
(2014) 03 BOM CK 0023
In the Bombay High Court
Case No : Criminal Appeal No. 955 of 2010

Bake	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 20-03-2014

Acts Referred:

Identification of Prisoners Act, 1920 — Section 4, 5
Penal Code, 1860 (IPC) — Section 201, 302, 376, 380, 449

Citation : (2014) ALLMR(Cri) 3219

Hon'ble Judges : V.K. Tahiramani, J; P.N. Deshmukh, J

Bench : Division Bench

Advocate : Aniket Vagal, Advocate for the Appellant; G.P. Mulekar, A.P.P, Advocate for the Respondent

Judgement

P.N. Deshmukh, J.—This appeal takes exception to the judgment dated 29th January, 2010, passed in Sessions Case No. 918 of 2006, by the learned 4th Ad-hoc Addl. Sessions Judge, Borivali Division, Dindoshi, Mumbai. Vide this judgment the appellant came to be convicted for the offence punishable under section 302 of the Indian Penal Code and is sentenced to undergo life imprisonment and to pay fine of Rs. 5000/-, in default, rigorous imprisonment for six months.

The appellant is also convicted for the offence punishable under section 376/ 511 of the Indian Penal Code and is sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs. 1000/-, in default, rigorous imprisonment for two months.

For the offence punishable under section 380 of the Indian Penal Code, the appellant is convicted and sentenced to undergo rigorous imprisonment for two years and fine of Rs. 1000/-, in default, rigorous imprisonment for two months.

For the offence punishable under section 201 of the Indian Penal Code, he is convicted and sentenced to undergo rigorous imprisonment for one year and to

pay fine of Rs. 1000/-, in default, rigorous imprisonment for two months.

In brief, it is case of the prosecution that P.W. 1-Gurunath Shenoy, the complainant was residing in Building No. 7, Flat No. 15, Keshevendha Bhuvanendra Cooperative Housing Society, Dahisar (E), Mumbai, with his wife and two daughters, namely, Vasudha, the deceased aged 19 years and Namrata.

On 15.05.2006, the complainant left to attend his office while his wife and younger daughter had been to their native place in the State of Karnataka, since 10 days prior to the incident. It is case of the prosecution that after the complainant left the house for his office at around 8.30 p.m., the deceased-Vasudha was alone in the flat and she was having cell phone No. 9820820787 with her. The complainant returned back home at 9.00 p.m. However, he found that the door bell was not responded and could notice that the inner lights were switched off, therefore, with the set of keys with him he opened his flat and switched on the lights, when he noticed that Vasudha was lying on the bed in the pool of blood having her clothes stained with blood. He noticed Vasudha to have sustained bleeding injuries on her stomach and neck. He also noticed that the salwar on the person of the deceased was pulled down below the waist. The complainant was thus shocked to see his daughter in above condition and immediately called his neighbour P.W. 10-Dr. Ganesh Kamath, who on examining Vasudha informed that Vasudha was dead. In the short time, police arrived on the spot and recorded statement of Gurunath. On the basis of the said statement, offence came to be registered against unknown person.

2. According to case of the prosecution, after the incident the cell phone of deceased-Vasudha was missing. During the course of investigation, inquest panchanama came to be drawn and body was sent for postmortem. The bloodstained clothes of the deceased, bed-sheet, one handkerchief, one plastic water bottle, broken knife with its handle came to be seized. Similarly, police collected fingerprints from the blade of the knife, wooden frame of the door and from sliding window frame and were sent to fingerprint expert for comparison.

During the course of investigation the Call Data Records (CDR) in respect of cell number of the deceased were collected, where from it revealed that from her cell some calls were made to a place known as Akori, Dist. Mirzapur, (U.P.). Accordingly, police team visited the said place and interrogated P.W. 16-Bulbul Yadav, on whose phone calls were made. P.W. 16-Bulbul Yadav informed that the appellant had phoned him from Mumbai and informed that the appellant was in the village, since he was back from Mumbai. Police accordingly searched for the appellant and apprehended him from Akori with the assistance of local police. The appellant was brought to Mumbai and arrested under panchanama. During interrogation the appellant confessed to discover his bloodstained clothes. The memorandum statement of the appellant came to be recorded and in pursuance to it police seized bloodstained clothes of the appellant. The statements came to be recorded and seized Muddemal articles were forwarded for its analysis to the Chemical Analyzer.

