu	Eye-witness
PW-6	Insp. Mahesh Kumar	Draughtsman of scaled site plan
PW-8	Ramanuj Pandey	Caretaker of Night Shelter (*Raen Basera*)
PW-10	Dr. B.N. Mishra	Post-mortem Doctor
PW-12	Ct. Ankur	Visited crime scene
PW-13	Dr. R. Kohli	MLC Doctor

PW-14	HC Ram Kumar	Witness to arrest of accused persons except Naresh *alias* Anna
PW-16	HC Ravinder Singh	Arrested Naresh *alias* Anna
PW-19	S.I. Narsingh	Visited crime scene on 29.03.2014
PW-21	ASI Vijay Kumar	MHC(M), P.S.: Uttam Nagar
PW-22	Insp. O.P. Thakur	Investigating Officer
DW-1	Raj Kumar s/o Roshan Lal	Re arrest of Naresh @ Anna
DW-2	Raj Kumar s/o Munshi Lal	Re arrest of Naresh @ Anna
DW-3	Niwas	Re arrest of Beerpal

6. We have heard Mr. Maninder Singh, learned senior counsel and Ms. Aishwarya Rao, Mr. Harsh Prabhakar and Mr. Sumeet Verma learned counsel for appellants A4, A1, A2 and A3 and A5 respectively.

7. We have also heard Mr. Ashish Dutta, learned Additional Public Prosecutor appearing for the State.

8. The submissions made by learned counsel for the parties are summarised in the discussion appearing below.

9. Learned counsel appearing for the appellants have also cited the following judicial precedents in support of their contentions:

9.1 On how the court should appreciate the testimony of a solitary eyewitness, counsel have cited : ***Lallu Manjhi vs. State of Jharkhand***[1], ***Amar Singh vs. State NCT Delhi***[2], ***Santosh***

[1] (2003) 2 SCC 401, para 10

Prasad @ Santosh Kumar vs. State of Bihar[3], ***State of Maharashtra vs. Dinesh***[4], ***Govindraju @ Govinda vs. State***[5] and ***Sampath Kumar vs. Inspector of Police, Krishnagiri***[6].

9.2 Submitting that 'suggestions' given by counsel during cross-examination should not being treated as 'admissions' that bind all the accused, counsel have relied upon : ***Salamat Ali vs. State***[7], ***Pawan Kumar vs. State***[8] and ***Koli Trikam Jivraj & Anr vs. State of Gujarat***[9].

9.3 Doubting the reliability of recovery of clothes worn by the accused, which are supposed to have blood stains, many days later at the time of arrest, counsel have placed reliance upon : ***Mohd Rizwan vs. State***[10], ***Naveen Kumar Verma vs. State***[11], ***Mohd. Jabbar vs. State***[12], ***Amarpal (Raj Pal) vs. State***[13] and ***Yamanappa Goolappa Shirgumpi & Ors vs. State of Karnataka***[14].

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[2] 2020 SCC OnLine SC 826, para 32
[3] (2020) 3 SCC 443, paras 5.4.2, 5.4.3, 5.5, 6
[4] (2018) 15 SCC 161, para 7
[5] (2012) 4 SCC 722, paras 23-26
[6] (2012) 4 SCC 124, paras 25, 27-30
[7] 2010 SCC OnLine Del 1343, paras 7-10
[8] 2019 SCC OnLine Del 10452, paras 13, 23-24
[9] AIR 1969 Guj 69, paras 14-21
[10] 2010 SCC OnLine Del 2675, para 24
[11] 2018 SCC OnLine Del 9606, paras 46, 47
[12] 2010 SCC OnLine Del 2050, paras 18-19, 22
[13] 2010 SCC OnLine Del 2113, paras 47-50
[14] AIR 1981 SC 646, para 7

9.4 On the proposition that unreliable evidence cannot be used to corroborate other unreliable evidence, counsel have cited : ***State of Punjab vs. Parveen Kumar***[15].

9.5 On the correctness of estimating the time of death based on the food found in the stomach of a deceased, counsel have relied upon : ***Nihal Singh vs. State***[16], ***Ram Prakash & Ors vs. State of Uttar Pradesh***[17], ***Masji Toto Rawool vs. State***[18] and ***Jitender Kumar vs. State of Haryana***[19].

9.6 On whether reliable direct evidence is to be rejected when contradicted by medical evidence, counsel have placed reliance upon : ***Punjab Singh vs. State of Haryana***[20].

9.7 On the procedure for execution of a warrant beyond the territorial jurisdiction of the concerned court, counsel have cited and relied upon : ***Rahuvansh Dewachand Bhasin vs. State of Maharashtra & Anr***[21].

9.8 On the aspect of non-joining of local police during arrest of an accused, counsel have cited : ***Riaz Ali vs. State (Govt. Of Nct) Delhi***[22].

[15] (2005) 9 SCC 659, para 10
[16] AIR 1965 SC 26, para 12
[17] (1969) 1 SCC 48, para 5
[18] (1971) 3 SCC 416, para 7
[19] (2012) 6 SCC 204, paras 50-61
[20] (1984) Supp SCC 233, para 2
[21] (2012) 9 SCC 791, para 28
[22] 2012 SCC OnLine 1091, paras 78-79

9.9 On the view taken if there is contradiction between oral and documentary evidence, counsel have relied upon : ***Allauddin Khan vs. State of West Bengal***[23].

9.10 On the aspect of non-examination of important witnesses, counsel have placed reliance upon : ***State (Delhi Admn.) vs. Kulwant Singh***[24].

9.11 On the aspect of prosecution witness not being re-examined on material points, counsel have cited : ***Javed Masood & Anr vs. State of Rajasthan***a[25].

9.12 On the consequence of missing information in a site plan, counsel have cited : ***State of Punjab vs. Ajaib Singh & Ors***[26].

9.13 Arguing that a statement under section 161 Cr.P.C. can only be used for contradiction and not for corroboration, counsel have cited : ***Priya Swami vs. State***[27].

9.14 On the necessity to put all incriminating circumstances to an accused under section 313 Cr.P.C., counsel have cited : ***Maheshwar Tigga vs. State of Jharkhand***[28].

9.15 Submitting that Defence Witnesses are to be treated at par with Prosecution Witnesses, counsel have relied upon : ***Dudh Nath Pandey vs. State of Uttar Pradesh***[29].

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[23] 2015 SCC OnLine Cal 3033, para 22
[24] 1992 SCC OnLine Del 77, para 21
[25] (2010) 3 SCC 538, paras 19, 20
[26] (2005) 9 SCC 94, para 13
[27] 2015 SCC OnLine Del 6531, paras 21-22
[28] (2020) 10 SCC 108, paras 8-9
[29] AIR 1981 SC 911, para 19

9.16 On the proposition that if two views or interpretations are possible, evidence is to be read in favour of the accused, counsel have placed reliance upon : ***State of Uttar Pradesh vs. Nandu Vishwakarma & Ors***[30] and ***Rang Bahadur Singh & Ors vs. State of U.P.***[31].

Discussion

10. We have carefully perused the impugned judgment and have gone through the evidence on record in detail, assessing its merits and demerits from the perspective of each of the appellants.

11. The appellants have been convicted on the basis of ocular evidence, documentary evidence, medical evidence and forensic evidence, as discussed in detail, hereinafter.

