

NON-REPORTABLE

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1889 OF 2010**

Rajender @ Rajesh @ Raju

.....Appellant

Versus

State (NCT of Delhi)

.....Respondent

WITH

CRIMINAL APPEAL NO. 1890 OF 2010

Raj Kumar @ Raju

.....Appellant

Versus

State (NCT of Delhi)

.....Respondent

WITH

CRIMINAL APPEAL NO. 2377 OF 2014

Sharda Jain

.....Appellant

Versus

State (NCT of Delhi)

.....Respondent

J U D G M E N T

MOHAN M. SHANTANAGOUDAR, J.

1. The judgment dated 27.08.2009 passed by the High Court of Delhi in Criminal Appeal Nos. 144 of 2007 and 51 of 2007

has been called in question in the instant appeals. By the impugned judgment, the High Court affirmed the order of conviction passed by the Trial Court against Sharda Jain (A-1), Raj Kumar (A-2), Pushpender (A-3), Nirvikar (A-4), Rajender (A-5) and Roshan Singh (A-6) for offences under Section 302 r/w 120-B and Section 364 r/w 120-B of the Indian Penal Code (*hereinafter* 'IPC'). Sharda Jain, Raj Kumar, and Roshan Singh were also convicted under Section 201 r/w 120-B of the IPC.

2. The case of the prosecution in brief is that Atma Ram Gupta (*hereinafter* 'deceased') who was a Councillor of the Municipal Corporation of Delhi (*hereinafter* "MCD") went missing on 24.08.2002. On that day, he left his residence around 10.30 a.m. informing his wife Sumitra Gupta (PW-18) that he would first be going to the house of another Councillor of the MCD, Sharda Jain (A-1) and then be proceeding to attend a Congress Party rally at the Ferozshah Kotla Grounds along with her. His driver, Prabhu Yadav (PW-17) drove him to the residence of Sharda Jain and upon reaching there, the deceased instructed the driver to take the car back to their residence. When the deceased did not return home until evening, enquiries were made by his wife and family

members. A missing report was consequently lodged at 1 a.m. on 25.08.2002. Ultimately, the body of the deceased was found on 31.08.2002 in a sub-canal of the Bulandshar Rajwaha/Sanota Canal. A charge sheet came to be filed against nine accused, namely, Sharda Jain (A-1), Raj Kumar (A-2), Pushpender (A-3), Nirvikar (A-4), Rajender (A-5), Roshan Singh (A-6), Shri Pal Singh Raghav (A-7), Satender Kumar (A-8) and Rakesh Kumar (A-9). All the accused were tried before the Fast Track Court, Rohini in S.C. No. 139 of 2006.

3. The Trial Court convicted Sharda Jain (A-1), Raj Kumar (A-2), Pushpender (A-3), Nirvikar (A-4), Rajender (A-5) and Roshan Singh (A-6) for the charges framed against them. As regards the other three accused Shri Pal Singh Raghav (A-7), Satender Kumar (A-8) and Rakesh Kumar (A-9), the Trial Court found that they were not party to the conspiracy hatched by the other convicted persons. However, they were convicted under Section 201 IPC for causing disappearance of evidence.

4. All the six accused (A-1 to A-6) filed criminal appeals before the High Court, namely, Criminal Appeal Nos. 19 of 2007, 51 of 2007, 121 of 2007, 139 of 2007, 144 of 2007 and 65 of 2007. After re-appreciating the entire material on

record, the High Court dismissed Criminal Appeal Nos. 51 of 2007, 139 of 2007 and 144 of 2007 and allowed Criminal Appeal Nos. 19 of 2007, 121 of 2007 and 65 of 2007. In effect, the conviction of Sharda Jain (A-1), Raj Kumar (A-2), Rajender (A-5) and Roshan Singh (A-6) was affirmed, while the other accused Pushpender (A-3), Nirvikar (A-4), Shri Pal Singh Raghav (A-7), Satender Kumar (A-8) and Rakesh Kumar (A-9) were acquitted.

