



**Reserved
AFR**

1. Criminal (Capital) Appeal No. 8134 of 2008
Vinay Kumar vs State
2. Criminal (Capital) Appeal No. 8138 of 2008
Sadhu Singh vs. State
3. Criminal (Capital) Appeal no. 8369 of 2008
Jalveer alias Jalley vs. State
4. Reference no. 18 of 2008

Hon'ble Yatindra Singh, J
Hon'ble Surendra Singh, J

(Delivered by Hon'ble Yatindra Singh, J)

1. Often, a case leaves more questions than it answers. This is one of them. It has left many questions unanswered especially regarding prosecution of a criminal case.

THE FACTS

Regarding Case

2. An incident took place in the night intervening 17th and 18th August 1994. In this incident Neelam (the Deceased) was killed. Her husband Sadhu Singh (the Informant) lodged an FIR at 6:15 hours on 18.8.1994 (Case Crime no. 831 of 1994, under section 302 IPC, Police Station Sihani Gate, Ghaziabad).

3. The allegations in the FIR are as follows:

The Informant married the Deceased after the death of his first wife;

For seven years, the Informant's relations with the Deceased were good. However since last one year, the Deceased went out of control and started going to different places according to her own wish. Number of people used to come to meet her in absence of the Informant;

In the night, the Informant was lying in his room and the Deceased was lying in the adjoining room. Between 4:00 - 5:00 hours, three unknown assailants climbed up from the outside. They gagged the mouth of the Informant and tied his hand from behind;

The Informant somehow climbed up the stairs, removed the cloth, and started shouting. On his shouting, the other residents of Mohalla came;

The Informant reached inside the room and found that an electric wire was

tied on his wife's neck and there were injuries on her body. She had died.

4. On the report of the Informant, the police reached the spot and started investigation. An iron rod was stuck in her private parts. The police asked the Appellant to remove it.

5. Subedar Singh, Investigating Officer (IO) also recovered electric wire, iron rod, blood stained bed sheet, pillow, and cushion. The recovery memos were also prepared and they are Ex Ka-6 to Ka-8. The finger prints were also collected on 18.8.1994 and the memo of finger prints is Ex Ka-13.

6. The inquest of the dead body was conducted by Sub-inspector Tej Singh. The inquest report (Ex Ka-14) indicates that it started at 7:10 hours. He also got the iron rod extricated by the Informant at the time of the inquest. This is so recorded in its recovery memo (Ex Ka-7).

7. The post mortem was conducted by Dr. A Mishra at 15:45 hours on the 18.8.1994. The report is (Ex Ka-19).

8. In the FIR, as well as the injuries on the Deceased, indicated involvement of more than one person. The police investigated and arrested the Informant and his associates. The following action was taken:

- (i) The Informant was arrested on 19.8.1994 and on his pointing out a table fan (recovery memo Ex Ka-9) was recovered;
- (ii) Vinay Kumar was arrested on 19.8.1994 and on his pointing out a blood stained shirt (recovery memo Ex Ka-10) was recovered;
- (iii) Sunil was arrested on 19.8.1994 and on his pointing out blood stained shirt and a knife (recovery memo Ex Ka-11) was recovered;
- (iv) Jalveer alias Jalley was not arrested. He surrendered before the court on 12.9.1994 and on the same day he was sent on remand. On his pointing out, a blood stained shirt (recovery memo Ex Ka-12) was recovered.

9. The police submitted the charge-sheet on 19.10.1994 against the aforesaid four persons and two more namely Shri Ram and Jai Pal (jointly referred to as the Accused). The case was committed to the sessions' court on 13.9.2002 and was numbered as ST No. 914 of 2002.

10. The Additional sessions Judge, Court no. 4, Ghaziabad (the ASJ) framed the charge on 15.3.2003. The following charges were framed:

Sadhu Singh, Vinay Kumar, and Jalveer alias Jalley were charged under section 302 read with 34 IPC and section 120-B read with section 302 IPC;

Shri Ram and Jaipal were charged under section 120-B read with 302 IPC.

Sunil was not charged, as he was already dead by the time charges were framed.

11. The list of the documents filed by the prosecution is mentioned in a tabular form in **Appendix-1**. The first column provides exhibit number, the second one provides their description, the third and fourth one provide endorsement on the documents or how were they proved. The endorsement on documents were made on 5.12.2006 and 25.9.2008. In some documents endorsements are there but the date not mentioned. The counsel for the parties state that it was made on 5.12.2006 but it has been omitted due to mistake.

12. The prosecution examined the following witnesses:

Nakshtra Kaur (PW-1): Mother of the Deceased;

Deodutt Sharma (PW-2): Brother of the Deceased;

Virendra Sharma (PW-3): Brother of the Deceased;

Meera Sharma (PW-4): Wife of PW-2;

Kamal Jeet Singh (PW-5): Secretary of Congress Party of Mahanagar in 1994;

Sadhu Singh (PW-6): Informant and the prime accused in the case.