Ocular Evidence

12. PW1: Monu, who was a ragpicker operating in the area, is cited as an eye-witness to the crime. The relevant portions of his testimony are extracted below :

> PW-1:
>
> *"About* 1½ *years ago, at about 6.30 PM, I was present at Theka, Labour Chowk, Uttam Nagar, Delhi, when Anna and Wasim came on a motorcycle. Anna gave a currency note of Rs.500/- in the hand of Mantoo. Mantoo brought three Beer bottle and one half bottle. I went to Pappu and I emptied my garbage bag and* ***I remained seated there for about 1½ hours.*** *Thereafter, I reached near Pahari, Hastal Village while picking the garbage and I saw total six persons out of which one was female.* ***Anna and Wasim administered the liquor (Daaru) to that lady. When that female***

[30] (2009) 14 SCC 501, para 23
[31] (2000) 3 SCC 454, para 22

> ***started going from there, then Anna caught her and dragged her towards him. That female started raising shouting, thereafter, Wasim shut her mouth with his hand. Thereafter, Mantoo and Jitender started teasing her. Jitender removed Saree of that lady. Mantoo who was taking Beer hit Beer bottle on the head of that lady. Thereafter, all five accused persons started hitting that female with Adha and Rohra (pieces of bricks and stones) on the back and chest of that female. When that lady died, thereafter all five of them hanged that lady on a already cut tree of similar to my height***.
>
> *COURT OBSERVATION : The witness is appearing about 5 feet.*
>
> *Thereafter, Wasim and Anna sat on motorcycle and they went away through Exit towards Shamshan Ghaat. Mantoo, Jitender and Veerpal started running towards Hastal Village and Mantoo said to me "Kaam ho gaya hai, maar diya hai". I also started running behind them.*
>
> * * * * *
>
> *"(At this stage, Ld.defence counsel requested that witness should be asked to identify the accused persons individually).*
>
> *At this stage, the witness has pointed out towards accused Jitender, Veerpal, Anna, Mantoo and Wasim. (The witness has* ***correctly identified all the five accused persons*** *present in the court today).*
>
> * * * * *
>
> *"****Accused Wasim, Mantoo and Veerpal had taken the deadbody of deceased and hanged it on the already cut tree****."*
>
> (examination-in-chief dtd. 02.12.2014)

13. While cross-examining PW-1, the main thrust of counsel for the accused persons was to discredit PW-1 as an eye-witness, essentially on the basis that his deposition in court was not in consonance with his statement recorded under section 161 Cr.P.C. given to the police. PW-1 was confronted with his section 161 Cr.P.C. statement on various aspects. PW-1 was also sought to be discredited as being a 'planted witness' on the basis that, as per his own version, PW-1

himself was apprehended by the Police on the very next day after the incident and was detained at the Police Station for 05 days, and was therefore persuaded by the police to support the prosecution narrative.

14. Learned counsel have further argued that it is *ex-facie* incredible that PW-1 patiently and quietly witnessed the horrendous acts that he says were committed upon the victim for about 2 ½ hours, without helping the victim himself and without even calling for help. Attention in this regard is drawn to the following portion of PW-1's deposition :

> PW-1:
>
> *"I had stated in my statement before the police that accused Anna and Wasim had administered liquor to that lady (Confronted with statement Ex.PW-1/DA wherein it is not so recorded). I had stated before the police that all the five accused persons started hitting that female with Adha and Rora. (Confronted with statement Ex.PW-1/DA wherein it is not so recorded). I had stated before the police in my statement that I also started running behind them. (Confronted with statement Ex.PW-1/DA wherein it is not so recorded).*
>
> *I had not stated before the police as upto what distance I had followed the accused persons.* ***I had not informed the PCR. I had not informed any police official while going to PS. I had not informed any other authority or gate keeper regarding this incident immediately or thereafter. I had not informed the incident to any other person known to me****. ... The lady was crying like "Bachao Bachao". I had not stated before the police that "that lady was crying like Bachao Bachao". It is correct that I had reached nearby the park at around 08:00 PM. I had stated before the police that all the accused persons were already known to me prior to the incident.*
>
> * * * * *
>
> *"... I had not stated before the police that Jitender had removed the Saree of that lady. I had stated before the police that accused Montoo had given beer bottle blow on the head of that lady. (Confronted with- statement Ex.PW-1/DA wherein it is not so*

recorded). I had not stated before the police that Montoo told me that "Kaam ho gaya hai, Maar diya hai".

* * * * *

"It is correct that near the park of Safeda, there was Cremation Ground. It is correct that at the Cremation Ground, a room was built near the gate of cremation ground and the persons were residing with their family in that room. At the time of incident, those persons were inside the room. Gate was closed and they were sleeping. It is wrong to suggest that those persons were awakened and present there. (vol. one person probably gate keeper known as Baba was seated there and now that person is dead). Probably after about 5-6 months of this incident, Baba had died. The Baba was not questioned by the police in my presence. It is correct that on one side of the park, there is office of DESU, but at the time of incident, this DESU office was not built. It is wrong to suggest that at the time of incident, there was DESU office and one gate keeper used to remain there for whole time. ... Accused persons had never quarreled with me. ***It is correct that on 29.03.2014, 'Kahasuni' (verbal altercation) had taken place between me and accused persons and on that occasion we were taken to PS by the police. It is correct that all the accused persons were made to sit in the PS. I was made to sit in PS for about 5-6 days. Accused persons were also made to sit in the PS. Police had apprehended me during night hours about 10 or 11 PM****. My statement was recorded by the police in the PS. It is wrong to suggest that I had not seen the incident of this case or that I am deposing falsely at the instance of police.*

* * * * *

*"... **The light was available at the place of occurrence at a distance of about 8-9 steps. There were electric poles may be 5 or 6 in numbers installed nearby the spot. On the day of incident also I had consumed Ganja**. At that point of time, I was alone.*

Q. Why you did not try to save the lady?

*Ans. **I was seeing the incident while standing. I could not save the lady as I was sensing fear**.*

***I kept on watching this incident upto about 2 ½ hours**. The blood had oozed out from the head and leg of that lady (deceased). The accused persons had completely made that lady naked. At that time, the lady was seated inside the park. The accused persons had*

> *hanged that lady on the cut portion of the tree, after killing her. After seeing the incident, I started picking rags. After sometime, "mera dil hi nahi laga or mai ghar chala gaya". **I had left the spot at around 12:30 AM** and reached at the place where I used to sleep by foot. It took about 15 minutes to me in reaching to my place of sleeping. One constable (Sipahi) was standing on the gate of PS. 1 had not narrated the fact of incident to that constable. Police had apprehended me after about third day of the incident. It is wrong to suggest that I am narrating facts at the instance of police or that I am deposing falsely. It is wrong to suggest that I am deposing against the accused persons due to the reason that they had verbal altercation (Kaha Suni) with me prior to this incident."*
>
> (cross-examination dtd. 23.02.2016)

15. The second witness upon whose testimony the learned trial court has placed reliance is PW-8, Ramanuj Pandey, who is stated to be the caretaker of the *Raen Basera* (night-shelter), where the deceased used to sleep alongwith her husband and son. PW-8 is stated to have been witness to the fact that the deceased left the night-shelter on the intervening night of 28/29.03.2014 and never returned. The following portions of the testimony of PW-8 are relevant :

> PW-8:
>
> *" … A register was being maintained at the Centre, wherein I used to mention the names of visitors. One lady Sukhmati, her husband Sh.Jogeshwar and son Shiv Kumar used to come in the night-shelter. I used to make entry in register maintained by me. Sukhmati was beggar and she used to consume liquor. Her husband was handcart puller. Her son Shiv Kumar was a rickshaw puller. I do not remember the date of last visit of Sukhmati in Night Shelter, however, the relevant entries are made in said register.*
>
> *On 28.03.2014 Sukhmati was reported to have died. I came to know this fact in the early morning. **On 28.03.2014, Sukhmati, her husband and son had come in night-shelter around 10 pm. They had slept in the shelter**. She had taken food through a vendor who had come in Maruti Car around 12 night and thereafter, she slept in Shelter. During night hours, Sukhmati left the shelter but I*

do not know what time she left the shelter. On the following day in the morning, I came to know that her deadbody was found in Safeda Park and she was murdered.