5. The convicted persons have approached this Court in the instant appeals. Among them, Roshan Singh (A-6) who had filed Appeal No. 1888 of 2010 expired on 02.05.2017 and his appeal has therefore been dismissed as abated. Accordingly, only the appeals filed by Sharda Jain (A-1), Raj Kumar (A-2) and Rajender (A-5) were heard and have been decided by this common judgment.

6. It is the case of the prosecution that Sharda Jain (A-1) had developed close relations with the deceased. When he began ignoring her for another woman, she hatched a conspiracy with her brother, Raj Kumar (A-2) and two other persons, Rajender (A-5) and Roshan Singh (A-6) to murder him. Pursuant to this, the deceased was taken to village Chajjupur in her car, where

two hired assassins, namely, Pushpender (A-3) and Nirvikar (A-4), shot him dead. It is alleged that the dead body was disposed of with the help of three police officers, namely, Shri Pal Singh Raghav (A-7), Satender Kumar (A-8), and Rakesh Kumar (A-9) who threw it in a canal.

7. There are no eye witnesses to the incident in question. The case of the prosecution fully rests on circumstantial evidence, which has been used to weave a chain that points to the guilt of each of the convicted persons.

7.1 With respect to Sharda Jain (A-1), the Trial Court and the High Court have considered the following circumstances:

- (a) that she pointed out the place of the murder of the deceased;
- (b) that the deceased was last seen alive in her company and that the time gap between the last seen and the time of death of the deceased is so small that it makes the possibility that the deceased could have come in the contact of any other person too remote;
- (c) no plausible explanation has been given by her as to how and when the deceased parted company with her on 24.08.2002;

- (d) a false claim was made by her that she did not visit Ghaziabad on 24.08.2002;
- (e) she misled the family members of the deceased when they made enquiries from her about the whereabouts of the deceased;
- (f) two meetings took place between Sharda Jain, Raj Kumar, Rajender and Roshan Singh at the residence of Sharda Jain, just a few days prior to 24.08.2002;
- (g) her conduct of visiting the house of her driver, Om Prakash in the late hours of the night on 24.08.2002 is suspicious;
- (h) that she had motive to kill the deceased.

7.2 As regards Raj Kumar (A-2), the brother of Sharda Jain, the lower Courts have considered the following circumstances:

- (a) that he visited the house of Sharda Jain (A-1) on two occasions along with two other persons just a few days prior to 24.08.2002;
- (b) that he pointed out the place of the murder of the deceased;
- (c) that his place of residence was in the vicinity of the place of murder of the deceased;

(d) that he did not controvert the fact of acquaintance with other co-accused, Rajender (A-5) and Roshan Singh (A-6); and

(e) that the wrist watch of the deceased was recovered at his instance.

7.3 As regards Rajender (A-5), the Trial Court and the High Court have considered the following circumstances:

(a) that the deceased was last seen alive in his company and that the time gap between the last seen and time of the death of the deceased is so small that it makes the possibility that the deceased could have come in the contact of any other person too remote;

(b) no plausible explanation has been given by him as to how and when he parted company with the deceased on 24.08.2002;

(c) that he has not controverted the fact that he used to drive the car of Roshan Singh (A-6) on a temporary basis and therefore, he was associated with Roshan Singh;

(d) that he made a false claim about never having visited the house of Sharda Jain (A-1);

- (e) that he refused to participate in the test identification parade (TIP) and the reasons for such refusal are not plausible.

8. Upon considering the aforementioned circumstances and appreciating the material on record, the High Court found that the chain of circumstances as against Sharda Jain (A-1), Raj Kumar (A-2), and Rajender (A-5) was complete and it was proven that these persons had entered into a conspiracy to murder the deceased. Accordingly, the conviction of these persons under Sections 302 and 364 read with Section 120-B, IPC was affirmed.

