

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

% *Judgment Reserved on: July 26, 2022*
Judgment Delivered on: September 19, 2022

+ **CRL.A. 1243/2018**

GURDEEP SINGH

..... Appellant

Represented by: Ms. Sushma Sharma, Mr.
Girish Kumar Sharma, Mr.
Karan Verma, Ms. Aayushi
Gaur, Advs.

Versus

STATE

..... Respondent

Represented by: Mr. Tarang Srivastava, APP for
State.

+ **CRL.A. 172/2019**

REHMAN ALI

..... Appellant

Represented by: Ms. Saahila Lamba, Adv.

Versus

STATE

..... Respondent

Represented by: Mr. Tarang Srivastava, APP for
State.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MR. JUSTICE ANISH DAYAL

MUKTA GUPTA, J.

1. By these appeals, the appellants challenge the impugned judgment dated 29th August 2018 convicting Gurdeep Singh and Rehman Ali for

murder of one lady Falguni, one 5 years old child Chetna and one male Ashit Kumar; and order dated 30th August 2018 directing Gurdeep Singh to undergo imprisonment for life alongwith a fine of ₹10,000/-, and in default of payment of fine to undergo rigorous imprisonment of six months, and directing Rehman Ali to undergo imprisonment for life and a fine of ₹2,000/- and in default of payment of fine to undergo rigorous imprisonment of two months under Sections 302/34 of the Indian Penal Code, 1860 (“IPC”).

2. Learned counsels for the appellants assailing the conviction and consequent order on sentence contend that the appellants have been convicted based on circumstantial evidence. However, only two circumstances have been pressed into service for establishing the guilt of the appellant i.e. firstly, the appellants were found at the place of incident at the time when the two police personnel i.e. Constable Sushil Kumar, PW-3 and Constable Rajender Kumar, PW-5 reached at the place of incident and secondly, clothes worn by the appellant Gurdeep Singh were found to be stained with blood. No evidence has been led to prove that the appellant Gurdeep Singh was a resident of the flat where the offence took place. In the statement recorded under Section 313 of Code of Criminal Procedure, 1973 (“CrPC”), Gurdeep Singh clearly stated that on hearing screams, he went to the flat where he found the three persons murdered and he was mistaken to be the assailant. It is contended that to base a conviction on circumstantial evidence, the chain of circumstances must be complete and the only conclusion that can be drawn from the same should be in consonance with the guilt of the accused and there should be no gap left in the chain of evidence. On the strength of these two circumstances

purportedly proved by the prosecution, the appellant Gurdeep Singh cannot be convicted for the offence punishable under Sections 302/34 IPC. No evidence was led in form of departure entry from the police station to prove that Constable Sushil Kumar and Constable Rajender Kumar were on patrolling duty. No effort was made by the police to associate any independent witness at the time of investigation despite number of independent witnesses being available.

3. It is further contended that there is serious discrepancy as to on which floor the alleged incident took place, for the reason, though it is the case of the prosecution that the incident took place on 3rd floor of the house in question, however, Rahul Arora, PW-22 deposed that he was residing in the third floor of the house and the incident took place on the fourth floor of the house. The conduct of the appellants to be standing at the place is not in consonance with their guilt, as in case they would have committed the murder, they had sufficient time to flee away from the place of incident. There was no motive whatsoever attributable to Gurdeep Singh to have committed the offence alleged. It is the case of the prosecution that the clothes of the two appellants were seized at the spot and despite specific question put in cross examination as to from where the clothes were given to change to the appellants, no explanation was rendered by police officials. Even as per the testimony of the police officers, the place of incident was easily accessible. Rahul Arora, the informant clearly stated that there were screams of the women from the place of incident and other persons were also going up and down at the place of incident after he had made the call to the police.