13. On 5.12.2006, an application was filed on behalf of the State that the permission be granted to examine the Informant who was also an accused in the case. On the same day, the court passed an order granting permission to examine the Informant. Subsequently, the deposition of the Informant (PW-6) was recorded on 12.12.2006.

14. The statements of the accused under section 313 CrPC were recorded on 18.12.2006.

15. Ex Ka-1 is written report to the police. It was dictated to the police by the Informant and signed by him in Gurmukhi. The signatures on the same has been accepted by the Informant though part of its contents are disputed.

16. The prosecution filed twenty five documents. Their list is Appendix-1. All of them except eleven, were admitted on 5.12.2006. The following endorsement were made,

'Sir, genuineness of the document admitted'.

These documents are indicated as 'Admitted' in the third column of Appendix-1.

17. Out of eleven, two namely Ex Ka-1 was proved by the Informant (PW-6) and Ex Ka-2 was exhibited under section 293 CrPC. The remaining nine were also admitted without any condition on 25.9.2008 and the following endorsement was made,

'Genuineness of document admitted without any condition.'

These nine documents are indicated as 'Admitted without any condition' in the fourth column of Appendix-1.

Regarding Trial

18. The incident happened in 1994. The police submitted charge-sheet on 19.10.1994. Yet recording of evidence started in 2006. There was considerable delay. This has happened due to the following reasons.

19. On 7.1.1995, the file was sent to copying section from where it was sent back to court in December 1999 and the first summons were issued to the Appellants on 16.12.1999. There was undue delay of five years in copying only.

20. Thereafter, the Accused absconded and therefore proceedings under section 82, 83, 446 CrPC was initiated against them by the order dated 27.7.2000. The Accused gave an application on 8.5.2001 to recall the aforesaid order. The case was committed to the sessions' court on 13.9.2002.

21. Accused Jalveer was in Tihar jail, Delhi. B-warrants was issued against him so that he be brought to Ghaziabad for commencement of trial. There was considerable delay as B-warrants were issued many times before he was finally brought to Ghaziabad. Then the case proceeded.

22. On 12.1.2007, the case was argued before the trial court and the judgement was reserved. It was ordered to be listed on 17.1.2007.

23. On 17.1.2007, the court passed an order that:

The prosecution witnesses have turned hostile;

The material witnesses, like Head Constable Bharpur Singh, Constable Ashok Kumar, who took finger prints from the place of occurrence and Subedar Singh, Investigating Officer have not been examined. They should be examined as court witnesses.

The prosecution should take steps to produce these witnesses on priority basis.

24. The order sheet indicates that case was taken up on number of days and was adjourned because the witnesses sought to be examined were not present. The court also issued non bailable warrant, wrote to DG Police without any result. The details of some orders are as follows:

(i) On 5.2.2007, and 13.3.2007, the court passed an order issuing non-bailable warrants;

(ii) On 17.4.2007, the court passed an order issuing non-bailable warrant and notice under section 350 CrPC;

(iii) On 17.4.2008, the court sent a letter to DG Police;

(iv) On 1.8.2008, the court passed a detailed order that:

On 24 different dates the witnesses did not appear despite non-bailable warrants issued against them;

The prosecution is not in a position to produce these witnesses; and

The case should be listed for arguments on 6.8.2008.

The case was heard on 6.8.2008 and the judgement was reserved. It was fixed for judgement on 12.8.2008.

25. On 12.8.2008, a detailed order was passed that:

The genuineness of some documents was accepted with conditions;

There is no such provision under section 294 CrPC;

The defence side may re-consider it.

26. On 25.9.2008, the defence counsel accepted the genuineness of the documents without any condition. The case was argued on 11.11.2008 and it was listed on 19.11.2008 for judgement.

27. The ASJ acquitted Shri Ram and Jaipal on 19.11.2008. However, the Informant, Vinay Kumar, and Jalveer alias Jalley were convicted. They were

awarded death sentence under section 302 read with 34 IPC and fine Rs.10,000/- each on 20.11.2008.

28. The convicted persons (jointly referred to as the Appellants) have filed three separate appeals:

Vinay Kumar has filed Appeal 8134 of 2008;

The Informant has filed Appeal no. 8138 of 2008; and

Jalveer alias Jalley has filed Appeal No. 8369 of 2008.

The ASJ has also sent reference no. 18 of 2008 for confirmation.

29. The aforesaid appeals alongwith reference were heard by a division bench of this court. The court was of the view that proper question under section 313 CrPC were not asked and for limited purpose sent the case back on 29.7.2009 to trial court to record the statement under section 313 CrPC. The court also granted liberty to the trial court to examine any witness as court witness and defence was also granted similar liberty. The operative portion of the order is mentioned in **Appendix-2**.