The Investigating Officer on the basis of statements of the witnesses has also arranged for test identification parade, wherein the appellant came to be identified by P.W. 2-Krushnanand, P.W. 3-Ramjiyut and P.W. 12-Prafulla Naik. In the meantime the fingerprint expert's report came to be obtained, according to which the chance fingerprints of the appellant matched with the fingerprints found on the blade of knife seized from the spot. On concluding the investigation, the charge-sheet came to be filed before the learned Metropolitan Magistrate, Borivali, Mumbai.

During the course of time, same came to be committed before the learned Sessions Court for trial. The charges framed against the appellant are for the offences punishable under sections 449, 376, 302, 380 and 201 of the Indian Penal Code, to which he pleaded not guilty and claimed to be tried. The defence of the appellant is of total denial and of false implication.

Prosecution to establish the charges levelled against the appellant, have examined as many as 22 witnesses and on considering the evidence on record, convicted the appellant as afore-stated. Hence, this appeal.

3. We have heard learned Counsel for the appellant and learned A.P.P. to effectively evaluate the submissions advanced by both the sides. We, with their assistance scrutinized the evidence on record.

4. P.W. 1-Gurunath Shenoy, the complainant and father of the deceased has deposed that he is resident of flat No. 15 in building No. 7 situated at Keshevendha Bhuvanendra Co-operative Housing Society, Dahisar (East), Mumbai, since 1981, with his wife and two daughters. On 15.05.2006, the wife of the complainant and his younger daughter Namrata had been to their native place, while he along with his daughter Vasudha, the deceased were present in the flat. At about about 8.30 a.m. the complainant left his house to attend his office at Jogeshwari, where he was working as a Purchase Executive in a pharmaceutical company. Before leaving the house, he served breakfast to the deceased and left at 8.30 a.m. The complainant returned at 60 clock in the evening and before leaving the office, he has telephoned on the cell phone of the deceased. However, there was no response, though the bell was ringing. According to the complainant, his deceased daughter was possessing cell phone No. 9820820787. He has stated that he returned home at 9.00 p.m. and rang the door bell. However, it was not responded and thus entered flat by opening it with the keys in his possession. When he switched on the lights, he was shocked to notice that his daughter Vasudha was lying in the pool of blood on the bed having sustained bleeding injuries on her abdomen, chest and throat. He further noticed that her clothes were removed up to thigh. He found one handkerchief, one knife in broken condition having yellow coloured handle, plastic water bottle lying on the spot. In-spite of his repeatedly calling Vasudha, she did not respond in any manner. The complainant, therefore, immediately called the neighbour. P.W. 10-Dr. Ganesh Kamath, who examined Vasudha and informed her to be dead. In due course of time, police arrived and recorded statement of the

complainant. Treating the same as F.I.R., police registered the offence.

5. According to the complainant, on the following day of incident he informed the Police that the mobile phone of the deceased was missing, which was of Nokia make having cell No. 9820820787, which was gifted to her by one Vijay Bhatt, the neighbourer, before leaving to U.S. on 06.03.2006. After the incident, the complainant also obtained E-mail dated 15.08.2006 to this effect from Vijay Bhatt.

In his evidence, the complainant identified the salwar, kameez, underwear of the deceased as well as plastic water bottle, steel blade knife, plastic handle and one handkerchief.

6. The complainant has admitted that in building No. 7, there are 16 flats and that he had not doubted any one who has committed the crime.