4. Countering the arguments of learned counsels for the appellants,

learned APP for the State submits that PW-15, Sanjay Bhalla has proved that the flat where the three dead bodies were found, belonged to appellant Gurdeep Singh. The appellant Rehman Ali was an employee of appellant Gurdeep Singh, which fact he also admitted in his statement under Section 313 CrPC and as further proved by the call details between the two accused, they often used to exchange calls. Learned APP for the State submits that the prosecution has proved the motive to commit the murder of Ashit Kumar, Falguni and girl child Chetna. It is the case of the prosecution that the appellant Gurdeep Singh asked deceased persons to bring all the original documents relating to a flat in Bawana on the pretext of arranging a meeting with the prospective buyer. Taking that opportunity, both the appellants executed the plan of committing the murder of three victims in order to get the original property documents. The black bag having entire set of original documents relating to the flat of Bawana was seized from the spot vide seizure memo Ex.PW3/H, thereby facilitating the appellants to destroy the documents of ownership in favour of the wife of the deceased Ashit Kumar. The deceased were residents of Karol Bagh and had come to meet the appellant Gurdeep Singh. The fact that appellant Gurdeep Singh knew Ashit Kumar very well has come in deposition of PW-14 Bharti @ Rakhi, wife of Gurdeep Singh who deposed that Gurdeep Singh had purchased a flat in Bawana and the same was sold to the deceased Ashit Kumar in 2012. Further, Sanath, PW-19 deposed that Ashit Kumar was friendly with Gurdeep Singh. Even Shrawani Maajhi, PW-26, sister of the deceased Falguni deposed that Gurdeep Singh used to come to her sister's house and she had also seen her brother-in-law Ashit Kumar giving payment to accused Gurdeep Singh. Presence of the appellant Gurdeep Singh in

suspicious condition in the flat where the three dead bodies were lying with clothes stained with the blood of the deceased clearly prove his having committed the murder of the three victims with the aid of his employee Rehman Ali. Explanation of the appellant Gurdeep Singh in his statement under Section 313 CrPC that he heard the noise of the cry of women and then went upstairs is not plausible. Further, the explanation of appellant Rehman Ali that he was arrested from his house is also contrary to the record. It is submitted that the chain of circumstances unerringly points towards the guilt of the accused coupled with the explanation the appellant owes under Section 106 of the Indian Evidence Act in relation to the facts, especially, within their knowledge. There being no error in the impugned judgment of conviction and order on sentence, the appeals be dismissed.

5. Heard learned counsels for the appellants and perused the record.

6. Investigation was set into motion on receipt of wireless message on 10th January, 2013 at about 11.20 pm, by Ct. Sushil Kumar/Complainant (PW3) who was on patrolling duty with Ct. Rajender Kumar (PW5) that screams of a lady could be heard from H.No.A-58, Nanhe Park, Uttam Nagar, and the information was recorded vide DD No. 94B. PW3 &PW5 reached the spot, i.e. third floor of the said house where they found convict Gurdeep Singh coming out of the door of the house with his clothes stained with blood. Gurdeep Singh was apprehended at the spot and he informed PW3 & PW5 that Rehman Ali (other convict) was present inside the house. As PW3 & PW5 went inside the house, they found one lady (Falguni) lying in the pool of blood, one child (Chetna) lying dead in another room and in the third room one person (Ashit Kumar) lying in injured condition (who later succumbed to injuries) and Rehman Ali was also found near that

injured person. One black color bag containing property documents, weapon of offence i.e. scissor & iron pieces which were part of sewing machine, blood stained clothes, etc. were seized from the spot.

7. Dr. B.N. Mishra (PW6), Medical Officer cum Medical Legal Expert, DDU Hospital conducted the post mortem of all the three dead bodies on 14th January 2013 and gave his reports Ex.PW6/A to Ex.PW6/C.

- a. Post mortem report of Chetna Ex.PW6/A opined *“cause of death due to asphyxia by manual smothering. The manner of death is homicide. Time since death is approx.. 2½ days prior to the post-mortem examination.”*
- b. Post mortem report of Ashit Ex.PW6/B opined *“cause of death was due to cranio cerebral injuries caused by being impacted by hard, heavy blunt object. All 5 injuries on head were individually sufficient to cause death in the ordinary course of nature or even enabled to cause instantaneous death. The manner of death is homicide. Time of death is consistent with the time of hospital death (i.e. dated 11th January, 2013 at 09.30 AM).”*
- c. Post mortem report of Falguni Ex.PW6/C opined *“The cause of death is due to combined effect of hemorrhagic shock and head injury caused by tearing of liver by recovered scissor and blunt forceful impact upon the head. The injury no 1st, 4th and 5th were individually sufficient to cause death in ordinary course of death. The constriction of neck was done after the death of the deceased. The possibility of involvement of assailants more than one person cannot be ruled out. The manner of death is homicide. Time since death is approx.. 2½ days prior to the post-mortem examination.”*
- d. In the subsequent opinion vide report Ex.PW6/D, it was opined that *“after perusal of PM report of deceased namely Smt. Falguni vide PM no. 59/2013 the external injury no. 1,2,3,6 & 7 and PM report no.60/2013 of deceased Ashit Kumar the injuries mentioned in external injury, no. 1, would have been inflicted by the parts of sewing machine of which the broken pieces are produced for examination.”*

