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(2014) 12 DEL CK 0227

In the Delhi High Court

Case No : Criminal Appeal 261 and 116/2014

Pradeep — APPELLANT

Vs

State — RESPONDENT

Date of Decision : 01-12-2014

Acts Referred:
Evidence Act, 1872 — Section 65B, 8
Penal Code, 1860 (IPC) — Section 161, 201, 302, 34, 364

Citation : (2014) 12 DEL CK 0227

Hon'ble Judges : Pradeep Nandrajog, J;Mukta Gupta, J

Bench : Division Bench

Advocate : Sumeet Verma, Amit Kala and Neeraj Bhardwaj, Advocate for the Appellant; Aashaa Tiwari, APP and Anil Sharma, Insp, Advocate for the Respondent

Judgement

Pradeep Nandrajog, J.—On March 27, 2008 a joint written complaint Ex. PW-5/A was handed over by Ram Prasad PW-2, father of Rajan (hereinafter referred to as the deceased), Babloo @ Mirajuddin PW-5, the owner-cum-driver of an Innova motor vehicle bearing registration No. DL 7CX 1951, and Hari Om Gupta PW-6, the proprietor of Himanshu Tours and Travels, informing the SHO of PS Mayur Vihar that Kuldeep and Pradeep, having mobile numbers 9250780099 and 9250746991 respectively, had booked the Innova car on March 25, 2008 to go to Ambala for a day. Rajan was the driver who took the two in the car and Rajan had not returned with the car. Pradeep and Kuldeep were not responding on their mobile numbers. The three suspected something amiss. The next day, on March 28, 2008, Ram Prashad again went to the police station to inform that his son Rajan had not returned and the vehicle in which he left was not to be found. The duty officer recorded Ram Prashad''s statement in the daily diary at serial No. 31A, Ex. PW-27/A, in which he disclosed that Rajan was aged 28 years and his height was 5 feet 6 inches and that when he left at 6:30 PM on March 25, 2008, Rajan was wearing a blue coloured jeans and a chocolate coloured shirt and sports shoes. He further disclosed that Rajan was to spend the night in Ambala

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at the house of his sister who informed that Rajan had not visited her house at Ambala. A few hours thereafter on March 28, 2008, Ram Prashad went to the police station where ASI Jaipal Singh PW-27, recorded the statement Ex. PW-2/A of Ram Prashad in which, in continuation of the missing person''s complaint Ex. PW-5/A and further information Ex. PW-27/A, Ram Prashad expressed apprehension that Kuldeep, a bad character of Trilokpuri and Pradeep, a bus driver and resident of District Jhajjar Haryana, had kidnapped his son. Making an endorsement Ex. PW-27/B beneath Ram Prashad''s statement Ex. PW-2/A, FIR No. 96/2008, Ex. PW-21/A for an offence punishable under Section 365 IPC was registered on March 28, 2008 at the instance of ASI Jaipal Singh at PS Mayur Vihar and entry Ex. PW-21/B to said effect was made in the daily diary.

2. Thus, investigation commenced to find out the whereabouts of Rajan and the Innova car, and the lead available with the Investigating Officer was the name of Pradeep and Kuldeep and their mobile numbers 9250780099, 9250746991 and as also the mobile number 9971720447 of Rajan. ASI Jaipal obtained the call detail record of the mobile number 9971720447 and found that on the day when Rajan was missing, apart from other numbers, he had received a call from the mobile number 9250780099, which number as per the service provider was told to ASI Jaipal being in the name of one Saurabh Sethi. ASI Jaipal contacted Saurabh Sethi who told him that the mobile phone along with the SIM card had been gifted by him to his girlfriend Ritu and currently he was using the mobile No. 9250780100. Saurabh Sethi gave Ritu''s address in Paschim Vihar to ASI Jaipal who contacted Ritu at her residence, who told him that about two or three months ago, while travelling in a taxi, she had inadvertently left the telephone in the vehicle and had not bothered to lodge a lost report. She disclosed that the name of the taxi driver was Devinder Malik who resided in Haryana. ASI Jaipal managed to locate Devinder Malik who told him that he had handed over the mobile phone, after removing the SIM card, to Pradeep who was the driver of a bus, owner whereof resided in Mahipal Pur. ASI Jaipal went to Mahipal Pur and located the owner of the bus which was being driven by Pradeep Kumar. The owner of the bus produced a driving license in the name of Pradeep Kumar, on seeing the photograph of the person in whose name the driving license was issued, Hari Om Gupta identified that he was the person who disclosed his name as Kuldeep when he booked the Innova car on March 25, 2008. Being informed that Pradeep Kumar resides with his parents in Gopal Colony, Najafgarh, ASI Jaipal located the house of the parents of Pradeep Kumar whose father informed that Pradeep was a bus driver and used to come home occasionally. He informed that Pradeep resided with his friend Vinod at Pandav Nagar. ASI Jaipal tracked Vinod in Pandav Nagar, who disclosed that Pradeep used to reside at 28/110 Trilokpuri. On reaching said house he found it locked. On April 01, 2008, Saurabh and Ritu handed over documents concerning mobile No. 9250780099 to ASI Jaipal who seized the same as recorded in the memo Ex. PW-1/C. He once again contacted Vinod to find out whether Pradeep had any other friends. Vinod informed him that Pradeep was friendly with Rohit who resided at Rama Krishna