9. It is well-settled that in cases where the prosecution relies on circumstantial evidence to establish its case, such circumstances should be duly proved and the chain of circumstances so proved should be complete. This means that the chain formed must unerringly point towards the guilt of the accused and not leave any missing links for the accused to escape from the clutches of law. Further, with respect to conspiracy, it is trite law that the existence of three elements must be shown- a criminal object, a plan or a scheme embodying means to accomplish that object, and an agreement

or understanding between two or more people to cooperate for the accomplishment of such object.

10. In light of these observations, we shall proceed to examine the cases of each of the three appellants, Sharda Jain (A-1), Raj Kumar (A-2) and Rajender (A-5) in order.

Sharda Jain (A-1)

11. As mentioned supra, the lower Courts have considered various circumstances against Sharda Jain (A-1). While some circumstances used by the Trial Court have been found to be proven by the High Court as well, some others have been ruled out. For the purpose of our consideration, given that the learned Counsels for both sides have premised their arguments on the circumstances finally used by the High Court to establish the guilt of Sharda Jain, we will be adverting to each of those in turn.

11.1 To prove the *first* circumstance of Sharda Jain pointing out the place of the murder of the deceased (*hereinafter* 'Spot A'), the prosecution has examined police officials, namely, Inspector V.S. Meena (PW-62), HC Sunita (PW-31), SI Ram Kumar (PW-32), SI Anil Kumar Chauhan (PW-44), and SI Shiv Raj Singh (PW-55). It also examined one Mahender Pal Gupta (PW-

8), but the High Court has entirely disbelieved his testimony due to several discrepancies. We agree with the reasons assigned by the High Court for disbelieving the testimony of PW-8.

Apart from this, with respect to the evidence of the police officials who accompanied Sharda Jain (A-1) to Spot A, i.e. PW-62, PW-31, PW-32, PW-44 and PW-55, we find that their evidence cannot be discarded. These prosecution witnesses have withstood the test of cross-examination and clearly stated that Spot A was not in the knowledge of the police up until 28.08.2002, which is when Sharda Jain (A-1) took the police officials to this spot. We do not find any valid ground to disbelieve their testimony, particularly when they are independent, unbiased police officials. There was no reason for them to falsely depose against Sharda Jain, who was also a public servant, being a Councillor of the MCD. Therefore, in our considered opinion, the circumstance of Sharda Jain pointing out the place of the murder of the deceased is proved.

11.2 To establish the *second* circumstance that the deceased was last seen alive in the company of Sharda Jain, the prosecution has examined Sumitra Gupta (PW-18), Prabhu

Yadav (PW-17), Om Prakash Chauhan (PW-11), and Manish Kumar (PW-14).

In her testimony, PW-18 (wife of the deceased) has stated that on the morning of 24.08.2002, when the deceased was leaving the house, he told her that he would be going to the residence of Sharda Jain. Further, PW-17 (the driver of the deceased) has deposed that he drove the deceased to the residence of Sharda Jain at about 10.30 a.m. on 24.08.2002. Likewise, Om Prakash Chauhan (PW-11), who is the driver of Sharda Jain, has stated that the deceased came to the house of Sharda Jain in a car driven by PW-17 and thereafter sent the car back to his residence. He has also deposed that he was driving the car of Sharda Jain in which the deceased and Sharda Jain were sitting and they were heading towards the Ferozshah Kotla Grounds, Delhi to attend a Congress party rally. Notably, none of these statements have been controverted by the defence.

In addition to this, Manish Kumar (PW-14) has stated that, as a matter of chance, he saw the deceased at this rally, around 12 noon. Thereafter, he saw him leave in a car where Sharda Jain was also seated. It is well-established that the

testimony of a chance witness, though not necessarily false, is proverbially unsafe to rely upon. It is for this reason that the High Court chose not to rely on the evidence of PW-14 with respect to the circumstance of last seen of the deceased. However, it was found that the evidence of the other witnesses, viz. Sumitra Gupta (PW-18), Prabhu Yadav (PW-17), and Om Prakash Chauhan (PW-11) conclusively proved that the deceased went to the house of Sharda Jain, sent his car back to his house, and then went with Sharda Jain and attended the rally in the afternoon of 24.08.2002.