30. The statements of the accused were again recorded under section 313 CrPC on 26.8.2009 by the trial court. However, no witnesses were examined.

POINTS FOR DETERMINATION

31. We have heard Sri Dilip Kumar and Sri Rajarshi Kumar, counsel for the Informant and Vinay Kumar; Sri VP Srivastava and Sri Lav Srivastava counsel for Jalveer alias Jalley; Sri DR Chaudhary, GA, Sri Arunendra Kumar Singh, and Sri Anand Tiwari, AGA for the State¹. The following points arise for determination in the case:

- (i) Whether the prosecution documents are reliable;
- (ii) Whether recovery memo of the iron rod (Ex Ka-7) is reliable in view of the postmortem report;
- (iii) Whether more than one person was involved in the crime;
- (iv) Whether the circumstances against the Informant are proved. Is he guilty?
- (v) Whether the circumstances against Vinay Kumar are proved. Is he

¹ We are thankful to the counsel appearing in the case for correcting a part of the judgement under the headings (THE FACTS, POINTS FOR DETERMINATION, Appendixes and ante mortem injuries of the Deceased). Yet, if there are any mistakes, they are ours.

guilty?

- (vi) Whether the circumstances against Jalveer alias Jalley are proved. Is he guilty?
- (vii) In case the Appellants are guilty, then what punishment should be awarded to them.

1st POINT: DOCUMENTS CAN BE RELIED

32. The counsel for the Appellants submitted that an adverse inference should be drawn against the prosecution as,

A part of nine documents (including four recovery memos Ex Ka-9 to 12) were disputed. The trial court had summoned witnesses to prove the documents but failed in getting their presence;

The prosecution did not examine any official or expert witness to prove the documents. The defence has been denied opportunity to cross-examine them;

The documents cannot be taken into account as no witnesses was examined to prove them.

The defence side accepted the genuineness of the aforesaid documents on the understanding that they will be acquitted as the trial court judge wanted to finish the case. This does not mean that the prosecution should not examine witnesses to prove them;

33. The defence side made endorsement on prosecution documents accepting their genuineness except eleven of them. Out of these eleven, there was no endorsement on two documents namely written report (Ex Ka-1) and finger print report (Ex Ka-2).

The written report Ex Ka-1 was proved by the Informant himself who was examined as PW-6;

The finger print report (Ex Ka-2) is report of government scientific expert and was exhibited under section 293 CrPC. There is no application by defence side to summon him.

34. Out of the remaining nine documents, four documents related to recovery (namely Ex Ka-9 and 12). The genuineness of these four documents were admitted except their recovery part. In the remaining five of them (including memo for taking finger prints) (Ex Ka-13, Ka-20 to Ka-23 and Ka-24), it was mentioned that,

श्रीमान् जी कागज की सत्यता अवैधानिक रूप से स्वीकार है।

It is not clear as to what it means. Nonetheless, the aforesaid nine documents could not be read unless they were properly proved.

35. The aforesaid nine documents should have been proved by the prosecution: it shows slackness on their part. It is for this reason that the trial court summoned some of the witnesses as court witnesses.

36. Nevertheless, the genuineness of the aforesaid nine documents was accepted by defence without any condition on 25.9.2008 and as such, there was no necessity to examine any witness.

37. There is nothing on record to suggest or indicate that any impression was given by the court that the Appellants would be acquitted. On the contrary, efforts of the court in issuing nonailable warrants as well as writing letter to DG Police shows that court wanted to do justice.

38. The trial court repeatedly made efforts, to summon the witnesses from 17.1.2007 but failed to get any support from the prosecution side. This not only shows slackness but gives an impression that there may be something fishy and chances of prosecution colluding with the Appellants cannot be ruled out.

39. Be as it may, once the documents were accepted without any condition, then the documents are to be accepted and are to be relied unless there is internally something to make them unreliable. We wish to state that no evidence was led by the defence side to doubt the veracity of the documents.

40. In our opinion, the documents cannot be said unreliable merely because the prosecution did not produce any witnesses to prove them: They were admitted it was not necessary to produce any witness.

2nd POINT: IRON ROD THRUST INSIDE—PRIVATE PART

41. The recovery memo of the iron rod (Ex Ka-7) indicates that:

An iron rod was stuck in the private part of the Deceased;

It was of one *angul* thick and two *balist* and 8 *angul* long. (The counsel for the parties agree that one *balist* is equal to 8 inches and 8 *angul* would be about 4 inches. So the total length of the iron rod would be about 20 inches).

Only three inches of the rod was out side (remaining seventeen inches would be inside the dead body);

It was taken out by the Informant and was taken possession of.

42. The counsel for the Appellants submitted that:

In case a rod of 20 inches long is thrust inside the private part with seventeen inches inside the body then it will internally damage the body. Atleast the uterus would be damaged;

The post mortem report does not indicate any internal damage or to the uterus;

The rod was not thrust inside the private part and recovery memo is unreliable.