7. The evidence of P.W. 2-Krushnanand Baitul, the neighbourer is on the circumstances about his seeing the appellant in the building on the day of incident, as he has stated that on 15.05.2006, when he returned back to his building at around 12.45 p.m. to 01.00 p.m., he saw one person, who had worked about one day before for sliding window work in his house, who was standing at the ground floor. P.W. 2-Krushnanand had identified the appellant as the same person who has worked for two days in his flat for sliding window work. As per his further evidence on 06.06.2006, he had identified the appellant in a test identification parade held in Thane jail as the same person to whom he had seen on the ground floor of the building on the day of the incident.

In the cross-examination P.W. 2-Krushnanand denied that the appellant has never worked for sliding window work in his house nor he has seen the appellant in the building on 15.05.2006. He has also denied to have not identified the appellant in the test-identification parade held at Thane jail.

8. To establish the presence of the appellant in the building on the day of incident, the prosecution has further examined P.W. 3-Ramjiyut Dixit, the Security Guard, who was posted at the building on the day of incident wherein flat of the complainant is situated, where the incident took place. P.W. 3-Ramjiyut has stated that he was working as Security Guard at said building since February, 2006 and was on duty on the day of incident from 08.00 a.m. to 08.00 p.m. along with Shailesh Kolekar-Security Guard. He stated that on the day of incident at 01.00 p.m. one person to whom he knew as a worker of one Chandawarkar, entered the premises and informed him that he wanted to meet his contractor to collect his wages and clothes, which he had kept in the building and would come back in ten minutes. However, he did not return till 01.30 p.m. to 01.45 p.m. He stated that on his returning back, as said person had not brought any clothes, he asked about it, to which it was informed that since the contractor as well as keys were not available, he could not collect the same and left the place hurriedly. It is his evidence that on the following day, he learnt about the incident and further stated that on 06.06.2006 he has identified the appellant as the same person in

the test identification parade held at Thane jail.

In the cross-examination P.W. 3-Ramjiyut admitted that it is his duty to take entry in the register in respect of the persons visiting the building stating therein their names, purpose of visit and admitted that he has not taken any such entry in respect of the appellant, when he entered the building on the day of the incident, however, we do not find such admission to be fatal to the prosecution in view of the fact that the evidence of P.W. 3-Ramjiyut reveals that the person who visited the building at 01.00 p.m. on the day of the incident was known by this witness as a worker working for Chandawarkar and has also voluntarily deposed in the cross-examination that he had trusted the appellant when he came to the building. In view of said evidence, we do not find that the evidence by way of admission given by P.W. 3-Ramjiyut in any way is fatal to the case of prosecution. Said witness has denied that he has not identified the appellant in the test identification parade.

9. On the aspect of presence of the appellant at the building on the day of incident, the evidence of P.W. 12-Prafulla Naik also appears to be material when she has stated that on 15.05.2006 i.e. on the day of incident at around 11.00 a.m. one Umesh Lad with whom she was working as a maid had left along with his wife and daughter to Girgaon and on doing her work at around 12.45 p.m., she left the place when she saw the appellant wandering in the building, who had done the work of sliding windows in the building. She stated that prior to this, the work of sliding window was carried out in the flat of Umesh Lad, which is situated in the same building No. 7. She has further stated to have identified the appellant in the identification parade held on 06.06.2006 at Thane jail. Her evidence also establish that in her statement she has given physical description of the appellant. However, said evidence of her identifying the appellant in the test-identification parade does not appear to be convincing to be acted upon in view of her admitting to have seen the appellant in the police station. In view of her admission as above, said evidence only, to the extent of her identifying the appellant needs to be discarded. However, rest of her evidence establish the fact of her seeing the appellant in the building on the day of incident, who has done the work of sliding window in their flat situated in building No. 7.

10. On the material aspect of appellant working on the job of sliding window in the building wherein the flat in which the incident took place is situated, prosecution has examined P.W. 8-Ajay Roy, who has stated that he is in the business of doing job-work of sliding windows. Since 28.04.2006 to 05.05.2006, he carried out said work in flat No. 16, which appears to be adjacent to the flat of the complainant, since he has occupied flat No. 15 in the same building No. 7. The said witness also stated to have carried out similar work in flat No. 3 in the same building. Thus, from his evidence, it reveals that the work of sliding window was carried about 10 days prior to the incident in building No. 7 of the complainant in various flats. P.W. 8-Ajay Roy stated that he knows the appellant since one year prior to the incident, as he hailed from the same place which also

belonged to other workers.