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Ashram Marg near house No. 7/75, Rama Krishna Ashram Marg where Vinod''s mother-in-law used to reside.

3. ASI Abhay Singh PW-18, a police officer with Haryana Police was posted at PP Badli under jurisdiction of PS Sadar Bahadurgarh, Haryana as on March 31, 2008, and in the morning thereof he received information that a dead body had been found in the Gurgaon Water Supply Canal near village Lagarpur. The body was entangled in the pipes and was retrieved. Photographs of the dead body were taken and the body was sent to the mortuary of PG Hospital, Rohtak with a request that post-mortem be deferred pending identification of the dead body.

4. On April 01, 2008, further investigation of FIR No. 96/2008 was taken over by Insp. Anil Sharma PW-31, but he continued to associate ASI Jaipal in the investigation, and in view of the information given by Vinod regarding Rohit, Insp. Anil Sharma and ASI Jaipal, accompanied by Babloo @ Mirajuddin, went to Rama Krishna Ashram Marg, where Ramkali, the mother-in-law of Vinod informed them that she had seen Pradeep in the area near the railway colony. Insp. Anil Sharma and ASI Jaipal proceeded to the railway colony and saw Pradeep who was arrested at 4.00 P.M. on April 01, 2008 as recorded in the arrest memo Ex. PW-6/B. The seizure memo Ex. PW-6/A records that one black coloured Tata Indicom mobile phone, two SIM cards issued by Tata Indicom and a visiting card of Himanshu Tours and Travels were recovered from the possession of Pradeep. Pradeep made a disclosure statement Ex. PW-6/D in which he disclosed that he knew the place where the Innova car was parked and hence could lead the police to the place and get the car recovered as also the place where the purse of the deceased was kept by him and also the mobile phone of the deceased. And that he knew the place where the dead body was thrown in a canal. Pursuant to the disclosure statement, accompanied by Babloo @ Mirajuddin, the owner of the Innova car, ASI Jaipal, Insp. Anil Sharma and Pradeep went to Panchkuian Road and at the pointing out of Pradeep the two police officers seized the Innova car on which a fake number plate DL 3CX 2597 was affixed. The vehicle was seized as recorded in the memo Ex. PW-5/C. The chassis number and engine number of the car tallied with that of the car registered vide No. DL 7CX 1951. Packets of namkeen were found on the rear seat of the car, which were seized as recorded in the memo Ex. PW-5/B. All proceeded thereafter to Jhajjar Haryana where Pradeep pointed out, as recorded in the pointing out memo Ex. PW-26/A the spot in the Gurgaon Water Supply Canal where as per Pradeep, Rajan''s body was thrown.

5. At that point of time, the chitha munshi of PP Badli within jurisdiction whereof the portion of the canal was flowing, on learning that police personnel from Delhi were searching for a dead body in the canal went to the place where Delhi Police Officers with Pradeep were present and gave information that the day previous i.e. on March 31, 2008, a dead body of a male was recovered in the canal at a spot downstream from the spot pointed out by Pradeep where Rajan''s dead body was thrown. He disclosed that the dead body had been kept in the mortuary of

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PG Hospital, Rohtak on being seized by SI Abhay of Haryana Police.

6. Rakesh PW-26, the brother-in-law of Rajan who resided in Haryana was contacted to identify the dead body and with respect to the clothes on the dead body, two iron rings, two white metal rings, one bracelet (kada), either of brass or copper, and a thread on the wrist and a black thread on the neck of the deceased identified the body as that of Rajan. Thereafter postmortem was conducted by Dr. Jitender Jhakar PW-28 who handed over the various articles, Ex. P-2 collectively removed from the dead body to Haryana Police Officers who in turn handed over the same along with the photographs taken when Rajan''s dead body was recovered by them from the Gurgaon Water Supply Canal near Village Lagarpur to the Delhi Police personnel. The viscera was also handed over to the Haryana Police Personnel who in turn handed over the same to the personnel of Delhi Police. The post-mortem report Ex. PW-28/A records that the length of the dead body was 176 cm (5 feet 9 inches). No cause of death was indicated because the body was in a high state of putrification. It was recorded that the cause of death would be given after the viscera was examined.