8. Case of prosecution rests primarily upon the circumstantial evidence

for which 33 witnesses were examined by the prosecution during the course of trial, and on the other hand, one witness was examined by Gurdeep Singh as defence witness. Based on the evidence brought on record, prosecution has relied upon the following circumstances pointing towards the guilt of the appellants and claim that the offences charged are proved beyond reasonable doubt;

- i. Convict Gurdeep Singh was present inside the property where the incident took place, while convict Rehman Ali was present in the last room of the third floor flat. No other person was present at the spot when PW3 & PW5 reached the spot.
- ii. Place of incident has never been disputed by the defence and the post mortem report confirmed that the three deceased were murdered.
- iii. Place of occurrence was under tenancy and in possession of Gurdeep Singh, which was deposed by Sanjay Bhalla (PW15), that he had let his property out on rent i.e. third floor of A-58, Nanhe Park, Uttam Nagar to Gurdeep Singh, which was in Gurdeep's possession at the relevant time, though he failed to identify Gurdeep Singh as he stated that the property was given to Gurdeep through his neighbor Hanuman Singh who has since passed away.
- iv. Gurdeep Singh & Ashit Kumar were well known to each other. Sanath (PW19) deposed that he was acquainted with deceased Ashit Kumar as both of them belonged to West Bengal and that during his acquaintance with the deceased he got to know about the association of Ashit & Gurdeep who was working as a tailor in Karol Bagh and even Ashit was working in the same street at Karol Bagh. Even

Shrawani Maajhi (PW26) sister of deceased Falguni deposed that her brother-in-law used to treat Gurdeep as his friend and that Gurdeep Singh used to come to her sister's house.

v. Bharti @ Rakhi (PW 14), who is the wife of Gurdeep Singh deposed that she had sold the plot situated at Bawana, property bearing no. 205-C, 2nd Floor, Block 1, Type-1, DSIIDC Housing Scheme, Sector-3, to deceased Ashit Kumar, original sale documents of which property were seized from the spot.

vi. As per the prosecution, the motive to commit the offences was that after murdering the deceased, the bodies would be disposed of and the property would again be sold in the market, for which the deceased were called with the original property documents at the flat of Gurdeep Singh.

vii. Clothes of the two convicts were stained with blood, and the FSL report Ex.PW32/O3 confirmed the presence of blood on Gurdeep's clothes to match with the blood group of the deceased persons, and that of Rehman Ali were also found to have human blood stains.

viii. Further, the case of prosecution is that when PW3 & PW5 reached the spot, they found Gurdeep Singh in frightened condition, which would be relevant as convict's subsequent conduct u/S.8 of the Indian Evidence Act.

9. Thus the case of prosecution was that as the two convicts were present with two dead bodies and one injured person in the premises under tenancy and in possession of convict Gurdeep, and both the convicts were working together, the onus would lie upon the accused persons u/S.106 of the Indian

Evidence Act, to establish facts which are especially within the knowledge regarding the incident of murder of three persons which took place within the four walls of the house. And since the accused persons failed to furnish any plausible explanation for the same, adverse inference must be drawn against the convicts.

10. The defence of the convicts was merely in denial. Gurdeep Singh accepted having sold the Bawana plot to the deceased but stated that there were no friendly relation with the deceased and that on the said day, when he was passing through the street after having drink and meal at the house of his friend Anil Kumar, few police officials asked for his help in removing the injured persons to the ground floor, and from there he was taken to the police station. On the other hand, Rehman Ali stated that he used to work at the chicken shop of Gurdeep Singh at Matiala Road, but as the shop was closed for few days, he had gone to the residence of Gurdeep Singh, who was not found at the residence, and that when he was returning back, police picked him up and took him to the police station where Gurdeep Singh was already present.