In his cross-examination, Ajay Roy admitted that while the work of sliding windows was in progress, the appellant was under his supervision. In view of said admission, we find no substance when it is suggested to him that the appellant never worked for him. In the evidence of this witness, it has come on record that P.W. 9-Sudhir Rajbhar is also a contractor, who has stated that he is doing the work of sliding windows since six years in Mumbai and in April, 2006, he was given contract of said work by one contractor - Chandawarkar to carry out the job in the flat situated in the building in Sudhindra Nagar. As per the evidence of the complainant, the co-operative housing society wherein he possessed the flat, where the incident took place is also in the same nagar. P.W. 9-Sudhir further stated that during completion of this work, he left to his native place for a family function and thus in his absence the work was further continued by P.W. 8-Ajay Roy. Above evidence of P.W. 9-Sudhir as such corroborates the version of P.W. 8-Ajay Roy about his working on contract with P.W. 9-Sudhir, who was working with contractor - Chandawarkar and further corroborates with the evidence of P.W. 3-Ramjiyut, the Security Guard who he stated that he has trusted the appellant, when he entered the building to whom he was knowing as worker of contractor-Chandawarkar.

Further evidence of P.W. 9-Sudhir reveals about his return back from his native place on 06.05.2006, on which day he found the appellant working with P.W. 8-Ajay Roy and further stated about the appellant working with him till 11.05.2006. It is specific evidence of P.W. 9-Sudhir that the appellant worked for sliding windows in building No. 7. It has also come in his evidence that he knows the appellant and he had worked with him.

Nothing material is elicited in the cross-examination of this witness except for suggesting that he has no document to show that the appellant was working with him at any time.

11. Evidence of P.W. 2-Krushnanand and P.W. 3-Ramjiyut finds substantiated on the aspect of their identifying the appellant in the test-identification parade held on 06.06.2006 from the evidence of P.W. 13-Ramzan Khan, S.E.O., who at the request of investigating officer had held test-identification parade. He has stated that in the second round the appellant chose to stand in between dummy Nos. 3 & 4 amongst six dummies selected for test-identification parade and was identified by P.W. 3-Ramjiyut Dixit. He has further deposed that in the fourth round the appellant was identified by P.W. 2-Krushnanand, when the appellant was standing between dummies 5 and 6, though from his evidence it appears that in the first round one witness, namely, Shailesh Kelkar had also identified the appellant, he is not examined. According to evidence of the S.E.O., P.W. 12-Prafulla has also identified the appellant in the test-identification parade, however, her evidence does not find to be convincing as already stated earlier, in view of the fact of her admitting that before the test-identification parade was held, the appellant was shown to her in the police station.

Evidence of S.E.O. establishes fact of his holding test-identification parade on taking necessary precautions about his selecting dummies who are similar to the physical description of the appellant and on taking care to see that the identifying witness has no chance to see the appellant and had held the test-identification parade confirming that except for himself, the panchas and identifying witnesses, nobody was present when it came to be held. The memorandum of identification parade is on record at Exh. 45.

12. On considering the above discussed evidence, the prosecution does appear to have satisfactorily proved on record that prior to the incident the appellant had worked for the job of sliding windows in building No. 7, which was carried by P.W. 8-Ajay Roy and P.W. 9-Sudhir, the supervisor of the contractor respectively. The prosecution has also established the fact of the appellant working for the sliding windows in the flat No. 16, in building No. 7, which is adjacent to the flat of the complainant, who on the material date was in occupation of flat No. 15 in the same building. The above discussed evidence also established on record, presence of the appellant in-spite of completion of work of sliding windows in the building at around 01.00 p.m. on 15.05.2006, who gained access to the housing society on the false pretext to collect his wages and his clothes which were in the building. There is no satisfactory explanation put-forth on behalf of the appellant on any of the above material circumstances. In the circumstances, we find said evidence to be sufficient to establish that the appellant on the day of incident had entered the building wherein flat No. 15 occupied by the complainant is situated.