7. On April 02, 2008, a supplementary disclosure statement, Ex. PW-2/E, of Pradeep was recorded by Insp. Anil Sharma in which he stated that he knew the whereabouts of Rohit and pursuant to the statement he took the police officers to a park in Trilokpuri and pointed out Rohit, who was arrested and on his personal search a Sony Ericson mobile phone for the mobile No. 9971720447 was recovered, as entered in the memo Ex. PW-2/B.

8. Since in the Innova car which was recovered the Registration Certificate was missing, and it became important to recover the key of the car as also its Registration Certificate, Pradeep and Rohit were interrogated further by Insp. Anil Sharma. Pradeep made a further disclosure statement Ex. PW-26/C, in which he once again claimed to know the place where the purse of the deceased was lying and additionally further disclosed that he knew the place where the Registration Certificate and the key of the Innova car were lying. He led Insp. Anil Sharma and other police officers to House No. 28/110 Trilokpuri, and got recovered a mobile phone which was seized vide memo Ex. PW-26/E as also a purse containing the driving license of the deceased, a photograph of the deceased, a duty slip of Himanshu Tours and Travels, which were seized vide memo Ex. PW-26/F. Concealed behind a drain pipe on the first floor of his house, Pradeep got recovered the key of the Innova car and the Registration Certificate thereof, as recorded in the seizure memo Ex. PW-5/D.

9. As regards Rohit, he led Insp. Anil Sharma and other police officers to his house on April 04, 2008, and got recovered a piece of nylon rope which was seized vide memo Ex. PW-26/K, two empty strips of Larpose tablets, which were seized vide memo Ex. PW-26/L.

10. Pradeep and Rohit thereafter took Insp. Anil Sharma and other police officers and pointed out a spot, a little upstream in the Gurgaon Water Supply Canal,

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from where Rajan''s dead body was recovered; the spot being near eucalyptus trees, from where a left foot of a pair of shoes and a 21/2 ft. nylon rope was recovered as recorded in the memo Ex. PW-26/H.

11. Both accused thereafter pointed out a road side eatery (dhaba) of Karamveer Singh PW-7, who confirmed that on March 25, 2008, Rohit and Pradeep had taken meals in his eatery at 11.00 P.M. Thereafter Rohit and Pradeep led the two police officers to the shop of Rakesh PW-8 who disclosed that at the asking of Pradeep and Rohit he had prepared two number plates of registration No. DL 2CX 2597.

12. The viscera of Rajan, the nylon rope seized vide memo Ex. PW-26/A and the nylon rope seized vide Ex. PW-26/H, the two empty strips of larpose tablets which were seized vide memo Ex. PW-26/L and the namkeen seized from the Innova car as per memo Ex. PW-5/B were sent for forensic examination and vide report Ex. PW-31/G it was opined that the viscera of the deceased contained ethyl alcohol as also lorazepam and phenobarbitone and that in the namkeen, phenobarbitone was detected. Further, the two empty strips of larpose contained lorazepam and phenobarbitone. Vide report Ex. PW-31/H it was opined that the two nylon ropes were similar in respect of colour, texture designs, twist, number of strands, average number of threads, average thickness of rope and U.V. fluorescence. But no opinion was offered regarding the corresponding cuts.

13. After the viscera report was obtained it was sent to Dr. Jitender Jhakar PW-28 who had conducted the post-mortem of the dead body of Rajan and he gave a report that probably the deceased had consumed ethyl alcohol, lorazepam and phenobarbitone before his death. He opined that he was not in a position to definitely state as to what was the cause of the death of Rajan.

14. Ram Prashad handed over a bill Ex. PW-2/G evidencing that Rajan had purchased a Sony Ericson mobile phone ''W-550I'' having IMEI No. 357444008923269 to Insp. Anil Sharma. One Vikas met the Investigating Officer on April 05, 2008 and claimed that he saw the accused and the deceased in the Innova car at 9:00 PM on March 25, 2008 and he and the driver has consumed beer.

15. Aforesaid investigation with its record consisting of statements of various persons whose names we have noted above as also the exhibits seized and the reports of the experts was the material presented against Pradeep and Rohit when the two were sent for trial, charged of the offence of having kidnapped Rajan with the intent of murdering him and for the charge of having murdered him they were also charged for the offence of putting a false number plate on the Innova car i.e. the offence punishable under Section 482 IPC. For the act of throwing Rajan''s body in the canal they were charged for the offence of knowingly tampering with evidence with the intention to screen themselves.

16. Needless to state if the prosecution witnesses deposed as per what they informed the Investigating Officer, subject to their testimony being credible, and

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on proof of the fact that mobile number 9250780099 was used by Pradeep and the mobile number 9250746991 was used by Pradeep and Rohit and mobile number 9971720447 was used by Rajan, and additionally it being proved that the recoveries attributed by the prosecution pursuant to the disclosure statements made by Pradeep and Rohit, the case of the prosecution would succeed.