During her examination under Section 313 of the Code of Criminal Procedure (*hereinafter* 'Cr.P.C.'), Sharda Jain (A-1) has admitted that the deceased was present with her till the afternoon of 24.08.2002. The law on the point is very clear. A statement made by an accused under Section 313, Cr.P.C. can be used as an aid to lend credence to the evidence led by the prosecution. Therefore, in light of the testimonies of PW-18, PW-17, and PW-11, as well as the statement of Sharda Jain, we find that the prosecution has proved that the deceased was present with Sharda Jain (A-1) in the afternoon of 24.08.2002 and was not seen alive by anyone after such time.

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.

In the instance case, there is proximity between the time of last seen of the deceased with Sharda Jain and the time of his death. As mentioned supra, it is proved that the deceased was last seen with Sharda Jain on 24.08.2002. It has also been shown that the deceased expired on 24.08.2002, as indicated in the testimony of Dr. S.K. Aggarwal (PW-21) who conducted the post-mortem examination of the deceased at 2.30 p.m. on

31.08.2002. He has deposed that the probable date of death of the deceased was about a week prior to the post-mortem examination, i.e. on 24.08.2002. Thus, the proximity between the time of last seen and the time of death of the deceased is established. This, in turn, connects the accused to the crime in question.

Further, the records show that the place of murder of the deceased was a secluded area. In such a scenario, given that the deceased had last been seen with Sharda Jain, the explanation given by her as to how she parted company with the deceased becomes crucial. In her statement under Section 313, Cr.P.C., she has stated that she parted company with the deceased on the afternoon of 24.08.2002, when the deceased got down from her car at the Inter State Bus Terminus (I.S.B.T.). This explanation has been disbelieved by the lower Courts in light of the conduct of Sharda Jain prior and subsequent to the incident in question – she did not depose about her movements on 24.08.2002 after the deceased allegedly got down from her car at I.S.B.T., and she also denied being in the vicinity of Spot A on 24.08.2002. Both these claims have been found to be false by the Trial Court and the High Court and thereby

undermine the explanation offered by her on how she parted with the deceased. We find that the explanation given by Sharda Jain is also falsified by the evidence of her driver, Om Prakash Chauhan (PW-11). PW-11 has emphatically deposed that he got down from the car at I.S.B.T. and the deceased proceeded on the onward journey to Ghaziabad along with Sharda Jain and Rajender (A-5), who were also seated in the car. There is no reason for PW-11 to depose against Sharda Jain, especially since he was her driver. Thus, having regard to the material on record, we find that the Courts below are justified in concluding that the deceased was last seen in the company of Sharda Jain and that the time gap between the last seen and the time of the death of the deceased is so small so as to make it impossible for the deceased to come in the contact of any other person. Further, since no plausible explanation has been given by Sharda Jain as to how and when she parted company with the deceased on 24.08.2002, this forms a link in the chain of incriminating circumstances against her.

11.3 We now turn to the *third* circumstance that a false claim was made by Sharda Jain that she did not visit Ghaziabad

on 24.08.2002. In this regard, the testimony of Om Prakash Chauhan (PW-11) is again relevant. He has deposed that on 24.08.2002, when the deceased and Sharda Jain returned from the rally, Sharda Jain had instructed him to go towards Ghaziabad. As mentioned supra, PW-11 is a reliable witness who has withstood the test of cross-examination. Thus, his testimony establishes that the car of Sharda Jain was to be driven to Ghaziabad on 24.08.2002. In addition to this, it is relevant that mud having similar characteristics as soil found at Spot A was found stuck on the car of Sharda Jain. In her statement under Section 313, Cr.P.C., she has not given any explanation as to why such mud was there on her car or as to her whereabouts after the rally on 24.08.2002. Given that she was uniquely placed to explain these facts, we agree with the High Court that an inference can be drawn that Sharda Jain was present at or around Ghaziabad on 24.08.2002 which is close to the place where the incident in question has occurred.