43. The police reached the spot immediately after lodging of the FIR. At that time, the Informant was not a suspect. There is nothing to show as to why would police create a false document. An FIR was lodged; a ghastly crime was committed: every effort of the police would have been to catch the three unknown culprits mentioned in the FIR. In the recovery memo of the iron rod (Ex Ka-7) the endorsement is recorded on 5.12.2006 that,

' Sir, Genuineness of the document is admitted'.

44. The recovery memo of the iron rod (ex Ka-7) is not the only document that records it. The inquest report (Ex Ka-14) also records it.

45. In the inquest report, while recording the inspection of the dead body, it is mentioned that underwear is removed and iron rod is stuck in the private parts. The genuineness of the inquest report (Ex Ka-14) was also admitted on 5.12.2006. There are two documents that record that iron rod was stuck in the private part.

46. The post mortem was done on the same day (18.8.1994) at 15:45 hours. The Informant and some other accused were arrested on 19.8.1994 but by that time suspicion had started against them.

47. The post mortem report (Ex Ka-19) does not indicate any damage by the iron rod. It may be just possible that the doctor (Dr. A Mishra) was negligent and did not perform his duty well or he was colluding.

48. In our opinion,

The recovery memo of the rod (Ex Ka-7) is not unreliable. The iron rod was thrust inside private part of Deceased;

However, a part of the postmortem report not indicating the internal injuries is unreliable;

3rd POINT: CRIME NOT BY ONE PERSON

49. The ante-mortem injuries of the Deceased are as follows:

- (i) Multiple incised wounds 3 cm x 2 cm (25 over the chest between both nipples) chest cavity deep over the front of the chest wall several ribs and sternum cut - reddish.
- (ii) Superficial ligature mark on the skin 6 cm x 1 cm over the supra thyroid region in the middle S/c tissue & deep tissues normal.
- (iii) Multiple incised wounds over abdomen above umbilical region size 3 cm x 2 cm Abdominal cavity deep (six in number).

50. The ante mortem injuries of the Deceased indicate that there are multiple incised wounds on her body. Her neck was tied with an electric wire (recovery memo Ex Ka-6). Apart from it, an iron rod was also thrust in her private part (see discussion on the 2nd Point).

51. Causing multiple injuries, tying neck with electric wire, and pushing an iron rod in the private part, cannot be done by one person. Two or more had to hold the Deceased and another person had to tie and push in the iron rod. This indicates that it was not a one person's job but more than one person were involved in the crime.

52. The Informant himself alleged in the FIR and deposed that three unknown assailants had killed the Deceased.

53. In our opinion, the crime was not committed by one person but more than one person were involved in the same.

4th POINT: CIRCUMSTANCES AGAINST INFORMANT—PROVED

54. No one saw the incident. The case is based on circumstantial evidence. The law—when a case can be said to be proved against an accused on circumstantial

evidence—has been established in different decisions (see below for citations)². It is as follows:

- (i) The circumstances from which the conclusion of guilt is to be drawn should or must be established.
- (ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
- (iii) The circumstances should be of a conclusive nature and tendency.
- (iv) They should exclude every possible hypothesis except the one to be proved.

In substance, there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all probability the act must have been perpetrated by the accused.

55. There are three Appellants. Some circumstances against them are common and some are different. In view of this, it would be proper to consider the circumstances separately.

56. The circumstances against the Informant are as follows:

- (i) The relationship of the Informant and the Deceased, who were married, was strained;
- (ii) The cause of the crime was not theft, or dacoity or looting;
- (iii) The injuries of the Deceased show that it might be due to suspicion of fidelity of the Deceased;
- (iv) The Appellant was not injured;
- (v) The recovery of the fan, with electric wire cut has been done at the instance of Sadhu Singh which indicates the method of killing.
- (vi) The incident happened in the night and at that time the Informant was present in the house. The burden was on him to explain. There is no plausible explanation.

First Circumstance—Proved

57. The Informant married the Deceased after death of his first wife. The Deceased

² The cases are: KT Palanisamy v. State of Tamil Nadu: AIR 2008 SC 1095, Arun Bhanudas Pawar Vs State of UP: 2008 (61) ACC 32, Sharad Birdhichad Sarada v. State of Maharashtra (SC): AIR 1984 SC 1662, Shivaji Sahabrao Bobade Vs State of Maharashtra: AIR 1973 SC 2622, Hanumant Vs State of MP: AIR 1953 SC 129.

herself was a divorcee. In the FIR that was dictated by the Informant, it is mentioned that:

For last one year, the terms between the Informant and the Deceased were not good;

She was not under Informant's control;

She used to go here and there according to her own wish.