17. The testimonies of Hari Om Gupta PW-6, the owner of Himanshu Tours and Travels and Babloo PW-5 as also that of Karamvir Singh PW-7, Rakesh PW-8, Vikas PW-12 and Devender Malik PW-13 would be critical to the case of the prosecution as also the defence.

18. At the trial save and except Devender Malik PW-13 who turned hostile, all other witnesses of the prosecution supported the case of the prosecution and believing their testimony as also the recoveries made pursuant to the disclosure statements made by Pradeep and Rohit and exhibits seized pursuant thereto and even otherwise, further relying upon the two FSL Reports and the opinion of Dr. Jitender Jhakar, vide decision dated October 26, 2013 the learned Trial Judge has convicted Pradeep and Rohit of the four charges framed against them and vide order on sentence dated November 07, 2013, for the offence punishable under Section 364/ 34 IPC, the two have been sentenced to undergo rigorous imprisonment for 10 years and pay fine in sum of Rs. 500/-, and in default to pay the fine have been directed to undergo simple imprisonment for one month; for the offence punishable under Section 302/ 34 IPC the two have been sentenced to undergo imprisonment for life and pay fine in sum of Rs. 1,000/-, and in default to pay the fine have been directed to undergo simple imprisonment for two months; for the offence punishable under Section 482/ 34 IPC both have been sentenced to undergo rigorous imprisonment for one year and for the offence punishable under Section 201/ 34 IPC both have been sentenced to undergo RI for three years and pay fine in sum of Rs. 500/-, and in default to undergo simple imprisonment for 15 days.

19. We propose to firstly deal with the evidence concerning mobile phone numbers 9250780099, 9250746991 and 9971720447 for the reason the linkage of the first two numbers to Pradeep would incriminate Pradeep in light of the testimony of Hari Om Gupta PW-6 that on 13th or 14th March, 2008 Pradeep disclosing his name to be Kuldeep had booked one Innova car for going to Ringus on March 30, 2008 and had paid Rs. 200/- in advance and by way of receipt he had noted said sum at the reverse of his visiting card and that he had given to Pradeep the mobile number of his driver Pappu (which is the pet name of Rajan) and that on March 25, 2008 he had received a call from a mobile number, last 3 digits whereof were 099 and the caller gave his name as Kuldeep @ Pradeep and that he asked him to cancel the booking for Ringus and instead provide him a vehicle on March 25, 2008 itself to go to Ambala. The further incrimination would be that the mobile phone instrument on which the SIM card for the mobile number 9250746991 was statedly recovered from Pradeep and the mobile

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number 9971720447 was statedly belonging to the deceased and the mobile phone instrument was statedly recovered from the pocket of Rohit when he was apprehended.

20. As regards mobile phone number 9250780099, Saurav Seth PW-1 has deposed that he was the registered consumer of the said number and had given the SIM card with the mobile phone instrument to his girlfriend Ritu. Ritu PW-3 confirm said fact and deposed that she had forgotten the mobile phone in a taxi driven by Devender Malik PW-13, who denied that he handed over any mobile phone with the SIM card to Pradeep. There is thus a break in the chain of evidence required to prove that Pradeep was in possession of the SIM card of the mobile number 9250780099. Unfortunately Hari Om Gupta PW-6 has only said that as far as he remembers, on March 25, 2008 he had received a call from the mobile number 099. Regretfully, the prosecution has not proved the CDRs of Hari Om Gupta''s mobile number 9312273919, which could have proved that the mobile number 9250780099 was in touch with the mobile number 9312273919 on March 25, 2008, nor have the CDRs of the mobile number 9250780099 been proved which could have proved that the mobile number 9250780099 was in touch with the mobile number 9312273919 on March 25, 2008. But we would put a caveat, the testimony of Hari Om Gupta PW-6 that the person who had booked a car from him on March 13th or 14th, 2008 to go to Ringus for a wedding on March 30, 2008 i.e. Pradeep had rung him up on March 25, 2008 would not be discredited on said lack of evidence and thus while discussing the testimony of Hari Om Gupta with respect to his testimony as above noted we shall be drawing the conclusions which law would require us to so conclude.

21. Concerning mobile number 9250746991 we find that Insp. Anil Sharma PW-31 has deposed that when Pradeep was apprehended the SIM card of the mobile number 9250746991 was recovered. But how could Insp. Anil Sharma PW-31 deposed to said fact has remained a mystery. We would have appreciated if the prosecution had led evidence to exhibit the SIM card and with respect to the SIM number examined the telecom service provider to prove that the SIM card in number was activated on the mobile number 9250746991. What has happened is this. Pradeep''s disclosure statement that the SIM card in question was of the mobile number 9250746991 has been parroted by Insp. Anil Sharma.