This is also supported by the mobile records of Sharda Jain, which show that she visited Ghaziabad on 24.08.2002. Though the High Court has held that these records have not

been proved, as no certificate was issued in terms of Section 65-B(4) of the Indian Evidence Act, 1872, we find that these records can be relied upon. This is because an objection relating to the non-production of a certificate under Section 65-B(4) relates to the mode and method of proof and cannot be raised at the appellate stage as has been held by this Court in ***Sonu v. State of Haryana***, (2017) 8 SCC 570. In that case, an objection regarding the mode/method of proof of call detail records (CDRs) of mobile phones recovered from the accused was raised for the first time before the Supreme Court. Drawing a distinction between objections relating to admissibility or relevance of facts and objections as to the mode or method of proof of facts, the Court observed as follows:

“32. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the trial court without a certificate as required by Section 65-B(4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court

could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 CrPC, 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65-B(4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof.”

(emphasis supplied)

Applying this to the instant case, we find that the objection as to the reliability of the call records of Sharda Jain on account of non-compliance with the procedure under Section 65-B(4) was raised for the first time before the High Court. Since no such objection was raised at the time of marking of these records before the Trial Court, we find that these records can be considered.

A perusal of these call records shows that Sharda Jain had visited Ghaziabad on 24.08.2002. Thus, in light of this, and the other circumstances discussed above, we find that it is proved that Sharda Jain made a false claim in her examination under Section 313, Cr.P.C. that she did not visit Ghaziabad on 24.08.2002.

11.4 The *fourth* circumstance relates to Sharda Jain misleading the family members of the deceased about his whereabouts. In this regard, Sumitra Gupta (PW-18) and Rajender Pal Gupta (PW-9; younger brother of the deceased), have deposed that Sharda Jain gave misleading and false answers to them when they made enquiries from her about the whereabouts of the deceased. In our considered opinion, the High Court has correctly relied upon the evidence of these witnesses to conclude that Sharda Jain had given a false explanation to the family members of the deceased about his whereabouts.

11.5 The *fifth* circumstance against Sharda Jain concerns her conduct of visiting the house of her driver (PW-11) in the late hours of night of 24.08.2002. Om Prakash Chauhan (PW-11) has deposed that Sharda Jain had sent a fat man to his residence in

the late hours of 24.08.2002 and the said person had told him that Sharda Jain is calling him. This fact has not been controverted by the defence. Likewise, the evidence of his mother, Shanti (PW-10) that a boy came to her house and told her that Sharda Jain was calling Om Prakash has also not been controverted. Admittedly, there was some vagueness in the evidence of PW-10, but in our considered opinion, given that she is a rustic woman, the High Court was justified in reading her evidence harmoniously with that of PW-11. Since the scene of murder in the present case is rural, the Court should judge the matter after accounting for the rustic behavioral pattern of the witnesses and not adopt extremely sophisticated approaches familiar in courts based on unreal assumptions about human conduct. Keeping this in mind, it becomes clear that when Shanti (PW-10) was told by the boy that Sharda Jain is calling her son, she perceived that Sharda Jain was present outside her house. It is on the basis of this perception that she deposed that Sharda Jain had come to her house. However, a combined reading of the testimonies of PW-11 and PW-10 establishes that Sharda Jain tried to contact her driver (PW-11) on 24.08.2002. This conduct of attempting to establish contact

with her driver in the late hours of the day of the incident, raises a strong suspicion against Sharda Jain and indicates an attempt to request or pressurize PW-11 to not disclose the incident to any other person.