58. The counsel for the Appellants submitted that:

It is merely an FIR and not a substantive piece of evidence;

There is no oral evidence to substantiate the assertions made in the FIR;

The FIR was wrongly recorded. The aforesaid facts were never dictated by the Informant.

59. The prosecution has examined six witnesses. Out of these six witnesses, four of them namely, Nakshtra Kaur (PW-1), Deodutt Sharma (PW-2), Virendra Sharma (PW-3) and Meera Sharma (PW-4) are relations of the Deceased. The fifth and sixth witnesses are Kamal Jeet Singh (PW-5) and the Informant (PW-6). PW-5 is a political leader and was a secretary of a political party to which the Deceased allegedly belonged.

60. PW-1 to PW-4 denied that relations between the Deceased and the Informant were bad or the Deceased was being harassed by the Informant. PW-5 denied having any information.

61. The incident happened in the year 1994. The evidence was recorded in the year 2006. It appears that the witnesses were won over by the time. They were also declared hostile and cross-examined by the prosecution.

62. The Informant (PW-6) deposed that:

The FIR was not read out to him;

He cannot read or write Hindi and can sign in Gurumukhi;

His wife was under his control and was not characterless;

He alongwith his friends had not committed her murder.

63. It is correct that the Informant was examined as a prosecution witness. It is little surprising as he was prime accused in the case. But there was no objection from his side that he was being compelled to give evidence against himself. However,

he was declared hostile and was cross-examined.

64. The written complaint (Ex Ka-1) is signed in Gurumukhi. The Informant admitted his signature on the same. The FIR (Ex Ka-3) was registered on the basis of the same. In the FIR (Ex Ka-3) the endorsement of counsel for Appellant is mentioned that genuineness of the document is admitted.

65. The Deceased died in the night intervening 17th and 18th august 1994. The Informant himself had gone to lodge the FIR. It was lodged at 6:15 hours. At the time, when the FIR was lodged, the police neither had knowledge about the incident nor was the Appellant suspect at that time. The police had no animus or ill will against him. There is neither any evidence nor anything on record to show that the police wrongly recorded the FIR except the interested version of the Informant. In view of this, there is no reason to believe that the police wrongly recorded the FIR or added words therein.

66. In our opinion, there is no reason to ignore or disbelieve the admissions of the Informant in the FIR. In our opinion,

The relation between the Informant and Deceased were not good;
He suspected the Deceased regarding her fidelity.

The first circumstance is proved.

Second to Fourth Circumstances—Proved

67. There is no report of theft or dacoity or looting. There is no evidence of forcing open any door. There is neither any FIR nor the Informant deposed regarding the same.

68. There is no evidence that the Deceased had enmity with anyone or anyone else had reason to kill her.

69. The Deceased was strangled, stabbed and iron rod was pushed inside her private part (see 2nd POINT: IRON ROD THURST INSIDE PRIVATE PART). This not only indicates the anger of the assailants but points that the assailants doubted her fidelity otherwise there was no point in pushing iron rod in her private part.

70. The Informant in the FIR alleged that he was gagged and his hands were tied. He went up stairs and shouted, yet the assailants did not cause any injury to him.

71. There was no injury on the body of the Informant. There is no evidence that he was injured. He also did not depose it. He was not injured.

72. The Deceased was brutally murdered yet, there being no injury on the Informant indicates his complicity.

73. In our opinion, the second to fourth circumstances are proved.

Fifth Circumstance—Proved

74. The FIR states that electric wire was tied on his wife's neck. This was also found by the police when they reached the spot. The police removed the electric wire from her neck and possession of the same was taken. This is mentioned in the recovery memo regarding the electric wire (Ex Ka-6). The genuineness of this document was admitted on 5.12.2006. Injury no. (ii) indicates that the Deceased was strangled.

75. A table fan also recovered at the instance of the Informant. The recovery memo of table fan is Ex Ka-9. The genuineness of this document was also accepted without any condition on 25.9.2008. In the recovery memo, it is mentioned that the lead of this fan has been cut. It is also mentioned that this cut appeared to be fresh.

76. No one keeps a table fan whose lead is cut. It was the electric wire from this table fan that was tied in the neck.

77. In our opinion, the fifth circumstance is also proved.

Sixth Circumstance—Proved

78. The counsel for the Appellants submitted that:

In the night three assailants had gagged the mouth of the Informant by cloth and had tied his hand from behind;

The Deceased was killed thereafter;

The Informant has given plausible explanation;

The Appellant cannot be held guilty of murder.

79. The Informant had not only mentioned the aforesaid points in the FIR but also deposed regarding the same. However, it neither inspires confidence nor it creates

any doubt in our mind. It cannot be said to be a plausible explanation.

80. The site plan of the premises is Ex Ka-5. This indicate that the ground floor is occupied by the tenants. The Informant alongwith the Deceased was living in the first floor. The incident admittedly happened in the night. There is no evidence that any door or window was broken. Unless it was so, the assailants could not come inside the house. In such a situation, they could come inside house only on being invited by the Informant himself.