22. As regards the mobile number 9971720447, as per Ex. PW-2/B a mobile phone of Sony Ericson was recovered from the pocket of Rohit when he was apprehended. Insp. Anil Sharma has deposed that the SIM card in the phone was of the mobile number 9971720447, but unfortunately the CDRs Ex. PW-31/J of said phone number has not been proved as per law. Insp. Anil Sharma PW-31 has tendered them in evidence with the statement that he obtained the same from the service provider. Neither a certificate envisaged by Section 65B of the Evidence Act has been proved nor has any witness been examined from the telecom service provider to prove that the SIM number was activated for the mobile number 9971720447 and that the CDRs were generated from a computer

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maintained in the ordinary course of business by the service provider. Thus, the prosecution has been negligent in not leading evidence concerning the SIM card being linked to the mobile number. But we lodge a caveat even here, being the testimony of Ram Prashad that the mobile phone instrument Ex. P-1 was purchased by his son Rajan as per bill Ex. PW-2/G and his dock identification of the instrument as that of his son and the fact that the mobile phone instrument had IMEI No. 357444008923269 shall be discussed by us at the appropriate stage and the deficiency in the evidence concerning said mobile number noted by us in the present paragraph should not be treated to mean that we have totally rejected the prosecution evidence having proved linkage of the mobile phone instrument Ex. P-1 to the deceased and it being recovered from Rohit. This aspect would be discussed more elaborately.

23. At the trial, Hari Om Gupta PW-6 deposed that he was running a travelling agency under the name Himanshu Tours and Travels and on March 13 or 14, 2008 Pradeep, disclosing his name as Kuldeep, had booked an Innova car to go to Ringus on March 30, 2008 and had paid Rs. 200/- in advance which receipt was acknowledged on the reverse of his visiting card. On March 25, 2008 he received a call on his mobile phone No. 9312273919 from Kuldeep who while making a reference to the booking for Ringus requested him to cancel the booking and provide him a vehicle to go to Ambala the same day. Since he had no vehicle available he contacted Babloo @ Mirajuddin who was also engaged in the same trade. Babloo told him that he had a vehicle available with him and he called Babloo to his shop and he made him speak to Kuldeep. Babloo agreed to provide a vehicle the same day to go to Ambala. The vehicle had to return on March 26, 2008. The vehicle did not return on March 26, 2008. Neither Rajan nor Kuldeep could be contacted. Missing person report Ex. PW-5/A was given to the police by him, Rajan''s father and Babloo. On April 01, 2008 he accompanied the police officers to Rama Krishna Marg and near the primary school he saw Pradeep and told the police officers that this was the person who had booked the vehicle disclosing his name as Kuldeep. Pradeep was apprehended and on interrogation disclosed his name as Pradeep. On his personal search a TATA Indicom Mobile Phone having two chips of the number 9250746991 and 9211651396 and one visiting card of his company were recovered which were seized vide seizure memo Ex. PW-6/A. Pradeep''s disclosure statement Ex. PW-6/D was recorded in his presence.

24. Ram Prashad PW-2 deposed that the statement Ex. PW-2/A was made by him and that he joined the investigation on April 02, 2008 when at Pradeep''s pointing out Rohit was apprehended and a mobile phone Ex. P-1 was recovered in his presence which he recognized as that of his son which was seized vide memo Ex. PW-2/B. On April 19, 2008 he handed over the bill Ex. PW-2/G evidencing his son Rajan having purchased the mobile phone in his name. Pertinently when the mobile phone having dark grey colour and make ''HUAWEI'' was shown to him, Ram Prashad expressed his inability to recollect whether this was the phone recovered from Rohit when he was apprehended.

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25. Babloo @ Mirajuddin PW-5 deposed that on March 25, 2008 Hari Om Gupta had contacted him wanting to know if he could provide a vehicle to take passengers to Ambala the same day and he agreed. He took the mobile phone number of the passenger and spoke to him who told him that the vehicle should reach Gol Market near Panchkuian Road by 7:00 PM where the passenger would meet him. He left his residence in the evening with the vehicle and on the way met Rajan who requested him to let him take the passenger to Ambala where he could meet his sister and since he was tired he gave the car to Rajan to go to Ambala. At about 7:45 PM he received a call from Rajan who informed him that he could not locate the passenger. At around 9:30 PM he received a call from Rajan who informed him that they were proceeding to Ambala and it appeared to him that Rajan was intoxicated. Later in the night he tried to contact Rajan but could not do so because Rajan''s phone was switched off. Since the car did not return the next day, along with Hari Om Gupta and Rajan''s father he lodged the missing person report. He deposed facts as claimed by the prosecution pertaining to the investigations done on April 01, 2008 and April 02, 2008, which we have noted above and proved recoveries made pursuant to disclosure statement of Pradeep i.e. the recovery of the car, the namkeen packets in the car, the seizure memo drawn up. The recovery of the key and the RC of the car by Pradeep. He proved further recoveries after Rohit was arrested, and in sync with the case of the prosecution.