13. The evidence of P.W. 4-Dinesh Shukla and P.W. 5-Sadanand Shetty, both spot panchas, reveals that on 16.05.2006 they acted as panch and visited the flat which was found locked and sealed, which was opened by the police and some photographs were obtained on removing the paper affixed on the window. Both these witnesses stated to have seen one knife in broken condition which was seized and sealed and has identified as Article No. 5 to be the same broken knife. The said panchanama is effected on 16.05.2006 from 11.00 a.m. to 11.50 a.m. vide Exh. 22.

14. Evidence of above witnesses is found substantiated from the evidence of P.W. 7-Shaila Bhatt, who had visited the flat on the day of the incident and had noted that one knife in broken condition along with other articles was lying in the flat.

15. The evidence of P.W.-20 P.Y. Bhoje, P.I. established the investigation carried out by him, when he has stated that on 15.05.2006 when he was attached to Dahisar Police Station, as A.P.I., and was on night duty, information was received about murder of some girl in Sudhendra Nagar Society, Dahisar (East) and therefore with his staff visited the spot which was flat No. 15 in building No. 7 of Keshevendra Bhuvanendra Co-operative Housing Society, where one girl was found murdered lying dead on the cot. He further stated that he got inquest panchanama and spot panchanama prepared and seized the articles. He has further stated that a team of fingerprint expert arrived on the spot and collected

fingerprints, which were found on the blade of knife, frame of wooden door and of sliding window. He further stated that on following day on 16.05.2006, the investigation team entered the flat after opening the seal and photographs were obtained and knife which was found lying on the spot was kept as it is, so that investigating team would get the fingerprints without being disturbed on obtaining photographs and thereafter the blade and the knife were seized.

In the background of above evidence, prosecution further relied upon the evidence of P.W. 11-Sharad Shalu, the fingerprint expert. It has come in his evidence that since 1991, he is working as fingerprint expert and on the day of the incident he was attached to Fingerprint Bureau, State C.I.D., Pune and in the night of 15.05.2006 on receiving message from the control room visited the spot with his staff and P.W. 15-P.I.-H.G. Bane. He stated that he noted one broken knife and from its blade developed one chance print. He further stated to have developed chance print from the wooden frame of the door as well as from the frame of sliding window. According to his evidence four finger prints from the wooden frame door and one fingerprint each from the sliding window frame and the blade of knife respectively were collected and preserved for photograph. According to his evidence on 29.05.2006, his office received the fingerprints for comparison and the photographs were received in his office on 14.06.2006, which was compared by P.W. 15-H.G. Bane, P.I., who submitted his report to Dahisar Police Station on 05.07.2006.

16. The above stated evidence on the point of investigating team collecting the chance fingerprints, preserving it and sending for comparison to the fingerprint expert have been further substantiated from the evidence of P.W. 15-H.G. Bane, P.I., who at the material time was serving as a fingerprint expert, CID, Mumbai. He has stated that on 15.05.2006 on receiving message from Dahisar Police Station, he has visited the spot along with police staff in the mid-night at 10 clock. P.W. 20-A. P.I. Bhoje was already present at the spot and got chance fingerprint on the blade of knife, wooden frame of door and frame of balcony window, which was preserved. He further stated to have obtained photographs of the said six fingerprints and found two fingerprints were fit for comparison, which were fingerprints found on the blade of knife, which was found identical to the left middle fingerprint of the appellant and has accordingly gave his opinion vide Exh. 49. On considering the evidence discussed as above, we thus found that out of these chance prints found and collected by the fingerprint expert, one fingerprint found on the blade of knife on comparison was found tallying with that of the appellant. There is nothing to discard evidence of this witness, who even otherwise is not suggested that he has never visited the spot nor found any chance fingerprints. It is even not suggested that the fingerprints found on the blade of knife stated to be tallying with that of the appellant is not that of the appellant. The above evidence thus established the presence of the appellant on the spot.