* * * * *

"... The entire entries in the register are in my handwriting. The said register is now exhibited as Ex. P.1. The another part of this register is Ex P.2. Entries in this register are also in my handwriting. There is entry dt. 28.03.2014 at srl.no. 29 and 30 where names of Jogender and Shiv Kumar are written respectively. At srl. No. 46 of the register, name of Sukhmati is mentioned. All these entries are in my hand. The name of Jogender at srl. no. 29 is written due to mistake however, it was Jogeshwar. Due to mistake, I written Jogender,

Sukhmati, her husband and son used to visit Rain Basera and I had made relevant entries in the said register.

Accused Jitender @ Jai Pal and Montoo Sharma present before the court also used to come in Night Shelter. (witness pointed out towards accused Jitender @ Jai Pal by saying that he is Satender and accused himself disclosed his name as Jitender). (Another accused Mantoo Sharma is correctly identified by name and face). (another accused Jitender is identified by the witness by face)."

(examination-in-chief dtd. 17.09.2015)

"There was a clock in the night-shelter. I noticed the time when red colour Van had come. It was 12 mid night and it took about atleast half an hour in distributing the food. I cannot comment as upto what time the food was consumed by Sukhmati. There was no space inside the Rain Basera, hence, Sukhmati and his family remained outside the Rain Basera ..."

* * * * *

"I was on 24 hours duty in the Rain Basera. In fact, there were 8 hours shift in Rain Basera but in the absence of concerned employee, I used to remain there for 24 hours. On 28.03.2014, I recorded names of visitors upto the period when the Van distributed food and thereafter I did not mention any entry. No time is mentioned in the said register against any entry. It is correct that the last entry in register Ex. P.2 at srl.no. 46 is that of Sukhmati. Police had recorded my statement. It is correct that Sukhmati was

> *Quarrelsome lady. It is correct that she used to quarrel with her husband. It is wrong to suggest that I am deposing falsely at the instance of IO. It is wrong to suggest that Sukhmati being quarrelsome lady picked up quarrel on the day of incident at Rain Basera with some unknown person, where she was murdered."*
>
> * * * * *
>
> *"... I had seen the deceased lastly at 12:30 AM (on intervening night of 28/29.03.2014) and after that I had not seen her. Deceased never left the Rain Basera prior to 28/29.03.2014 during night during her stay. I cannot tell without seeing the record as to how much days the deceased did not reside at Rain Basera from the period w.e.f. 22.03.2014 to 28./29.03.2014. It is wrong to suggest that deceased most of the time used to stay at Rain Basera or that deceased after making entry at Rain Basera, used to leave the Rain Basera on her own ..."*
>
> (cross-examination dtd. 17.09.2015)

16. Arguing that the time of the offence as alleged by PW-1 was evidently false, inasmuch as PW-8, the caretaker of the *Raen Basera*, who must be deemed to have acted as a government official, clearly says that he saw the deceased at the *Raen Basera* last at 12:30 AM on the intervening night of 28/29.03.2014; whereas PW-1 says he witnessed the killing somewhere between 8 p.m. and 10.30 p.m. on the night of 28/29.03.2014. Furthermore, it is argued that if the testimony of PW-8 is to be accepted when he says that the deceased *"... had taken food through a vendor who had come in Maruti Car around 12 night and thereafter, she slept in Shelter. During night hours, Sukhmati left the shelter but I do not know what time she left the shelter ...."*, then the observation in the post-mortem report (PMR) that the stomach as well as rectum of the deceased were both empty is also wrong since traces of the food consumed by the deceased would have been found either in her stomach or in the

rectum. It is further submitted that if the names of the husband and son of the deceased, namely Jogeshwar and Shiv Kumar, came to be entered at S.Nos. 29 and 30 on 28.03.2014 in the *Raen Basera* register; and it is PW 8's case that the three of them used to come together, then why would the name of the deceased come to be entered at S. No. 46 of the register on the same day. It is argued that these discrepancies make the prosecution version unbelievable.

Medical Evidence

17. Upon the deceased being found in Safeda park, the body was first taken to Deen Dayal Upadhyay Hospital, New Delhi ('DDU Hospital') where the body was examined by one Dr. Manoj and MLC dated 29.03.2014 was recorded by the Chief Medical Officer, Dr. R. Kohli; who then subsequently deposed as PW-13. In the MLC which is exhibited as Ex PW-13/A, PW-13 says : "*Imp: Pt is declared Brought Dead as Causality at 10:35 a.m. on 29/03/2014.*"; and that subsequently the body was "*…packed and sent to Mortuary*". It is noteworthy that though the name of Constable Vikas appears in the narration in the charge sheet and PW12 and PW-19 say that Ct. Vikas was deputed to look after the body at the hospital, he was dropped from the list of witnesses as recorded in order dated 08.03.2016 during the course of the trial.

18. Post-mortem on the body was conducted at the DDU Hospital, Delhi by PW-10 Doctor B.N. Mishra, whose testimony is of considerable importance. The PMR which is exhibited as Ex. PW-10/A, bears the date of *30.03.2014* at no less than five places and mentions *29.03.2014* at 2 places; but in his dock testimony, PW-10 states that

he conducted the post-mortem on 29.03.2014. To be sure, the PMR number; the entry relating to the date and hour of receipt of inquest papers; the entry relating to the date and hour of starting autopsy; the date and hour of completing the autopsy; as also the date at the foot of the PMR, are all of 30.03.2014. Furthermore, the boards held next to the body while photographing it as an exhibit, and the viscera samples persevered, all bear the date of 30.03.2014.

19. What is also significant is, that while the PMR records injury marks on the forehead, frontal part of the head and up to base of the nose and abrasions and bruises on the lower limbs, elbow and shoulder blade but nothing abnormal was detected on the chest, thoracic regions or in the abdomen. Furthermore, the PMR records that the stomach, urinary bladder as well as the rectum were 'Empty'. Significantly, the cause and the time of death are recorded as under:

> *"**OPINION:***
> ***1. The cause of death is due to cranio cerebral injuries caused by hard, heavy and forceful impact upon her head by stone like material.***
> ***2. Manner of death is homicide.***
> *3. TIME SINCE DEATH:* ***Approx 12 hours prior to post mortem examination.***
> *4. TOTAL No. of inquest papers :* ***Eleven (11) papers enclosed with signature****."*

20. If the post-mortem was conducted between 2:15 p.m. and 3:15 p.m. on 30.03.2014, which is what the PMR records, and the time of death is about 12 hours prior to the post-mortem examination, that would mean that the victim died sometime between 2:15 a.m. and 3:15 a.m. on 30.03.2014. Now, in his cross examination on 19.09.2017, PW-12 Constable Ankur says that he reached the spot where the body was

found at about 7:20 a.m.; that the crime-team members reached there "after 7.45 a.m." and completed all proceedings at the spot till 9:30 a.m.; and that thereafter he, along with Constable Vikas and S.I. Narsingh, shifted the body to the DDU Hospital at about 9:45 a.m., reaching the hospital at about 10:25 a.m. In MLC dated 29.03.2014, the time that the body was brought is recorded as 10:35 a.m. on 29.03.2014. Accordingly, before 7:20 a.m. on 29.03.2014, the victim was already dead and the date and the time of death, if inferred from the bare text of PMR is therefore, incorrect. If however, it is assumed that the date of 30.03.2014 appearing on PMR was a typographical error; and that the date given by the post-mortem doctor in his testimony, namely of 29.03.2014 is correct, then the time of death would be about 12 hours *before* the time of conduct of post-mortem that is between 2:15 p.m. and 3:15 p.m. on 29.03.2014, which would *relate back to between 2:15 a.m. and 3:15 a.m. on 29.03.2014*, which then correlates with the statement of PW-12.