26. Rakesh PW-8 deposed that on March 28, 2008 at the asking of Pradeep and Rohit he had prepared two number plates of registration No. DL 3CX 2597 and charged Rs. 80/-. During cross examination he admitted that he maintained the record of the number plates which he prepared but said that he did not remember whether he had made a record of the number plates which he prepared at the asking of the accused. He admitted that he used to check the RC of the vehicle for which he would prepare the number plates but said that in the instant case he did not do so.

27. Vikas PW-12 deposed that he was a helper in Lady Harding Hospital and knew Rohit and that on March 25, 2008 Rohit told him that along with Pradeep he was going to Ambala for a marriage. He went with Rohit to Mandir Marg and saw Pradeep and driver Rajan sitting in an Innova car. Rohit told him that the driver wanted to have a drink and since Pradeep did not drink and being a Tuesday Rohit did not drink, he i.e. Vikas gave company to the driver and the two consumed beer.

28. Karamvir PW-7 deposed that the two accused had come to his road side eatery at Sonipat Assoda Road just after Nilothi crossing in a while coloured Innova car at around 11:00 AM on March 25, 2008 (a date stated to be wrongly typed and should read March 26, 2008) and had taken meals. During cross examination he said that about 120 customers visit his dhaba and therefore he was unable to remember their faces, but claimed to remember the faces of the accused because they had an altercation with him when he demanded Rs. 50/-

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for a plate of shahi paneer and the two accused said that in the metropolitan city of Delhi a plate of shahi paneer costed Rs. 30/-; the altercation being obviously on the point that he was overcharging the two customers.

29. Rakesh PW-26 deposed facts noted by us above concerning identification of Rajan''s dead body.

30. ASI Jaipal Singh and Insp. Anil Sharma deposed facts in sync with the investigation carried out by them, how Pradeep and Rohit were arrested, recoveries made from their personal search, the disclosure statements made by the two and the recoveries made at their instance.

31. The learned Trial Judge has believed the testimony of all the witnesses and has held that the testimony of Hari Om Gupta would establish that Pradeep falsely disclosing his name as Kuldeep had on March 13 or 14, 2008 booked a car from Hari Om Gupta to go to Ringus on March 30, 2008 and on March 25, 2008 had cancelled the booking with a request that same day a car should be provided to him to go to Ambala. Linking the same to the testimony of Babloo @ Mirajuddin the learned Trial Judge has held that though Babloo never personally met Pradeep but obviously he gave his Innova car to Rajan to ferry Pradeep to Ambala. The testimony of Vikas PW-12 has been accepted that at around 9:00 PM on March 25, 2008, the two accused were in the company of Rajan and whereas the accused did not consume beer, Rajan and Vikas consumed beer. With reference to the viscera report of the deceased and analysis of the namkeen recovered from the car as also recovery of larpose tablet strips at the instance of Rohit the learned Trial Judge has held that it is proved that the deceased was tricked to consume larpose tablets which were laced into the namkeen. From the testimony of Rakesh the learned Trial Judge has held that the fake number plates were affixed on the Innova car by the two accused who had gone to Rakesh to get the number plates made. From the testimony of Karamvir Singh the learned Judge has held that the prosecution has established that on March 26, 2008 the two accused were in possession of the white Innova car. All recoveries have been held to be duly proved and believing the ownership of the three mobile numbers 9250780099, 9250746991 and 9971720447 as alleged by the prosecution, holding that the dead body recovered by Haryana Police Personnel on March 31, 2008 was that of Rajan, holding further that the rope piece recovered by Rohit after he was arrested from his house and the rope piece recovered from near the canal in which Rajan''s dead body was thrown were proved to be two segments of the same rope, Pradeep and Rohit have been held guilty.

32. We have already discussed in paragraphs 19 to 22 above the effect of the prosecution not examining the service providers of the three mobile numbers 9250780099, 9250746991 and 9971720447 and thereby not linking the SIM cards statedly recovered to the three numbers and further there being no proof of the name of the registered consumer of the three mobile numbers and therefore it has to be held that the evidence found incriminating by the learned Trial Judge concerning said evidence led by the trial is based on a wrong

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appreciation of facts. The critical links to establish that a SIM card ''X'' was activated for a mobile phone number ''Y'' and the said SIM card was used in a mobile instrument ''Z'' have been overlooked by the learned Trial Judge.