17. The evidence of P.W. 14-Jaywant Shivalkar-H.C. Is on the aspect of his

collecting fingerprints of the appellant when he has stated that on 27.05.2006, he was directed by his superior officer to take fingerprint of the appellant, which he collected and on 29.05.2006 submitted the same to the Fingerprint Bureau, Crime Branch, Mumbai. According to him, he has collected the fingerprint of roll and palm of the appellant. In his cross-examination it has come on record that till the date of incident he has obtained fingerprints of about 500 accused since 2004. Nothing material is brought on record to discard evidence of this witness except for suggesting that he has not collected the fingerprints of the appellant, which is denied by him.

On this aspect the learned Counsel for the appellant submitted that the evidence of P.W. 14-Jaywant Shivalkar H.C. is silent on the point if he had obtained fingerprints of the appellant on obtaining permission from the Magistrate and has thus relied upon the case of Mohd. Aman, Babu Khan and another Vs. State of Rajasthan, . It was a case of homicidal death. The victim was alone in the house and the house was found ransacked. The only incriminating circumstance against one of the accused was that his fingerprints were found on the brass jug in the house of the deceased. The brass jug was forwarded to the Fingerprint Bureau, who opined that the chance fingerprints found on the brass jug were identical to the specimen fingerprints of the accused. However, in that case said aspect was not considered in favour of the prosecution observing that the prosecution failed to establish that the seized articles were not tampered with before they reached to the Bureau for examination. However, this is not the aspect involved in the appeal in hand. On the contrary there is no suggestion to this effect to the witnesses, nor that they have not collected the chance prints from the knife nor to P.W. 14-Shivalkar H.C., who had collected the specimen fingerprint of the appellant.

The learned Counsel for the appellant had also relied upon said authority on the aspect of prosecution's failure to establish if the permission was obtained from the Magistrate before specimen fingerprints of the appellant were obtained. With reference to this, though the specimen fingerprints of the appellant were obtained on number of occasions, they were never taken before or under the order of the Magistrate in accordance with Section 5 of the Identification of the Prisoner's Act and thus it is observed that to dispel any suspicion as to its bona fide or to eliminate the possibility of fabrication of evidence, it was imminently desirable that the specimen of a fingerprint should be taken before or under the orders of the Magistrate.

In the case in hand the evidence as already discussed above, however, reveals that there is no such case put-forth to any of the witness as submitted, about there not obtaining prior permission of the Magistrate for obtaining specimen fingerprints of the appellant. Moreover, in the case of Mohd. Aman, Babu Khan and another Vs. State of Rajasthan, reported supra, this was the only incriminating circumstance against the appellant. While in the case in hand there is sufficient evidence to establish presence of the appellant on the spot at the

time of incident.

Even otherwise according to Section 4 of the Identification of the Prisoner's Act, police is competent to take fingerprints of the accused, but it is only to dispel the suspicion as stated above, it is desirable to obtain the same under the orders of the Magistrate. In any event, thus, the said Act do not preclude police from obtaining specimen of the fingerprints. Moreover, there is no challenge on this aspect, in the evidence of the Investigating Officer.

18. Apart from above circumstances, another incriminating circumstance against the appellant is the CDR. It has come in the evidence of the complainant that the deceased was possessing cell phone having its number as 9820820787 and had also informed said fact to police during the course of investigation that the said phone was found missing after the incident. The investigating agency, therefore, collected the CDR of said cell No. of the deceased. In view of this the evidence of P.W. 18-Bhagwati Singh of village Akori, Mirzapur District, U.P., finds to be material when he has stated that he knows the appellant since his childhood being from his village and has also stated that he has telephone facility being telephone No. 242473. He has stated that he also has mobile handset and used to receive telephone calls from the appellant. However, he has expressed his inability as to who received telephone call made by the appellant. From the evidence of the witness, thus it is established that the appellant who at the time of incident was working in Mumbai for earning his livelihood, had made phone call at his native place to this witness, though according to his evidence, he is not aware, who received the telephone call made by the appellant. From his evidence prosecution has established fact of telephone call being received on his telephone from the appellant.