81. There is no looting or theft in the house. The Informant has mentioned that after his hands were tied and mouth was gagged with clothes, he climbed up the stair and started shouting. It is surprising that the assailants who brutally killed the Deceased, his wife, neither stopped nor injured him. This can only happen if the Informant was party to the crime.

82. In our opinion, the Informant has not been able to explain. The sixth circumstance is also proved against him.

83. In our opinion, all circumstances have been proved. The chain of evidence is complete. There is no ground for the conclusion consistent with the innocence of the Informant. The prosecution has proved its case beyond reasonable doubts against the Informant.

5th POINT: CASE PROVED AGAINST VINAY KUMAR

84. The circumstances, against Vinay Kumar, are as follows:

- (i) The crime was committed by more than one person;
- (ii) Vinay Kumar and Jalveer were known to the Informant and were his friends;
- (iii) A blood stained shirt was recovered at his instance;
- (iv) His finger print was found at the place of the incident;
- (v) He was present there.

First Two Circumstances—Proved

85. The first circumstance is proved while discussing 3rd POINT: CRIME NOT BY ONE PERSON.

86. The Informant (PW-6) in his cross-examination deposed that:

He knew Jaipal, Shri Ram, Vinay and Jalveer;

They used to work with him in the factory at Modi Nagar with him;

They used to come to his house. The last they came to his house was four-six months ago.

This shows that they were friends.

87. In our opinion, the first two circumstances are proved.

Third Circumstance—Proved

88. A blood stained shirt was also recovered at the instance of Vinay Kumar. Its recovery memo is Ex Ka-10. Its genuineness was accepted without any condition. In the recovery memo, it is mentioned that it is a blood stained shirt.

89. This shirt was also sent to the *Vidhi Vigyan Prayogshala*, Lucknow (the *Pryogshala*) for chemical examination. The report of the *Prayogshala* is dated 16.2.1995. It is paper no. 35 Ka. This is admissible without any proof under section 293 CrPC.

90. The shirt of the accused Vinay is at serial number 8. It indicates that the spots are of blood but are disintegrated. This means that spots are not merely of red colour but are spots of blood though the blood cannot be further identified.

91. In our opinion the third circumstance is proved.

Fourth Circumstance—Proved

92. Finger prints were also taken from the spot. The memo for taking finger prints is Ex Ka-13. The genuineness of this document was accepted on 25.9.2008. This indicates that finger prints were taken from the house no. II F 92, Nehru Nagar, Police Station Sihani Gate, Ghaziabad. The address of the Informant is also mentioned in Ex Ka-5. It is the same. The genuineness of this memo was also accepted.

93. The memo records that:

Six finger prints were taken from the pillow of the double bed;

Six were taken from the round table; and

Six were taken from the glass;

Out of these, thirteen were taken with coal powder and five were taken with

white powder.

This proves that the finger prints were taken from the place of the incident.

94. The report of finger print expert is Ex Ka-2. It opines that finger print of Vinay was found among the finger prints lifted on the spot. It states as follows in item-5:

'वि.ग्र.अ.चि. सं. ५३३४ तथा न्या.अ.सं. ५३५९ समान फारमेशन एवं रेखीय विशेषताएं समान हैं। इनके विस्तृत चित्रों में समानता रेखीय विशेषताओं के सम्वादी लाल रेखाओं द्वारा प्रदर्शित किया गया है। विवरण समानता सूची संलग्न में दर्ज है।'

95. The counsel for the Appellants submitted that:

Eighteen finger prints were taken and three were on the back. They were numbered as 5332 to 5352 (total 21);

The admitted finger print of Vinay is 5379 and it was found similar to 5339; It is not clear whether 5339 was among the finger prints that was lifted or one that was on the back.

96. Eighteen finger prints were taken and this is also clear from finger print expert report which states that eighteen finger prints were taken on the spot. The finger print report regarding Vinay is at item no. 5 (quoted in the paragraph preceding the previous one). It broadly states as follows:

'वि.ग्र.अ.चि. (विवाद ग्रस्त अंगुल चिन्ह) (disputed finger print) 5339 is similar to न्या.अ.चि. (न्यायालय अंगुल चिन्ह) (admitted finger print) 5379.'

97. It is clear from the report that finger print expert has compared the admitted finger print taken in the court with the finger print that was disputed or in other words lifted from the place of the incident not at the back of the page.

98. The finger prints do not last long. They are wiped, cleaned, or get over smeared. The finger print of Vinay has been found at the place of the incident. This indicates that Vinay was recently present at the place of the incident. It was for him to explain as to how his finger print was found there. There is no explanation for the same.

99. All circumstances against Vinay Kumar have also been proved. In our opinion, prosecution has proved its case beyond reasonable doubts against Vinay Kumar.