11.6 *Lastly*, as regards the motive of Sharda Jain based on her close relations with the deceased and her discontent with his growing relationship with another woman, (Memwati Berwala), we agree with the High Court. The material on record is insufficient to prove that the deceased had intimate relations with Sharda Jain or Memwati Berwala. At best, the evidence on record indicates that the deceased and Sharda Jain were good friends. Thus, the High Court has rightly concluded that the motive, as put forth by the prosecution, is not proved.

12. Be that as it may, the foregoing discussion on the other circumstances against Sharda Jain clearly establishes that she was last seen in the company of the deceased in the afternoon of 24.08.2002, which is the day on which he went missing and was killed. Further, it is established that she was going with the deceased to Ghaziabad on that day and was the first to point out the place of murder to the police. In addition to this, she has made false claims as to the whereabouts of the deceased

as well as her actions post the afternoon of 24.08.2002. In light of all these circumstances, we find that the prosecution has succeeded in making a case against her for the offence under Section 302, IPC. Further, given that the body of the deceased was recovered from a sub-canal, and not from the place of commission of murder, it is clear that the evidence of the offence was caused to be disappeared and the involvement of Sharda Jain (A-1) was screened through false claims. Thus, charge under Section 201 of the IPC is also proved.

Raj Kumar (A-2)

13. With respect to Raj Kumar (A-2), two circumstances merit our consideration – *first*, that he visited the house of Sharda Jain along with two other persons on two occasions just a few days prior to 24.08.2002; and *second*, that the wrist watch of the deceased was recovered by the police at his instance.

13.1 With respect to the *first* circumstance, we agree with the High Court that there is nothing incriminating in this conduct of Raj Kumar (A-2). Being the brother of Sharda Jain, it is but natural for him to visit her house frequently. Merely because he visited her house on two occasions, just a few days before the

date of incident, an inference cannot be drawn that these visits were for conspiring to commit the murder of the deceased. In any case, it is not clear from the material on record as to who were the other two persons who accompanied him to the house of Sharda Jain and how many days prior to date of the incident were such visits made. Thus, in our considered opinion, this circumstance has not been proven against Raj Kumar.

13.2 The *second* circumstance is that the wrist watch of the deceased was recovered at the instance of Raj Kumar. To prove this circumstance, the prosecution examined police officials, namely, Inspector V.S. Meena (PW-62), Anil Kumar Chauhan (PW-44), and SI Shiv Raj Singh (PW-55). These officials have deposed that on 28.08.2002, Raj Kumar got the wrist watch of the deceased recovered from behind a speaker kept at a ventilator in the balcony of his house. It is further claimed by the prosecution that the watch so recovered was deposited in the malkhana on the same date, i.e. 28.08.2002.

Before we discuss these claims, it is important to bear in mind that the instant case is not that of a robbery. Being an affluent businessman, Raj Kumar cannot be expected to have committed the theft of a wrist watch. Moreover, the wrist watch

seized from his house was identified by one Rajender Pal Gupta (PW-9), who resides about 10 km away from the residence of the deceased. In his cross-examination, PW-9 has admitted that he went to the spot of the murder on 31.08.2002 and that the wrist watch was still on the hand of the deceased at that time. However, as mentioned supra, Inspector V.S. Meena (PW-62) has deposed that the wrist watch of the deceased was deposited by him in the malkhana on 28.08.2002. This is supported by the testimony of Dinesh Kumar (PW-43) who has also deposed that the said wrist watch was deposited in the malkhana on 28.08.2002 and that he had made an entry in the malkhana register accordingly. Clearly, the testimony of the police officials directly belies the evidence of PW-9. However, given that these officials are independent, unbiased witnesses and the fact that none of the close family members of the deceased were called on to identify his wrist watch, we are inclined to believe the testimony of these officials. Thus, it appears that the prosecution has tried to improve its case by planting the said wrist watch so as to falsely implicate Raj Kumar in this case. In light of this, we find that the prosecution has failed to prove the recovery of the wrist watch at the

instance of Raj Kumar (A-2). Given that the High Court had sustained the conviction of A-2 primarily on the basis of this recovery, we are of the opinion that he should be given the benefit of doubt.