Similarly evidence of P.W. 17-Akshata Bhatt who on the day of the incident was residing in the same housing society, established the fact of deceased possessing cell phone No. 9820820787, as it has come in her evidence that she used to talk with the deceased from her land-line number or from her cell on the cell of the deceased. She has stated that on the day of the incident deceased gave her call on her land-line No. 28485216 informing that she would visit her to solve some problem of Accountancy subject and they have accordingly decided to meet at 04.00 p.m., however, she did not turn up. Here it is material to note that, according to the evidence of the complainant, at the time of incident, the deceased was studying in Dahanukar College in Commerce stream and was doing her Company Secretary course. As such, it is found that deceased was to meet P.W. 17-Akshata for seeking her help for solving some problems relating to Accountancy. P.W. 17-Akshata further stated that on the same day, she learnt about the incident.

With reference to the evidence of above two witnesses, when evidence of P.W. 21-P.S.I. Shinde is perused, he has stated that for the purpose of investigation in this crime, he visited Uttar Pradesh as per directions of his superior officer and collected the CDR from the concerned mobile company, where from it revealed to

him that from the cell phone of the deceased one call was made to Akori village in Mirzapur District, U.P. He has stated that accordingly he visited Mirzapur Police Station and on contacting the local police station informed about the facts of the case and on visiting village Akori contacted P.W. 16-Bulbul Yadav, on whose number phone call was made from the phone of the deceased. As per his further evidence, on his enquiry P.W. 16-Bulbul has informed that the appellant made phone call to him from Mumbai and also informed that the appellant at that time was in the village. The investigating team thus searched for the appellant and apprehended him. P.W. 21-P.S.I. Shinde has placed on record the CDR at Exhs. 61 & 62. According to Exh. 61, the name and address of the owner of Mobile No. 9820820787 is shown as Ramkrushna Bhatt r/o. Sudhendra Nagar, Dahisar (East), which corroborates with the evidence of the complainant as well as of P.W. 17-Akshata Bhatt, who had deposed that the deceased was possessing cell phone which was given to her by Ramkrishna Bhatt, prior to his departing to U.S. Exh. 12 on record is the E-mail obtained by the complainant to that effect from Ramkrishna Bhatt, while as per Exh. 62, the investigating agency was supplied with the CDR of deceased, which also refers to Cell No. No. 9919239886, which is of P.W. 16-Bulbul Yadav.

On perusal of the CDR details, it is noted that one phone call from the cell phone of the deceased was made to P.W. 18-Bhagwati Singh on 15.05.2006 at 18.55 hours. This document thus established beyond reasonable doubt that the appellant after the incident took in his possession the cell phone of the deceased and from said cell phone made a call at his native village Akori in U.P. to P.W. 18-Bhagwati Singh, after the incident at 6.55 p.m.

The CDR also substantiated the case of P.W. 17-Akshata where from it reveals that the deceased prior to the incident had contacted this witness on her land-line phone No. 28484286. In-fact, there appears to be regular conversation between them.

From the CDR it is, in-fact, found that on the day of the incident on commission of crime, the appellant had called on cell phone of P.W. 16-Bulbul Yadav as many as five times. P.W. 16-Bulbul Yadav did not support the case of the prosecution. However, his evidence established that he is from village Akori, State of Uttar Pradesh and has cell phone with its No. as 9919239886. Moreover, prosecution has got proved on record contradictions from the evidence of this witness at Exh. 67 to 70. No reason is put-forth for P.W. 21-P.S.I. Shinde to mention such fact in the statement of P.W. 16-Bulbul.