6th POINT: CASE NOT PROVED AGAINST JALVEER

100. The circumstances against Jalveer alias Jalley are as follows:

- (i) The crime was committed by more than one person;
- (ii) Vinay Kumar and Jalveer were known to the Informant and were his friends;
- (iii) A blood stained shirt was recovered at his instance;
- (iv) He was absconding;
- (v) He was present at the place of the incident.

First Three Circumstances—Proved

101. The first two circumstances in respect of Jalveer are same as that of Vinay and are also proved.

102. Jalveer was not arrested immediately as was the case of Vinay. He surrendered before the court on 12.9.1994 and on the same day he was sent on remand. A blood stained shirt (recovery memo Ex Ka-12) was also recovered at his instance. This shirt was also sent for chemical examination. This was mentioned in item no. 7 of the report of the *Prayogshala* (paper 35 Ka). It states that human blood was found on the shirt. The third circumstance is proved.

Fourth and Fifth Circumstance—Doubtful

103. Jalveer was not arrested but surrendered in court on 12.9.1994. This does not mean that he was absconding. He may be away and when he came to know that he was wanted, he surrendered. One may chose to surrender because he may be afraid of the police torture.

104. There is no evidence that police had gone to arrest him but did not find him.

105. The finger print of Jalveer was also taken and compared with the disputed finger prints lifted from the place of the incident. However, his finger print was not found at the place of occurrence. There is no evidence to show that he was present or could be present at the place of incident. In view of this, fifth circumstance is not proved.

106. In our opinion, neither circumstances are proved nor prosecution has proved its case beyond reasonable doubt against Jalveer.

7th POINT: PUNISHMENT

107. The Informant killed his wife and it was brutal. The trial court has awarded death penalty to the guilty. However, we do not think that it is case for awarding death penalty for the following reasons:

The incident happened in 1994. The evidence was recorded in 2006 and this is year 2010. About 16 years have passed since the incident happened;
The close relatives of the Deceased also did not depose against the Informant;

The case itself is based on circumstantial evidence;

Suspicion of infidelity of the wife, often raises emotion that are difficult to control and generally result into unexpected behaviour.

Considering the circumstances of the case, imprisonment for life would be proper punishment.

108. We do not think that it is fit case for fine too:

It is in evidence that the Informant has three children. They may be enjoying the properties of the Informant. The fine would be realised from the property of the Informant depriving children who had no role to play;

Vinay was the friend of the Informant. He was party to the crime at the instance of the Informant. If Informant is not being fined then why should he be fined.

Imposition of fine is set aside.

SOME OBSERVATIONS

109. This case is a sad commentary on the functioning of the prosecuting agency. It hides more than it reveals. Had the prosecution been more vigilant, the result might have been different.

110. The prosecution has not examined any of the expert witness or the investigating officer. The trial court itself was conscious and had tried to examine the witnesses as the court witness. Yet despite the repeated dates, they did not appear. The details are mentioned under the heading 'THE FACTS' sub-heading 'Regarding Trial'.

111. Why the prosecuting counsel did not produce the expert witness at the first place. Why when the court summoned them they did not appear. There seems to be contradiction in the postmortem report and the recovery memo of the iron rod.

The doctor appears to be negligent (see discussion on 2nd POINT: IRON ROD THRUST INSIDE—PRIVATE PART). Was there something fishy? Was it done on purpose?

112. The witnesses were government servants. Non bailable warrants were issued and proceeding under section 350 CrPC were initiated. A letter was written to DG Police yet they did not appear.

113. This also gave handle to the counsel for the Appellants that the trial court had given indication of acquitting the accused (see 1st POINT: DOCUMENTS CAN BE RELIED). This pains us.

114. We leave it open to the State to take appropriate proceeding against the witnesses, who despite best efforts chose not to appear, the prosecuting counsel who did not produce the witnesses at the first place; and the doctor who conducted the postmortem.

SOME SUGGESTIONS

115. There was considerable delay between the date of the incident and recording of evidence. This resulted into some of the prosecution witness turning hostile and many being unavailable. This affected the trial. It shouldn't have happened.

116. There was considerable delay in copying section. Is there a way to reduce it. Here are some suggestions:

- (i) A time be fixed within which the copying section may supply the document. Beyond that time, the section may submit monthly report to the District and Sessions Judge or Chief Judicial Magistrate;
- (ii) The copying section may give importance to cases of heinous crimes, rather the cases of minor offences;
- (iii) The other better alternative may be that the police while submitting charge sheet may supply as number of copies as are the accused for supplying them to the accused.

The best should be tried.

CONCLUSIONS

117. Our conclusions are as follows:

- (i) In a case based on circumstantial evidence, there must be a chain of

evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been perpetrated by the accused;

- (ii) All circumstances against Sadhu Singh (the Informant) and Vinay Kumar are proved. They are guilty under section 302 read with 34 IPC and sentenced to imprisonment of life. They are in jail. They will serve out their sentence.
- (iii) All the circumstances against Jalveer alias Jalley are not proved. He is given benefit of doubt. He is in jail. He will be set at liberty unless wanted in some other case.