13.3 As regards other circumstances considered by the lower Courts against Raj Kumar (A-2), we find that there is no adequate material brought on record. As mentioned supra, the place of the incident (Spot A) was first shown by Sharda Jain and not by A-2. Clearly, there cannot be a discovery of an already discovered fact. Moreover, merely because A-2 knew the other accused Rajender (A-5) and Roshan Singh (A-6), it cannot be said that he was complicit in the commission of a crime with them. Something more such as a common criminal object, or a plan or scheme to achieve it must be shown to prove the complicity of A-2. In our considered opinion, the entire evidence on record is insufficient to bring home the guilt of Raj Kumar (A-2). Accordingly, he deserves to be acquitted for the charges framed against him.

Rajender (A-5)

14. With respect to Rajender (A-5), the major circumstances considered by the High Court are that the deceased was last

seen alive in his company on 24.08.2002; that the time gap between the last seen and the time of the death of the deceased is so small that it makes it impossible that the deceased could have come in the contact of any other person; and that no plausible explanation has been given by Rajender (A-5) as to how and when he parted company with the deceased on 24.08.2002.

14.1 As regards the circumstance relating to the last seen of Rajender (A-5), it is relevant to note that the driver of the deceased (PW-17) has deposed that he drove the deceased to the residence of Sharda Jain in the morning of 24.08.2002. This is corroborated by the testimony of Om Prakash Chauhan (PW-11) who has deposed that the deceased arrived at the residence of Sharda Jain in the morning, sent back his car with PW-17, and then proceeded to the rally with Sharda Jain in a car that he was driving. As mentioned supra, PW-11 has also deposed that while coming back from the rally, Rajender (A-5), the deceased and Sharda Jain were in the same car which was being driven by him towards Ghaziabad. It was during this journey that Sharda Jain instructed him to get down from the car near I.S.B.T. and go back to his house. Accordingly, PW-11

got down from the car at I.S.B.T. and left the company of the accused and the deceased. From that point onwards, it is stated that Rajender (A-5) was driving the vehicle.

The testimony of Om Prakash Chauhan (PW-11) was vehemently challenged by the defence. During his cross-examination, many suggestions were made to him, but they were all turned down. In light of his reliable testimony, we do not find any ground to disagree with the reasoning adopted by the lower Courts to conclude that the last seen circumstance in respect of Rajender (A-5) stands proved. Further, it is important to note that no explanation is forthcoming from Rajender (A-5) as to how and when he parted company with the deceased which thus becomes an additional link in the chain of circumstances.

14.2 In addition to this Rajender (A-5) has admitted that he was the driver of the car of Roshan Singh (A-6) on a temporary basis. This establishes his association with another convicted person in this case. Notably, this connection has not been controverted. Moreover, it has been found that the claim made by Rajinder Singh (A-5) that he has never visited the house of Sharda Jain is false. This is clear in light of the reliable evidence

of Om Prakash Chauhan (PW-11) who has stated that Rajender (A-5), Sharda Jain, and the deceased had left from the house of Sharda Jain to proceed for the rally at the Ferozshah Kotla Grounds.

14.3 Another circumstance against Raj Kumar relates to the place of the murder of the deceased. It has been proved that Spot A is the place of the incident. On a close perusal, the evidence on record reveals that the car in which the deceased, Sharda Jain, and Rajender (A-5) were seated went up to this spot on 24.08.2002. This is evident from the fact that the mud found stuck to the tyres of the car of Sharda Jain had similar physical characteristics as the soil found at spot A. Moreover, the car of Sharda Jain was found by the police at her residence on 27.08.2002. No explanation has been given by Rajender as to his movements on 24.08.2002 or any time thereafter. If it were the case that the car of Sharda Jain, (which has been proved to be driven by Rajender), had not gone to Spot A, the mud of the scene of the offence would not have been found stuck to the tyre of the car. However, this is not the case. Thus, we find that this circumstance indicates the involvement of Rajender (A-5) in the commission of the crime.