11. The defence witness Sh. Dharmender Bajaj (DW1) examined by Gurdeep reiterated the version of Gurdeep that he went to Anil's house for dinner & drinks on the said day and that after the dinner, when they were leaving, at about 11.30 pm they heard the screams from house no. A-58 and then Gurdeep went to see what was happening, where allegedly police officials did not allow Gurdeep to leave and told DW1 to leave the house otherwise, he would get involved in the murder case. However, he contradicted Gurdeep to the extent that Gurdeep had no permanent work, but was involved in petty whitewashing contracts.

12. As regards the contention of learned counsel for the appellant that there is no evidence that the appellant was a resident of the flat in view of the contradiction between the testimonies of the witnesses, it may be noted that PW-15 Sanjay Bhalla clearly stated that he had rented out the third floor of the property to Gurdeep Singh and the same was in possession of Gurdeep Singh, even though he failed to identify him. Further, the confusion in the statement of Rahul Arora, PW-22 as to whether the incident took place on the third floor or the fourth floor, is not material and can be accounted for in view of the fact that some people called the ground floor as first floor. The place of incident has been established convincingly by the testimony of the prosecution witnesses including PW-3 and PW-5 who reached the spot before the local police as they were on patrolling duty. Contention of learned counsels for the appellants that no departure entry from the police station has been proved to show that Constable Sushil Kumar and Constable Rajender Kumar were on patrolling duty, does not affect the prosecution case as the PCR call was made at 11.20 p.m. pursuant where to, SI Raj Kumar and Constable Laxman reached the spot, before whom Constable Sushil Kumar and Constable Rajender Kumar were already on the spot. Further, the fact that there was no delay, is evident from the MLCs of the three deceased which note that they reached the hospital at 12.25 a.m. on 11th January 2013 immediately after the incident. When Constable Sushil Kumar and Constable Rajender Kumar reached the spot, there were no other persons at the flat except the two appellants, the two dead bodies and one injured in different rooms. Therefore the explanation furnished by Gurdeep Singh that his clothes got smeared with blood as he was helping the police to bring the injured downstairs is not plausible.

13. From the evidence as noted above, it has been proved that Gurdeep Singh and the deceased Ashit Kumar were known to each other as deposed to by Sanath/PW-19 and Shrawani Maajhi/PW-26, sister of deceased Falguni. Further, as per the deposition of the wife of the appellant Gurdeep Singh, namely, Bharti @ Rakhi/ PW-14 a property at Bawana which was owned by her was sold to deceased Ashit Kumar and the documents of the said property were seized from the spot. This clearly proves the close connection between Ashit Kumar (deceased) and Gurdeep Singh. If the version of Gurdeep Singh is to be accepted that he heard the screams and thus came to the floor to help, having seen Ashit Kumar and his family whom he knew too well, it was highly unnatural that he did not call the Police. Further, Sanjay Bhalla/PW-15 clearly stated that he had given the third floor of property A-58, Nanhe Park, Uttam Nagar, the place where the three victims were found in badly injured condition to one Gurdeep Singh, who was in possession even though he could not identify Gurdeep by face as the property was rented out to someone else. Further, there is no plausible explanation of the appellant Gurdeep Singh as to how his clothes got smeared with blood which tallied with the blood group of the deceased person and that the clothes of Rehman Ali who was also present there were smeared with human blood, though the grouping could not be found out. In the light of these facts the learned Trial Court rightly invoked Section 106 of the Evidence Act and the facts especially within the knowledge of the appellant were required to be clarified by them.

14. The scope of Section 106 of the Indian Evidence Act first came up before the Hon'ble Supreme Court for consideration in the decision reported as AIR 1956 SC 404 Shambhu Nath Mehra v. State of Ajmer, wherein, it

was held as under:-

“11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. R. [1936 SCC OnLinePC20] and Seneviratne v. R. [1936 SCC OnLine PC 57]”.

15. The question of burden of proof where some facts are within the personal knowledge of the accused was examined in the case reported as (2000) Cri.L.J. 4047 State of West Bengal v. Mir Mohammad Omar and Ors. Taking note of the provision of Section 106 of the Indian Evidence Act, the Hon’ble Supreme Court laid down the following principles:-

“31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would

be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position.

34. When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the court what else happened to Mahesh at least until he was in their custody”.