118. In view of our conclusions,

The conviction dated 19.11.2008 passed in ST No. 914 of 2002 by Additional Sessions Judge, Court No.-2, Ghaziabad against Vinay Kumar {Criminal (Capital) Appeal No. 8134 of 2008} and Sadhu Singh {Criminal (Capital) Appeal No. 8138 of 2008} are upheld but sentence dated 20.11.2008 is modified;

The conviction dated 19.11.2008 and sentence dated 20.11.2008 passed in ST No. 914 of 2002 by Additional Sessions Judge, Court No.-2, Ghaziabad against Jalveer alias Jalley is set aside. He is in jail. He may be released unless wanted in connection with another case. Criminal (Capital) Appeal No. 8369 of 2008 is allowed;

The reference is rejected.

Let a copy of the judgement be placed in the record of Criminal (Capital) Appeal Nos. 8138 of 2008 and 8369 of 2008.

Date: 05.08.2010

BBL

Appendix-1

List of the documents filed by the prosecution is as follows.

The first column indicates the exhibit number.

The second column is its brief description.

The third column is either the endorsement on 5.12.2006 or how it was exhibited. In some documents no date is mentioned but the counsel for the parties state the endorsement was made on 5.12.2006 but by mistake date was omitted.

The fourth column indicates the endorsement made on 25.9.2008.

1 Ex No.	2 Description	3 Endorsement on 5.12.2006	4 Endorsement on 25.9.2008
Ex Ka-1	Written report	Proved by the Informant PW-6	
Ex Ka-2	Finger print report	Exhibited under section 293 CrPC	
Ex Ka-3	First Information Report	Admitted	
Ex Ka-4	Site plant of place of occurrence	Admitted	
Ex Ka-5	Site plan of place of recovery from Jalveer	Admitted	
Ex Ka-6	Recovery memo of electric wire	Admitted	
Ex Ka-7	Recovery memo of iron rod	Admitted	
Ex Ka-8	Recovery memo of blood stained bed-sheet, pillow and sun mica	Admitted	
Ex Ka-9	Recovery memo of table fan	Admitted, except recovery	Admitted without any condition
Ex Ka-10	Recovery memo of blood stained shirt from Vinay	Admitted, except recovery	Admitted without any condition
Ex Ka-11	Recovery memo of blood stained shirt and knife from Sunil	Admitted, except recovery	Admitted without any condition
Ex Ka-12	Recovery memo of blood stained shirt from Jalveer	Admitted, except recovery	Admitted without any condition

Ex Ka-13	Memo of taking finger print	कागज की सत्यता अवैधानिक रूप से स्वीकार की गयी। No date	Admitted without any condition
Ex Ka-14	Inquest report	Admitted	
Ex Ka-15	Letter to CMO	Admitted	
Ex Ka-16	Photo Nash	Admitted	
Ex Ka-17	Letter to RI	Admitted	
Ex Ka-18	Namoona Mohar	Admitted	
Ex Ka-19	Postmortem report	Admitted	
Ex Ka-20	Carbon copy of GD	कागज की सत्यता अवैधानिक रूप से स्वीकार है। No date	Admitted without any condition
Ex Ka-21	Carbon copy of GD	कागज की सत्यता अवैधानिक रूप से स्वीकार है। No date	Admitted without any condition
Ex Ka-22	Carbon copy of GD	कागज की सत्यता अवैधानिक रूप से स्वीकार है। No date	Admitted without any condition
Ex Ka-23	Carbon copy of GD	Admitted	
Ex Ka-24	Carbon Copy of GD	कागज की सत्यता अवैधानिक रूप से स्वीकार है। No date	Admitted without any condition
Ex Ka-25	Charge sheet	Admitted	
Paper No. 35 Ka	Report of the <i>Vidhi Vigyan Prayogshala</i>	Admissible under section 293 CrPC without any proof	

Appendix-2

The operative portion of the order dated 29.7.2009 passed by this court remanding the case for limited purpose for recording statement under section 313 CrPC and granting liberty to record evidence:

'In view of the above, we feel called to say that the matter be sent back under section 391 CrPC to the trial court for the limited purpose of putting question to the accused/appellants under section 313 CrPC so as to enable them to given explanation or answers qua the adverse/incriminating evidence on record.

It is directed that the learned trial court shall complete the exercise within a period not exceeding four months and resubmit the record to this court immediately thereafter. Upon receipt of the record, it is directed, the office shall list the matter again for hearing afresh on the point.

Before parting, it may be clarified that it would be open to the trial court to examine any witness as a court witness and defence may also examine any witness in their defence, if required.'