In his evidence P.W. 21-P.S.I. Shinde has stated that during the course of investigation on his meeting P.W. 16-Babulal at his village Akori, in Uttar Pradesh, it revealed to him, that from the cell phone of the deceased the appellant had made phone calls to him from Mumbai. Similarly, above referred CDR also establish fact of appellant contacting P.W. 18-Bhagwati Singh, on his land-line phone, from the cell phone of deceased, after commission of crime.

Above discussed evidence, therefore, establish fact of the appellant having in possession of cell phone of the deceased and using the same to make phone calls at his native place after the incident.

So far as the issue of apprehension of the appellant at Akori in U.P. is concerned, there is no challenge to this fact of the prosecution case, as it is nowhere suggested that the appellant was not apprehended from village Akori. In the circumstances, it was for the appellant to explain the cause of his arrest. However, we do not find any case put-forth by the appellant on this point.

19. Having considered the above evidence, we thus find that when the evidence of P.W. 21-P.S.I. Shinde, P.W. 16-Bulbul, P.W. 17-Akshata and P.W. 18-Bhagwati Singh is considered with the CDR Exhs. 56-A & 56-B along with letters issued by the mobile company Exh. 61 & 62, it clearly goes to show that on 15.05.2006 six calls were made by the appellant after 5.30 p.m. from the cell phone of the deceased to P.W. 16-Bulbul Yadav & P.W. 18-Bhagwati Singh.

Since we find no challenge by the appellant to his apprehension by investigating team at village Akori, we also find no explanation from the appellant about his being in custody of cell phone No. 9820820787 belonged to deceased at the time of incident nor any explanation is put-forth by the appellant about making phone calls from cell No. 9820820787 after the incident. We also find it material to note that the appellant has also failed to give explanation of his calling P.W. 16-Bulbul Yadav on his cell No. 9919239886.

Merely because the investigating agency could not recover the cell phone, this do not doubt the case of the prosecution, particularly when the appellant has failed to explain the fact of his being in possession of said phone and of his making phone call from the said cell phone immediately after the incident to his native place. All these facts, therefore, clearly established involvement of the appellant in taking away the call phone of deceased after the incident and using the same. In the circumstances the possibility of the appellant's destroying the phone after making its use in order to disappear the evidence cannot be ruled out.

20. Apart from above circumstances, which established the presence of the appellant at the scene of offence beyond reasonable doubt, we find that according to C.A. report, the semen having group "AB" is found on the underwear of the appellant and also on the bed-sheet, on which the deceased was found lying. It is material to note that the semen having group "AB" is also found on the kurta and underwear which was on the person of the deceased. The C.A. report (Exh. 38) thus established that the semen of the appellant was found on the clothes of the deceased as above. No explanation is put-forth by the appellant on this material aspect.

As per the C.A. report (Exh. 42), the blood group of the appellant is "AB", while the blood of the same group is found on the clothes of deceased and on the bed-sheet. All these circumstances further established the presence of the accused on the spot at the time of commission of the offence.

Considering the fact that the semen was found on the clothes of the deceased as well as on the appellant as above, there was ejaculation. So also according to the evidence of the complainant it has come on record that the garments which were on the person of the deceased were pulled down up to her thigh. The post-mortem report refers to deceased sustaining five injuries including stab injury on the abdomen just above umbilicus. Apart from said injury, the deceased is also found to have sustained one injury on her left thumb; said injury establish fact of deceased resisting the act of the appellant while committing rape upon her. Said fact proves that there was intention and preparation made by the appellant to commit rape on the deceased, as he has removed the salwar of deceased below her waist and there was ejaculation of semen. Considering the above evidence, prosecution is found to have established beyond reasonable doubt that the appellant having visited flat of the deceased, committed rape upon her and, we find that the appellant on deceased resisting for the said act, committed her murder.

In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

In view of above stated settled legal principles, from all the material circumstances as discussed above, prosecution is thus found to have established beyond reasonable doubt all the charges levelled against the appellant. Thus, we have no hesitation to hold that prosecution has established that the deceased had met with homicidal death. The prosecution has also established that the victim was raped before she was murdered.

We, therefore, do not find any merit in the appeal. Same is, therefore, dismissed.