21. Counsel appearing for the parties however submitted, that according to PW-1, he saw the appellants beating the victim for between 1½ and 2½ hours, beginning 8:00 p.m. on 28.03.2014; and further goes on to say that the appellants 'killed' the victim and then dragged her body and hung it over the tree stump. This would imply that the victim died sometime between 9:30 p.m. and 10:30 p.m. on 29.03.2014, which does not conform with the time of death indicated by the post-mortem doctor, according to whom the time of death is between 2:15 a.m. and 3:15 a.m. on 29.03.2014.

22. Counsel further point-out that even in his testimony, the Investigating Officer, PW-22 Inspector O.P. Thakur records the date when the body was found as 29.03.2014; and the date of conducting post-mortem as 30.03.2014.

Forensic Evidence

23. It is the prosecution's case that at the time of their arrest, A1, A2, A3 and A5 were found to be wearing clothes that were blood stained; and that FSL report dated 17.02.2015 found that the blood was of 'human' origin. The FSL reports in question were exhibited on the statement of PW-18, Ms. Manisha, Assistant Director (Biology), FSL, Rohini, Delhi as Ex. PW-18/A (Biological Report) and Ex. PW-18/B (Serological Report); and a closer reading of the report shows that the blood recovered on the t-shirts/shirts alleged to have been worn by A1, A2, A3 and A5 was of 'human' origin, and except for one of the shirts Ex-'15a', the blood on the other t-shirts/shirts was of Group 'B'. The blood grouping of the blood found on the shirt Ex-'15a' was 'inconclusive'. As far as the pants/jeans, alleged to have been worn by A1, A2, A3 and A5 are concerned, though the blood found thereon was stated to be of 'human' origin, the blood grouping showed no reaction. According to the FSL report, the blood recovered *inter-alia* from the clothing and the teeth of the deceased was of 'human' origin with the blood Group 'B'. It is noticed that there is nothing to show that the broken teeth, stated to have been found on the crime scene, were sent to FSL for DNA testing, to see if they were in fact of the deceased.

24. Furthermore, Examination Report dated 18.11.2014, exhibited as Ex. PW-17/A, of the examination of the viscera of the deceased opined that no alcohol was detected either in the stomach, or in the pieces of small intestine, liver, spleen or kidneys as forwarded to the FSL. For completeness it may be recorded that the preserved viscera is stated to have been received by the FSL on 22.05.2014 and the examination was conducted between 05.11.2014 and 18.11.2014, that is after about 6 months of receipt.

25. Counsel appearing on behalf of the appellants have sought to discredit and discard the aforesaid forensic evidence, submitting that merely because 'human blood' with blood Group 'B' is alleged to have been found on some of the appellant's clothing, without there being any definitive connection by indicating the rhesus factor or by a DNA analysis, no inference can be drawn that the blood found on the appellant's clothing was of the deceased. Furthermore, counsel submit that the prosecution hypothesis that the appellants first attempted to ply the victim with alcohol and subsequently molested and killed her, is also belied by the forensic report that no alcohol was found in the viscera of the deceased. They argue that it is equally incredible that the appellants would have been wearing the same allegedly blood-stained clothes even 5-6 days after the incident, waiting for the police to find them with such clothes on.

26. Although the court testimony of PW-1 has been sought to be discredited arguing that what he has stated in court is not contained in his statement recorded under section 161 Cr.P.C. on 02/03.04.2014; and that PW-1 offers no explanation for such discrepancies when

confronted in his cross-examination, upon a careful perusal of his statement under section 161 Cr.P.C., we find that in that statement PW-1 narrated *substantially* the same events as he deposed in his court testimony; and though on certain aspects, PW-1 *elaborated* on what he had witnessed, in our view, it is not correct to say that what PW-1 said in his dock testimony is *different* from what he had narrated in his section 161 Cr.P.C statement.

27. Another aspect on which counsel for the appellants have sought to discredit the testimony of PW-1 is that in his re-examination conducted on 02.06.2017, PW-14 Head Constable Ram Kumar had referred to PW-1 as a 'secret informer' of the police in the following words :

> PW-14:
>
> "*Re-examination by Sh.B.B.Bhasin, Ld.Addl.P.P.for the State.*
>
> *It is correct that I have referred to the person Monu @ Chedi as a witness in my examination in chief on 20.03.2017 and today I am referred to him as a Secret Informer.* ***I am mistaken in referring to him as a "witness" as he was actually the Secret Informer****."*
>
> (re-examination dtd. 02.06.2017)

28. It was argued on behalf of the appellants that since PW-1 was the police's secret informer, then *firstly*, he would have informed the police of the incident on 28-29/03.2014 itself and there was no reason why his section 161 Cr.P.C. statement would have been recorded five days later on 03.04.2014; and *secondly*, since PW-1 is admittedly a secret informer of the police, his statement must be tested with requisite circumspection.

Position of Law

29. We would now set-out the position of law on various aspects that arise in the matter.

29.1. **Reliance on testimony of solitary eye-witness** : The law on this point is well summarised in the following decisions :

1) ***Lallu Manjhi v State of Jharkhand***, (2003) 2 SCC 401 :

> *"10. The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However,* ***faced with the testimony of a single witness, the court may classify the oral testimony into three categories****, namely,* ***(i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable.*** *In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases.* ***The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness.*** *(See: Vadivelu Thevar v. State of Madras [AIR 1957 SC 614 : 1957 Cri LJ 1000] .)"*
>
> (emphasis supplied)

2) ***Amar Singh v State NCT Delhi,*** 2020 SCC OnLine SC 826 :

> "*16. Thus the finding of guilt of the two accused appellants recorded by the two Courts below is based on sole testimony of eye witness PW-1.* ***As a general rule the Court can and may act on the testimony of single eye witness provided he is wholly reliable****. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But* ***if there are doubts about the testimony Courts will insist on corroboration. It is not the number, the quantity but quality that is material. The time honoured principle is that evidence has to be weighed and not counted.*** *On this principle stands the edifice of Section 134 of the Evidence Act.* ***The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise*** *(see Sunil Kumar v. State Government of NCT of Delhi) (2003) 11 SCC 367.*
>
> * * * * *
>
> *"29. In the facts and circumstances of the case this was serious lapse on the part of the investigating officer. Though normally minor lapses on the part of the investigating officer should not come*

in the way of accepting eye witness account, if otherwise reliable. ***But in the circumstances of the case at hands where the conduct of sole eye witness is unnatural and there are various other surrounding circumstances which make his presence at the site of incident doubtful, such a lapse on the part of the investigating officer assumed significance and is not liable to ignored.***