15. In light of the foregoing discussion, it is proved that Rajender was driving the car in which the deceased was last seen with him and Sharda Jain (A-1). Further, it is also proven that this car went up till Spot A, which is the place of the incident as is evident from the existence of the mud from the spot on the tyres of the car. In the absence of any plausible explanation put forth by Rajender as to his actions on 24.08.2002 and thereafter, and given the totality of material on record, we find that the circumstances considered against him establish his complicity in committing the murder of the deceased. The lower Courts, were therefore, justified in convicting him under Section 302 of the IPC. In addition to this, given the false claims made by him and the fact that the body of the deceased was recovered from a sub-canal where it had been thrown, charge under Section 201 of the IPC is also established against Rajender (A-5).

16. However, as regards the charge of conspiracy, we do not find that the conduct of Sharda Jain (A-1) and Rajender (A-5) constitutes a criminal conspiracy to murder the deceased. Strangely, the High Court has observed that the prosecution has proven that Sharda Jain was complicit in such a conspiracy.

However, on a closer reading of the impugned judgment, we find that the High Court has not assigned any appropriate reasoning for arriving at this conclusion. Merely observing that it has been proven that A-1 and A-5 were complicit in a conspiracy to murder the deceased is insufficient to conclude the existence of such a conspiracy. As mentioned supra, three essential elements must be shown – a criminal object, a plan or scheme embodying means to accomplish that object, and an agreement between two or more persons to cooperate for the accomplishment of such object. Admittedly, the incorporation of Section 10 to the Indian Evidence Act, 1872, suggests that proof of a criminal conspiracy by direct evidence is not easy to get. While we acknowledge this constraint, we do not find any discussion by the High Court on what circumstances indicate the existence of the essential elements of a criminal conspiracy in the instant case. On going through the entire material on record, we find that a criminal conspiracy has not been proved in the instant case. Thus, the charge against Sharda Jain (A-1) and Rajender (A-5) under Section 120-B, IPC for conspiring to murder the deceased cannot be sustained. Be that as it may,

we find that their acts have been done in pursuance of a common intention and attract Section 34 of the IPC.

17. Having considered the entire evidence on record in proper perspective, we conclude that the prosecution has proved the aforementioned circumstances against A-1 and A-5, which form a complete chain pointing towards their guilt. In the absence of any missing links, they cannot be given a chance to escape from the clutches of law.

18. In view of the foregoing discussion, the following order is made:

- (a) Criminal Appeal No. 2377 of 2014 filed by Sharda Jain (A-1) is dismissed. The judgment and order of conviction passed against her stands affirmed for the offences under Sections 302 and 201 read with Section 34, IPC. Vide order dated 18.03.2015 passed by this Court, Sharda Jain (A-1) was granted bail. Accordingly, her bail bonds are cancelled. She shall be taken into custody immediately to serve out the remainder of her sentence.
- (b) Criminal Appeal No. 1889 of 2010 filed by Rajender (A-5) is dismissed. The judgment and order of

conviction passed against him stands affirmed for the offences under Sections 302 and 201 read with Section 34, IPC. Vide order dated 18.03.2015 passed by this Court, Rajender (A-5) was granted bail. Accordingly, his bail bonds are cancelled. He shall be taken into custody immediately to serve out the remainder of his sentence.

- (c) Criminal Appeal No. 1890 of 2010 is allowed and the appellant Raj Kumar (A-2) is acquitted of the charges framed against him. Vide order dated 18.03.2015 passed by this Court, Raj Kumar (A-2) was granted bail. His bail bonds stand discharged accordingly.

.....J.
(Mohan M.
Shantanagoudar)

.....J.
(Ajay
Rastogi)

**New Delhi;
October 24, 2019**