16. In the decision reported as AIR 2007 SC 144 State of Rajasthan vs. Kashi Ram, Hon'ble Supreme Court held that the principle in relation to provision of Section 106 of the Indian Evidence Act itself is unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be

held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. It was held that in a case resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are especially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain.

17. Further, the Hon'ble Supreme Court in the decision reported as (2015) 4 SCC 393 Ashok Vs. State of Maharashtra, dealing with the principle applicable under Section 106 of the Indian Evidence Act held that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, etc. non- explanation of death of the deceased, may lead to a presumption of guilt.

18. Similarly, in the decision reported as (2019) 10 SCC 623 Rajender &

Ors. vs. State (NCT of Delhi), it was held as under:-

“11.2. Having observed so, it is crucial to note that the reasonableness of the explanation offered by the Accused as to how and when he/she parted company with the deceased has a bearing on the effect of the last seen in a case. Section 106 of the Indian Evidence Act, 1872 provides that the burden of proof for any fact that is especially within the knowledge of a person lies upon such person. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company with the deceased. In other words, he must furnish an explanation that appears to the Court to be probable and satisfactory, and if he fails to offer such an explanation on the basis of facts within his special knowledge, the burden cast upon him Under Section 106 is not discharged. Particularly in cases resting on circumstantial evidence, if the Accused fails to offer a reasonable explanation in discharge of the burden placed on him, such failure by itself can provide an additional link in the chain of circumstances proved against him. This, however, does not mean that Section 106 shifts the burden of proof of a criminal trial on the Accused. Such burden always rests on the prosecution. Section 106 only lays down the Rule that when the Accused does not throw any light upon facts which are specially within his/her knowledge and which cannot support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce an explanation as an additional link which completes the chain of incriminating circumstances.

Notably, a circumstance of last seen does not, by itself, necessarily lead to an inference that the Accused committed the crime. There must be something more that establishes a connection between the Accused and the crime. For instance, there may be cases where close proximity between the event of last seen and the factum of death may persuade a rational mind to reach the irresistible conclusion that the last seen of the deceased is material and merits an explanation from the Accused”.

19. From the aforesaid noted decisions, the following principles can be

culled out for application of Section 106 of the Indian Evidence Act:

- (i) Section 106 of the Indian Evidence Act is designed to meet certain exceptional cases where the facts which are especially in the knowledge of the accused would be disproportionately difficult for the prosecution to establish
- (ii) Before invoking Section 106 of the Indian Evidence Act, the prosecution is bound to prove the foundational facts.
- (iii) Only the facts within the special knowledge of the accused are required to be explained to discharge the burden cast on the accused under Section 106 of the Indian Evidence Act.
- (iv) In case the burden on the accused is not discharged, an adverse inference is required to be drawn and the fact of non-offering of reasonable explanation can be treated as an additional link in the chain of circumstances proved against him.
- (v) The burden required to be discharged by the accused under Section 106 of the Indian Evidence Act is not of a proof beyond reasonable doubt but the explanation should be a probable one compatible with the innocence of the accused.

20. From the evidence led by the prosecution as also the onus that shifted to the appellant under Section 106 of the Evidence Act having not been discharged, this Court finds no error in the impugned judgment of conviction and order on sentence.

21. Consequently, the appeals are dismissed.

22. Copy of the judgment be sent to the Superintendent Tihar Jail for updation of record and intimation to the appellants.

CRL.M.B. 590/2022 in CRL.A. 172/2019

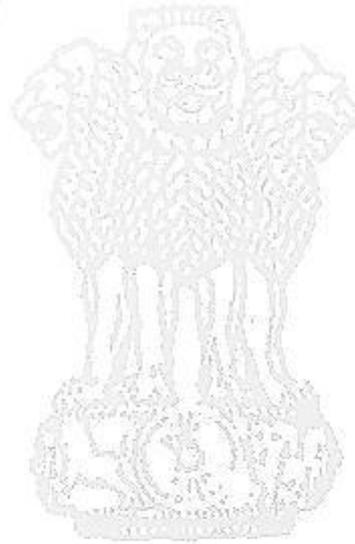
Application is disposed of as infructuous.

**(MUKTA GUPTA)
JUDGE**

**(ANISH DAYAL)
JUDGE**

**SEPTEMBER 19, 2022
'vg'**

HIGH COURT OF DELHI



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