* * * * * *

(emphasis supplied)

3) ***Santosh Prasad @ Santosh Kumar v State of Bihar,*** (2020) 3 SCC 443 :

"5.4.2. In Rai Sandeep [Rai Sandeep v. State (NCT of Delhi), (2012) 8 SCC 21 : (2012) 3 SCC (Cri) 750], ***this Court had an occasion to consider who can be said to be a "sterling witness"****. In para 22, it is observed and held as under: (SCC p. 29)*

> *"22. In our considered opinion,* ***the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation.*** *To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness.* ***What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court.*** *It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that*

such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. ***To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged****."*

(emphasis supplied)

4) ***State of Maharashtra v Dinesh***, (2018) 15 SCC 161:

"*8. In Joseph v. State of Kerala [Joseph v. State of Kerala, (2003) 1 SCC 465 : 2003 SCC (Cri) 356], this Court has observed that* ***where there is a sole witness, his evidence has to be accepted with an amount of caution and after testing it on the touchstone of other material on record.*** *In State of Haryana v. Inder Singh [State of Haryana v. Inder Singh, (2002) 9 SCC 537 : 2003 SCC (Cri) 1239] , this Court has laid down that* ***the testimony of a sole witness must be confidence inspiring and beyond suspicion, thus, leaving no doubt in the mind of the Court.*** *In Ramnaresh v. State of Chhattisgarh [Ramnaresh v. State of Chhattisgarh, (2012) 4 SCC 257 : (2012) 2 SCC (Cri) 382] , this Court, after taking note of the aforementioned two judgments, observed that "the principles stated in these judgments are indisputable.* ***None of these judgments say that the testimony of the sole eyewitness cannot be relied upon or conviction of an accused cannot be based upon the statement of the sole eyewitness to the crime****. All that is needed is that the statement of the sole eyewitness should be reliable, should not leave any doubt in the mind of the Court and has to be corroborated by other evidence produced by the prosecution in relation to commission of the crime and involvement of the accused in committing such a crime". It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement (Seeman v. State [Seeman v. State, (2005) 11 SCC 142 : 2005 SCC (Cri) 1893]).*

* * * * *

"11. Thus, in the foregoing circumstances, especially taking note of the unnatural manner in which PW 7 kept quiet till one-and-half months after the incident, that too in the midst of thickly populated vicinity, it is not safe to convict an accused solely relying on her

> *evidence. Thus, we find no firm ground in this appeal or reason to believe the testimony of alleged eyewitness PW 7 calling for our interference in the judgment passed by the High Court. In our view, the High Court has rightly classified and considered the evidence of prosecution witnesses and after properly analysing the facts and circumstances rendered a reasoned judgment, disbelieving the prosecution story. We, therefore, affirm the view taken by the High Court and dismiss the appeal of the State."*
>
> (emphasis supplied)

29.2. **On effect of not putting incriminating circumstances to witness under section 313 Cr.P.C. and 'admissions' contained in cross-examination :** On these aspects, the following precedents are required to be noticed :

5) ***Maheshwar Tigga v State of Jharkhand***, (2020) 10 SCC 108 :

> *"8. It stands well settled* ***that circumstances not put to an accused under Section 313 CrPC cannot be used against him, and must be excluded from consideration.*** *In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him.* ***A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt.***
>
> *"9. This Court, time and again, has emphasised the* ***importance of putting all relevant questions to an accused under Section 313 CrPC.*** *In Naval Kishore Singh v. State of Bihar [Naval Kishore Singh v. State of Bihar, (2004) 7 SCC 502 : 2004 SCC (Cri) 1967] , it was* ***held to be an essential part of a fair trial observing as follows*** *: (SCC p. 504, para 5)*
>
> > *"5.* ***The questioning of the accused under Section 313 CrPC was done in the most unsatisfactory manner. Under Section 313 CrPC the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him.*** *At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case****.*** *We deprecate the practice of putting the*

entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation. ***The trial Judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality.*** *It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence.""*

(emphasis supplied)

6) ***Pawan Kumar v State***, 2019 SCC OnLine Del 10452 :

"21. Similarly, in Sujit Biswas v. State of Assam reported as (2013) 12 SCC 406, it was held as under:—

"20. It is a settled legal proposition that ***in a criminal trial, the purpose of examining the accused person under Section 313 CrPC, is to meet the requirement of the principles of natural justice i.e. audi alteram partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation.*** *In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him.* ***The circumstances which are not put to the accused in his examination under Section 313 CrPC, cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.****"*

"22. Recently, in Samsul Haque v. State of Assam reported as 2019 SCC OnLine SC 1093, the Supreme Court reaffirmed the above views.

"23. The trial court as well the appellate court relied upon the suggestion given on behalf of the petitioner to the complainant that

she had already obtained the phone number of the petitioner after leaving the examination hall and that is how she knew the same. The appellate court observed that the suggestion essentially goes to show that the petitioner himself had admitted the possession of his phone number with the complainant.

"24. ***The question whether a suggestion given by the counsel on behalf of the accused can be considered as an admission and bind the accused under Section 18 of Indian Evidence Act came before the Supreme Court in Koli Trikam Jivraj (supra),*** *where it was held as under:—*

> *"18. Therefore,* ***the accused is entitled to the benefit of the plea set up by the lawyer but it cannot be said that the plea or defence which his lawyer puts forward must bind the accused. The reason is that in a criminal case a lawyer appears to defend the accused and has no implied authority to make admissions against his client during the progress of the litigation either for the purpose of dispensing with proof at the trial or incidentally as to any facts of the case.*** *See Phipson's Manual of Evidence, Eighth Edition Page 134. It is, therefore, evident that the role that a defence lawyer plays in a criminal trial is that of assisting the accused in defending his case. The lawyer has no implied authority to admit the guilt or facts incriminating the accused. The argument of Mr. Nanavati that suggestion put by the lawyer of the accused in the cross-examinations of the prosecution witnesses amounts to an admission under Section 18 of the Indian Evidence cannot be accepted."*
>
> * * * * *

(emphasis supplied)

7) ***Koli Trikam Jivraj & Anr v State of Gujarat***, AIR 1969 Guj 69 :

"16. To put it shortly Mr. Nanavati in advancing this argument merely repeated the main ground on which the conviction of the appellants was based by the learned Sessions Judge viz., that the accused no. 1 and accused no. 2 admitted their presence at the scene of the offence and that they were beaten by Dharamshi and Talshi. ***If the lawyer of the accused puts a suggestion to a prosecution witness that a particular event happened, or happened in a particular manner, then it cannot be implied that the lawyer commits himself to such an assertion. Suggestions put in cross-examination are no evidence at all and on the basis of such suggestions no inference can be drawn against the accused that he admitted the facts referred to in the suggestions.*** *It is possible that in putting suggestions the lawyer of the accused, if he thinks fit and*

proper, may not put the entire case of the accused in the cross examination of a prosecution witness.