33. The mobile phone Ex. P-1 recovered from Rohit identified by Ram Prashad as that of his son Rajan has been believed by the learned Trial Judge to conclude that the prosecution has established that Rajan''s mobile phone instrument was proved to have been recovered from Rohit. But the learned Trial Judge has overlooked the fact that the mobile phone instrument in question was admittedly of ''HUAWEI'' make (a fact recorded when the mobile phone instrument was produced in Court by the prosecution) and the bill Ex. PW-2/G proved by Ram Prashad in the name of Rajan shows that the mobile phone purchased by Rajan was of ''W-550I''. Regretfully, the learned Trial Judge has overlooked said fact as also the demeanour of Ram Prashad recorded by the learned Judge himself when Ram Prashad was being examined as a witness: Ram Prashad being perplexed and confused when he was confronted with aforenoted discrepancy and he gave an answer that being an old man he got confused. Whatever may be the confusion in Ram Prashad''s mind, it stares one in the face that whereas the bill produced by Ram Prashad shows the make of the mobile phone to be ''W-550I'', the instrument produced in the Court was of ''HUAWEI'' make. Thus, the recovery of the mobile phone Ex. P-1 from Rohit is not linked to the ownership thereof to Rajan.

34. The testimony of Rakesh and Karamvir has been believed by the learned Trial Judge overlooking the fact that Rakesh''s claim that he used to check the registration certificates of motor vehicles before he prepared the number plates and in the instant case he did not do so and that he used to maintain a record of the number plates which he used to prepare, but in the instant case he did not do so, and thus the testimony of Rakesh does not inspire confidence and especially in a case where the accused are charged with an offence which attracts the capital punishment. It is trite that the standard of proof of a fact at a criminal trial where the accused is charged with a serious offence has to be of the highest order. Similarly the testimony of Karamvir that since about 125 customers used to visit his dhaba everyday he could not recall their faces but could do so qua the accused because they had an altercation with him on the price of shahi paneer, has to be taken with a pinch of salt because the normal conduct of customers at a road side eatery is to ask the price of a commodity before the purchase and not after the purchase. Besides, there is a difference between remonstration between two persons and a mild haggling between two persons. A remonstration with a person may etch the memory of the person in the mind of the other person but not a mild haggling. While evaluating the testimony of witnesses who could be vulnerable to police pressure, for example those who operate road side eateries or carry on trait without licenses and permissions, one has to be careful qua the credibility of such witnesses. As per Karamvir the accused were brought to his eatery on April 04, 2008. As per him the two had taken meals in his dhaba on March 26, 2008. It would certainly be

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doubtful whether he would remember their faces over a slight quibbling qua the price of shahi paneer. The testimony of such witnesses must be received with eyebrows raised, and the same to be lowered if some credible corroborative evidence emerges which lends assurance to the Court that such kinds of witnesses are deposing truthfully and without any fear or pressure from the police.

35. But, as regards Pradeep we find that the prosecution has successfully proved:

(a) Through the testimony of Hari Om Gupta that masquerading as Kuldeep, Pradeep had gone to him on either 13th or 14th of March, 2008 and had booked a car to take him to Ringus on March 30, 2008, and Pradeep spoke to Hari Om Gupta on March 25, 2008 to cancel the booking to go to Ringus on March 30, 2008 and instead provide a vehicle the same day to go to Ambala and that at the asking of Hari Om Gupta, Babloo @ Mirajuddin agreed to take Pradeep to Ambala in his white coloured Innova car bearing No. DL 7CX 1951 and from the testimony of Babloo has established that when Babloo left his work place in the Innova car to go to the place directed by Pradeep from where Pradeep had to be picked up, he met on the way Rajan to whom he gave the car. The prosecution has thus proved that Rajan drove the car to the place disclosed by Pradeep i.e. near Gol Market and the prosecution would be entitled to the inevitable inference which the Court must draw that Rajan met Pradeep for the onward destination towards Ambala.

(b) From the testimony of Vikas, the prosecution has established that Pradeep (as also Rohit) were seen by him in the company of Rajan and at their asking he consumed beer in the Innova car with Rajan, during which drinking session Pradeep and Rohit abstained. The eyebrows which may be raised while evaluating the testimony of Vikas, who is a chance witness, must be dropped in the instant case because we find corroboration to Vikas''s testimony that Rajan consumed beer from the viscera report Ex. PW-31/G as per which ethyl alcohol was detected in the stomach pieces, pieces of large and small intestines, liver, spleen and kidney of Rajan. We need to emphasize that the viscera report was received by the prosecution as late as on December 04, 2008. Vikas''s statement under Section 161 was recorded on April 05, 2008. As of April 05, 2008 neither Vikas nor the Investigating Officer had the benefit of the viscera analysis report of Rajan and the fact that on April 05, 2008 Vikas said that the deceased and he consumed beer, and at that time Pradeep and Rohit were present lends assurance to the credibility of Vikas.

(c) The prosecution has proved that the Innova car with fictitious number plates were recovered pursuant to Pradeep''s disclosure statement and at his pointing out. It may be true that the car was recovered from an open space accessible to all, but it has to be kept in mind that the police was aware of only the fact that the white Innova car was bearing registration No. DL 7CX 1951 (the original number as per the registration certificate) and not that a fictitious number plate having number DL 3CX 2597 was affixed on the car. There are thousands of

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white coloured Innova cars parked all over Delhi and unless the person who knows that the number plate has been changed and further knows the place where the car is parked, it would be impossible for anyone to detect the car. The recovery of the car at instance of Pradeep is not only proved but is also incriminating evidence of he having knowledge that the car which was robbed was kept at a particular place. We overlook the evidence of recovery of the RC and the key of the car attributed to Pradeep for the reason no evidence has been led that the key in question was of the car and there would be a possibility that the RC was in the car itself.

(d) At the joint pointing out of Pradeep and Rohit, an evidence of conduct admissible under Section 8 of the Evidence Act, the prosecution has established that Pradeep and Rohit led the police to a place near the canal, downstream wherefrom the dead body of Rajan was recovered by Haryana Police on March 31, 2008 (we shall be dealing with the argument regarding identification of the dead body a little later, but for the purposes of instant incriminating evidence we would be treating that the dead body was that of Rajan), from where the left foot of the shoe worn by the deceased (the other being on the right foot of the deceased) was recovered and a rope segment was recovered morphological features whereof as per FSL Report Ex. PW-31/H were identical with the piece of rope got recovered by co-accused Rohit. Now, bodies flow downstream in a canal and not upstream. It assumes a character of incriminating evidence that Pradeep and Rohit led the police to a spot upstream the canal from where Rajan''s dead body was recovered and from the spot the left foot of a pair of shoes was recovered, the right foot whereof was on the foot of the deceased and also a piece of rope which matched with the other piece of rope got recovered by Rohit were found.

(e) The packet of namkeen seized from the car as per Ex. PW-5/B was laced with phenobarbitone which was found in the viscera of the deceased is the other incriminating evidence against Pradeep.

36. The cumulative effect of the aforesaid circumstantial evidence is sufficient to point towards Pradeep''s guilt and rule out his innocence.

37. The incriminating evidence against Rohit would be the same as against Pradeep as per (b), (d) and (e) above qua Pradeep with an addition to (e), being recovery of larpose strips pursuant to Rohit''s disclosure statement as per seizure memo Ex. PW-26/L. The trinity of the circumstantial evidence is sufficient to point towards the guilt of Rohit and ruling out his innocence.

38. We lastly deal with the argument whether dead body recovered by Haryana Police Personnel on March 31, 2008 was that of the deceased, and for which a two-fold argument was advanced. The first was that in Ram Prashad''s statement Ex. PW-2/A it is recorded that the height of his son was 5 feet and 6 inches and as per the post-mortem report the length of the body was 176 cm which is 5 feet 9 inches. The argument was that to a father who sees his son everyday, the

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height of 5 feet 6 inches, even if approximately stated, would not mismatch with the height of 5 feet 9 inches. The second argument was that Rakesh Kumar PW-26 who had identified the dead body was the brother-in-law of Rajan and he could not be expected to identify Rajan''s dead body on the basis of clothes on the person of Rajan as also the rings, bracelet and the black thread on the neck as also a thread on Rajan''s wrist.

39. As regards the first argument, as noted above regarding Ram Prashad''s testimony concerning the mobile phone Ex. P-1, in the identification whereof he faltered, Ram Prashad said that he was confused because of his old age. Now, when Ram Prashad lodged the missing person report Ex. PW-2/A it was March 28, 2008 and his son who had to return on March 26, 2008 had not returned and thus one can reasonably infer that Ram Prashad was perplexed due to anxiety when he made his statement and thus inaccurately gave the height of his son.

40. Rakesh Kumar PW-26 is the brother-in-law of Rajan and we see no reason to doubt his ability to recognize Rajan''s dead body with reference to the rings, bracelet and the black coloured thread on the neck of Rajan. Besides, the photographs of Rajan''s dead body Ex. PW-31/C9 and Ex. PW-31/C10, though showing the body blotted up (due to lying in water from the night of March 25, 2008 till when it was discovered in the morning of March 31, 2008, but would give sufficient indication to a close relative as to whose the body was for the reason the receiving hair line, the oval shape of the face, the stub of the chin, the wide nostrils etc. that the body was of a missing dear one.

41. We thus bring the curtains down on our discussion by dismissing both appeals and affirming the conviction of the appellants for the offences they were charged of; simultaneously affirming the order on sentence.

42. TCR be returned.

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