* * * * * *

(emphasis supplied)

29.3. **<u>On blood stains found on the appellants' clothes</u>** : The following judicial verdicts shed light on the contentions raised on this aspect:

8) ***Mohd Rizwan v State***, 2010 SCC OnLine Del 2675 :

"24. Even otherwise, ***we find it difficult to accept that the person, who commits a murder, will be wearing a bloodstained cloth at a public place near a bus stand and that too the cloth which he was wearing at the time of commission of offence. Considering the normal course of human conduct, the attempt of the offender would be to either wash his bloodstained clothes or to destroy them at the very first opportunity, since he knows it very well that in the event he of his being caught wearing a bloodstained cloth, he will have to explain the presence of blood on his clothes and the recovery of a bloodstained clothes from him would become a strong piece of evidence against him.*** *This is not the case of the prosecution that the appellants were on the run before they were arrested and, therefore, did not have an opportunity to destroy the bloodstained clothes which they were wearing at the time of commission of offence by them. According to PW-10, the appellants were arrested at 09.00 pm on 16th May, 1990.* ***<u>Hence, they had more than ample time available to them, not only to change the clothes, but also to wash them, in case there were any bloodstains on them</u>.*** *In fact, if PW-2 is to be believed, they had been to their respective houses and the clothes seized by the police were recovered from their house. If the appellants had the opportunity to go to their house, they would have washed the bloodstained cloths, instead of preserving them and that too in their own house. This is more so, when the accused knew that, murder committed by them, was witnessed by two persons, who were known to them and, therefore, were likely to inform the police about their involvement in the murder.* ***We, therefore, find it difficult to believe the alleged recovery of bloodstained clothes from the appellants****."*

(emphasis supplied)

9) ***Amarpal (Raj Pal) v State***, 2010 SCC OnLine Del 2113 :

"47. Noting the fact that co-accused Foorkan and Idrish have been acquitted for the reason nothing stood proved against them, we hold

that nothing stands proved against the appellant Amarpal. ***That blood of the same group as that of the deceased was detected on the clothes of the appellant which were seized as per the memo Ex. PW-1/K as per the report of the serologist is too insignificant incriminating evidence. Such kind of recoveries have been held to be extremely weak evidence as per the decisions*** *AIR 1963 SC 113, Prabhoo v. State of U.P.; 1993 Supp (1) SCC 208 : AIR 1994 SC 110, Surjit Singh v. State of Punjab; (1977) 4 SCC 600 (1) : AIR 1977 SC 1753, Narsinbhai Haribhai Prajapati, etc. v. Chhatrasinh and JT 2008 (1) SC 191, Mani v. State of Tamilnadu.*

"48. Before concluding we re-emphasize what we had stated in a decision penned by us a few months ago that ***at a criminal trial the best assurance of guarantee of justice to an accused that his rights under Article 21 of the Constitution of India are protected at the warm and living hands and the hawk's eye of a vigilant Judge through whose hands or eyes no piece of evidence worthy of being noted escapes attention of. When either these hands become cold or the eyes cease to watch carefully, the life and liberty of the accused becomes a casualty. Unfortunately, this has happened in the instant case.***

"49. We re-emphasize for the benefit of the learned Trial Judges that it is their duty to see with microscopic eyes, all evidence and then test the veracity of eyewitness account."

(emphasis supplied)

29.4. **On determining the time of death based on contents of stomach and faecal matter** : The following decisions are instructive on this aspect:

10) ***Jitender Kumar v State of Haryana***, (2012) 6 SCC 204 :

"56. ***Judging the time of death from the contents of the stomach, may not always be the determinative test.*** *It will require due corroboration from other evidence.* ***If the prosecution is able to prove its case beyond reasonable doubt and cumulatively, the evidence of the prosecution, including the time of death, is proved beyond reasonable doubt and the same points towards the guilt of the accused, then it may not be appropriate for the court to wholly reject the case of the prosecution and to determine the time of death with reference to the stomach contents of the deceased.***

"57. While discussing various judgments of this Court, Modi in the aforesaid book at p. 543 has recorded as under:

*"... **The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of the occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when the deceased had his last meal and what that meal consisted of** ... Where there is positive direct evidence about the time of occurrence, it is not open to the court to speculate about the time of occurrence by the presence of faecal matter in the intestines (Sheo Darshan v. State of U.P. [(1972) 3 SCC 74 : 1972 SCC (Cri) 394]). **The question of time of death of the victim should not be decided only by taking into consideration the state of food in the stomach. That may be a factor which should be considered along with other evidence, but that fact alone cannot be decisive** (Ram Prakash v. State of U.P. [(1969) 1 SCC 48])"*

* * * * * *

(emphasis supplied)

29.5. **<u>On weighing ocular evidence against medical opinion</u>** : The following precedents are important on this aspect :

11) ***Punjab Singh v State of Haryana***, (1984) Supp SCC 233 :

"2. ... The only contention raised was that medical evidence is inconsistent with the direct testimony. This contention must fail for two reasons:

*(i) that **if direct evidence is satisfactory and reliable the same cannot be rejected on hypothetical medical evidence**; and*

*(ii) as pointed out by Mr K.G. Bhagat, learned Additional Solicitor-General appearing for the State of Haryana, that **if medical evidence is properly read, it only shows two alternative possibilities but not any inconsistency.** That appears to be correct. ..."*

29.6. **<u>On discrepancies in depositions</u>** : The following verdicts clarify the position of law on this very important on this aspect :

12) ***Sampath Kumar v Inspector of Police, Krishnagiri***, (2012) 4 SCC 124 :

"*21. In Narayan Chetanram Chaudhary v. State of Maharashtra [(2000) 8 SCC 457 : 2000 SCC (Cri) 1546 : AIR 2000 SC 3352] this Court held that* ***while discrepancies in the testimony of a witness which may be caused by memory lapses were acceptable, contradictions in the testimony were not.*** *This Court observed: (SCC p. 483, para 42)*

> *"42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness.* ***The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person.***"

"22. ***The difference between discrepancies and contradictions was explained by this Court in State of H.P. v. Lekh Raj*** *[(2000) 1 SCC 247 : 2000 SCC (Cri) 147 : AIR 1999 SC 3916] . Reference may also be made to the decision of this Court in State of Haryana v. Gurdial Singh [(1974) 4 SCC 494 : 1974 SCC (Cri) 530 : AIR 1974 SC 1871]* ***where the prosecution witness had come out with two inconsistent versions of the occurrence.*** *One of these versions was given in the court while the other was contained in the statement made before the police. This Court held that these were contradictory versions on which the conclusion of fact could not be safely based.*

* * * * *

"24. Reference may also be made to the decision of this Court in Kehar Singh v. State (Delhi Admn.) [(1988) 3 SCC 609 : 1988 SCC (Cri) 711 : AIR 1988 SC 1883] . This Court held that ***if the discrepancies between the first version and the evidence in court were material, it was safer to err in acquitting than in convicting the accused.***

"25. In the present case the statement made by Palani (PW 7) is in complete contrast with the statement made by him before the police where the witness stated nothing about having seen the appellants standing near the deceased around the time of the incident. This omission is of very vital character. ***What affects the credibility of the witness is that he did not in his version to the police come out with what according to him is the truth, but withheld it for a period of five years till he was examined as a prosecution witness in the court.***

* * * * *

"28. ***In the present case the testimony cannot be wholly reliable or wholly unreliable. He is not a chance witness who had no reason to be found near the deceased at the time of the occurrence.*** *There is evidence to show that Palani (PW 7) used to sleep with the deceased Senthil in the verandah of the house.* ***What makes it suspect is that the witness has, despite being a natural witness, made a substantial improvement in the version without there being any acceptable explanation for his silence in regard to the fact and matters which were in his knowledge and which would make all the difference in the case. The Court would, therefore, look for independent corroboration to his version, which corroboration is not forthcoming.*** *All that is brought on record by the prosecution is the presence of a strong motive but that by itself is not enough to support a conviction especially in a case where the sentence can be capital punishment."*

(emphasis supplied)

13) ***Allauddin Khan v State of West Bengal***, 2015 SCC OnLine Cal 3033:

"*15.* ***It is the settled proposition of law that there (sic, is) bound to be some discrepancies between the depositions of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. But discrepancy has to be distinguished from contradiction. While minor discrepancy or variance in evidence will not make the prosecution's case doubtful, contradiction in the statement of witness is fatal for the case.*** *The above principle of law has been laid down in the matter of State of H.P. v. Lekh Raj, reported in (2000) 1 SCC 247 and the relevant portions of the above decision is quoted below:-*

> *"7. In support of the impugned judgment the learned counsel appearing for the respondents vainly attempted to point out some discrepancies in the statement of the prosecutrix and other witnesses for discrediting the prosecution version. Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful.* ***The normal course of the human conduct would be that while narrating a particular incident there may occur minor discrepancies, such discrepancies in law may render credential (sic,***

> ***credence) to the depositions. Parrot-like statements are disfavoured by the courts.*** *In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement.* *This Court in Ousu Varghese v. State of Kerala held that* ***minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony.*** *In Jagadish v. State of M.P. this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance.* ***Mere congruity or consistency is not the sole test of truth in the depositions.*** *This Court again in State of Rajasthan v. Kalki held that* ***in the depositions of witnesses there are always normal discrepancies, however, honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal and not expected of a normal person.*** *"*
>
> *(Emphasis supplied)*
>
> ***Whether the discrepancy is minor or the same is contradiction fatal for the case is a matter of fact which is special to each case.*** *... "*

(emphasis supplied; underlining in original)

29.7. **On using a section 161 Cr.P.C. statement for contradiction** : The following decision of the Supreme Court clarifies the position of law :

> 14) ***Priya Swami vs. State***, 2015 SCC OnLine Del 6531 :
>
> *"22. In the case of R. Shaji v. State of Kerala AIR 2013 SC 651, it has been held as under:*

> *"14.* ***Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence.*** ***Statements under Section 161 Code of Criminal Procedure can be used only for the purpose of contradiction and statements under Section 164 Code of Criminal Procedure can be used for both corroboration and contradiction*** *...*
>
> *"16. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Code of Criminal Procedure, can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 Code of Criminal Procedure, such statements cannot be treated as substantive evidence.""*
>
> (emphasis supplied)

29.8. **On whether defence witnesses are to be treated at par with prosecution witnesses** : The Supreme Court has settled the position of law in this regard in the following decisions :

> 15) ***Dudh Nath Pandey v State of UP***, AIR 1981 SC 911 :
> *"19. Counsel for the appellant pressed hard upon us that the defence evidence establishes the alibi of the appellant. We think not. .... We do not want to attribute motives to them merely because they were examined by the defence.* ***Defence witnesses are entitled to equal treatment with those of the prosecution. And, courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses.*** *Granting that DWs 1 to 5 are right, their evidence, particularly in the light of the evidence of the two court witnesses, is insufficient to prove that the appellant could not have been present near the Hathi Park at about 9.00 a.m. when the murder of Pappoo was committed.* ***The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed.*** *The evidence of the defence witnesses,*

accepting it at its face value, is consistent with the appellant's presence at the Naini factory at 8.30 a.m. and at the scene of offence at 9.00 a.m. So short is the distance between the two points. ...."

(emphasis supplied)

29.9. **On how evidence is be treated, when two views are possible** : The Supreme Court has opined on this aspect, in the following decisions :

16) ***State of UP v Nandu Vishwakarma & Ors***, (2009) 14 SCC 501 :

"23. It is a settled principle of law that ***when on the basis of the evidence on record two views could be taken—one in favour of the accused and the other against the accused—the one favouring the accused should always be accepted.*** *This Court in Chandrappa v. State of Karnataka [(2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325] observed as follows: (SCC p. 432, para 42)*

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) *An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.*

(2) *The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*

(3) *Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.*

(4) *An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the*

presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) ***If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court****."*

* * * * *

(emphasis supplied)

17) ***Rang Bahadur Singh & Ors v State of UP***, (2000) 3 SCC 454 :

"22. The amount of doubt which the Court would entertain regarding the complicity of the appellants in this case is much more than the level of reasonable doubt. We are aware that acquitting the accused in a case of this nature is not a matter of satisfaction for all concerned. ***At the same time we remind ourselves of the time-tested rule that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilt of the accused beyond reasonable doubt a conviction cannot be passed on the accused.*** *A criminal court cannot afford to deprive liberty of the appellants, lifelong liberty, without having at least a reasonable level of certainty that the appellants were the real culprits. We really entertain doubt about the involvement of the appellants in the crime."*

(emphasis supplied)

18) ***Govindraju @ Govinda v State,*** (2012) 4 SCC 722 :

"17. If we analyse the above principle somewhat concisely, it is obvious that ***the golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in a case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.***

* * * * *

"36. It is also not always necessary that wherever the witness turned hostile, the prosecution case must fail. Firstly, the part of the statement of such hostile witnesses that supports the case of the prosecution can always be taken into consideration. Secondly,

> ***where the sole witness is an eyewitness who can give a graphic account of the events which he had witnessed, with some precision cogently and if such a statement is corroborated by other evidence, documentary or otherwise, then such statement in face of the hostile witness can still be a ground for holding the accused guilty of the crime that was committed.*** *The court has to act with greater caution and accept such evidence with greater degree of care in order to ensure that justice alone is done. The evidence so considered should unequivocally point towards the guilt of the accused.*
>
> * * * * *
>
> (emphasis supplied)

Analysis & Conclusions

30. Upon a careful analysis of the factual matrix of the matter and applying the well-worn principles of law, in our opinion the decision of the case turns on the following as aspects :

30.1 Of all the witnesses marshalled, depositions of the following witnesses are dispositive of the matter :

i) PW-1 Monu, the rag-picker;

ii) PW-8 Ramanuj Pandey, the *raen basera* caretaker;

iii) PW-10 Dr. B. N. Mishra, the post-mortem doctor;

iv) PW-12 Ct. Ankur, who was one of the first to visit the crime scene;

v) PW-14 HC Ram Kumar, who was witness to the arrest of some of the accused persons.

30.2 Though, gathering from the various dates and times stated by various witnesses, the incident had occurred on the night of 28/29.03.2014, appellants A1, A2, A3 and A5 were arrested on 04.04.2014; and appellant A4 was arrested on 06.05.2014. It is not the case of the prosecution that the five appellants

were 'detained' at the police station from 28/29.03.2014 and were only 'formally' arrested on 04.04.2014 and 06.05.2014. It must therefore be taken to be the prosecution's case, that the appellants were out, free and not in detention or custody prior to that;

30.3 However, it is the prosecution's case that upon their arrest on 04.04.2014, appellants A1, A2, A3 and A5 were found wearing blood-stained clothes. This is a circumstance that strains credulity. This is also a circumstance that Co-ordinate Benches of this court have frowned upon[32];

30.4 In any case, forensic analysis of the blood found on the clothes only shows that it was of 'human origin 'and except for one of the shirts Ex-'15a', the blood on the other T-shirts/shirt was of Blood Group-B, inconclusive as regards the rhesus factor, nor was any DNA testing conducted to establish any connection with the blood group of the deceased [33].

30.5 The prosecution's star witness is PW-1 Monu, who is stated to be a ragpicker operating in the area. While there is no cavil with the proposition that a conviction can be founded on the ocular testimony even of a sole eyewitness[34], it is equally settled that for this to happen, the testimony has to be cogent,

[32] cf. *Mohd Rizwan* (supra)
[33] cf. *Amarpal (Rajpal)* (supra)
[34] cf. *Lallu Manjhi* (supra)

credible, trustworthy and must have the 'ring of truth' in it[35]. It is also the well accepted principle of law that every discrepancy is not a contradiction that would shake the credibility of a witness [36] . The discrepancies and shortcomings pointed-out in the present case between PW-1's statement recorded under section 161 Cr.P.C. and his subsequent statement recorded under section 164 Cr.P.C., do not persuade us to discard PW-1's testimony on that count alone[37]. However, it is noticed that while speaking of Monu, PW-14 HC Ram Kumar emphatically corrects himself to say that he was '*... mistaken in referring (sic, to) him as a "witness" as he was actually the Secret Informer*'. It is further noticed that in the backdrop of him being a secret informer, PW-1 himself states in his court deposition that despite allegedly witnessing the incident and identifying the appellants, he did not inform the PCR, nor any police official, nor indeed any other person about the incident on 28/29.03.2014. PW-1 further accepts that on 29.03.2014 there had been a verbal altercation between him and the appellants, whereupon they were all taken to the police station and were made to sit there. In particular, PW-1 says that he himself was made to sit at the police station for about 5-6 days. This, in our view, gives rise to a serious possibility

[35] cf. *Amar Singh* (supra)
[36] cf. *Allauddin Khan* (supra)
[37] cf. *Sampath Kumar* (supra)

of false implications. No evidence is led as to the verbal altercation, which PW-1 admits to. No evidence is led as to the detention of PW-1 and the accused persons in the police station for several days, to which PW-1 deposes. This creates doubt in our minds as to the credibility of PW-1 as an eye-witness;

30.6 The time of death of the victim is also shrouded in mystery. PW-8 Ramanuj Pandey, the *raen basera* caretaker, says he last saw the deceased at 12:30 a.m. on the intervening night of 28/29.03.2014. PW-12 Ct. Ankur, who was deputed to reach the crime scene, says that he reached the spot at about 07:20 a.m. on 29.03.2014 whereafter the crime-team reached the spot; completed all proceedings; and after that he, alongwith Ct. Vikas and PW-19 S.I. Narsingh shifted the body to the DDU Hospital at about 09:45 a.m., reaching there at about 10:25 a.m. Clearly therefore, according to PW-12, the victim was found dead at the crime scene at 07:20 a.m. or so. PW-10 Dr. B. N. Mishra, who conducted the post-mortem, states in his deposition before the court that he completed the post-mortem on 29.03.2014 at about 03:15 p.m. and then goes-on to opine that the time of the death was approximately 12 hours prior to the post-mortem examination. This would place the time of death at some time between 02:15 a.m. and 03:15 a.m. on 29.03.2014. However, the post-mortem report bears the date of 30.03.2014 at no less than five places and the date of 29.03.2014 at two places.

Furthermore, the photographs of the body and the viscera samples as adduced in evidence and also bear the date of 30.03.2014. On a conjoint reading of the statements of PW-12 and PW-10, we would believe that the date of 30.03.2014 appearing on the post-mortem report and the photographs and viscera samples adduced in evidence, *is an evident, though wholesale error*. We would therefore place the time of death somewhere between 02:15 a.m. and 03:15 a.m. on 29.03.2014. This would also co-relate with the statement of PW-8, who says that he saw the victim alive at 12:30 a.m. on the intervening night of 28/29.03.2014. However, what this also does is to seriously contradict the testimony of PW-1, who says that he saw the appellants molest and assault the victim from about 08:00 p.m. for about 2½ hours on the night of 28.03.2014, killing her in the end. Since he is a rustic witness, even giving some latitude for error to PW-1, who was obviously not marking time by the clock when he says he was witnessing the incident[38], the discrepancy of about 04 hours between what PW-1 says and what the post-mortem doctor opines, assumes significance. This discrepancy casts more than a shadow of doubt as to the very presence of PW-1 at the crime scene at the relevant time. When we say this, we also remind ourselves of PW-1's statements that PW-1 was

[38] *(1973) 3 SCC 680, para 11; (1980) Supp SCC 489, para 18*

a 'secret informer'; and PW-1's own statement that there had been a verbal altercation between him and the accused persons on 29.03.2014.

30.7 We also notice that the allegations that some of the accused persons purchased alcohol from a liquor vend; that they administered liquor to the victim; that one of the accused hit her on the head with a beer bottle, before hitting her with pieces of brick and stone, which led to her death, are also relevant elements of the assault on the victim. However, no beer bottle nor any shards of glass were recovered from the crime scene; nor were any traces of alcohol found in the victim's body during post-mortem. Absent any evidence in this behalf, the allegations regarding purchase of liquor, administering liquor to the victim and hitting her on the head with a beer bottle, also appear to be embellishments. We find ourselves unable to ignore these embellishments, if only because they are elements of fabrication of evidence on the part of PW-1.

30.8 Another aspect of the matter, though somewhat minor, is that PW-1 says in his deposition that he could view the incident since there were 5 or 6 electric poles about 8-9 steps from the spot. However, the site plan Ex-PW-6/A and even the draft site plan Ex-PW-19/B show no such lamp-posts. PW-1 also confesses in his statement in court, that on the date of the

incident he had consumed *ganja*. All this, yet again makes us doubt the credibility of PW-1 as an eye-witness[39].

31. On the touchstone of the cardinal principle of criminal jurisprudence that 'contradictions' in testimony are not acceptable[40], though 'discrepancies' may be[41], in view of what is observed above, we are *not* persuaded to accept PW-1's testimony as being truthful.

32. Applying another cardinal principle, that is, if two views are possible on the evidence adduced in a case, the view favouring the innocence of the accused should be adopted[42], in our opinion, in this case there are clearly two views that are possible in light of the several material contradictions in the prosecution's case, as detailed above. Such contradictions must enure to the benefit of the accused and we are therefore persuaded to accept the view favourable to the accused persons[43].

33. Accordingly, we are persuaded to extend to all the appellants, benefit of doubt.

34. We accordingly allow all five criminal appeals, thereby setting-aside judgment of conviction dated 26.08.2019 and sentencing order dated 29.08.2019 made by the learned Trial Court.

35. We acquit all the appellants and direct that all the appellants be released from custody *forthwith*, unless required in any other case.

36. The criminal appeals are allowed and disposed of in the above terms.

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[39] cf. *Ajaib Singh* (supra)
[40] cf. *Sampath Kumar* (supra)
[41] cf. *Allauddin Khan* (supra)
[42] cf. *Nandu Vishwakarma* (supra)
[43] cf. *Sampath Kumar* (supra)

37. Pending applications, if any, also stand disposed of.

38. There shall be no order as to costs.

39. A copy of the judgment be given to learned counsel for the parties and be also uploaded on the website of this court *expeditiously*.

40. A copy of the judgment be sent to the concerned Jail Superintendent for compliance.

SIDDHARTH MRIDUL, J

ANUP JAIRAM BHAMBHANI, J

MAY 24, 2022
ds/*uj*/Ne