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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Crl. Appeal No.734/2004

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Date of Decision : 15th of February, 2008

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SHEKHAR & ANR.

.....Appellant

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Through : Mr. Anil Soni, Amicus
Curiae

versus

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THE STATE OF NCT OF DELHI

.....Respondent

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Through : Ms. Fizani Hussain,
Addl. P.P.

&

Crl. Appeal No.374/2005

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SUNIL @ PANDIT

.....Appellant

!

Through : Mr. Anil Soni, Amicus
Curiae

versus

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THE STATE OF NCT OF DELHI

.....Respondent

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Through : Ms. Fizani Hussain,
Addl. P.P.

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CORAM:

HON'BLE MR. JUSTICE B.N. CHATURVEDI

HON'BLE MR. JUSTICE G.S. SISTANI

1. Whether the Reporters of local papers
may be allowed to see the judgment?

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be
reported in the Digest? Yes

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B.N.CHATURVEDI, J.

1. These appeals arise out of a judgment of

conviction dated 20th July, 2004 under Sections 392/394/302/34 IPC and Section 411 IPC in FIR No.390/2001 PS Mangol Puri, Delhi and sentence of imprisonment and fine to respective respondents by an order dated 24th July, 2004 as under :

(1) three years RI and a fine of Rs.1000/- each and in default of payment of fine SI for one month under Section 392/34 IPC;

(2) RI for four years and a fine of Rs.1,000/- each and in default of payment of fine SI for one month under Section 394/34 IPC;

(3) imprisonment for life and a fine of Rs.1,000/- each and in default of payment of fine SI for one month under Section 302/34 IPC; and

(4) RI for three years and a fine of Rs.1,000/- and in default SI for one month under Section 411 IPC.

2. The substantive sentences of imprisonment under different heads are to run concurrently.

3. The appellants together with three others were prosecuted on the allegations of committing

dacoity and murder of one Raju at House No.G-394 Mangol Puri, Delhi on the intervening night of 11/12th of May, 2001. Appellant Sanjay @ Moni was apprehended by Constable Bodh Raj Singh and Constable Parvinder Singh at D Block, Mangolpuri, Delhi immediately after commission of said dacoity and murder. At the relevant time both the said Constables were on patrolling duty. They noticed 6-7 boys coming from the side of E Block, who on being asked to stop started running away. On a chase, Constables Bodh Raj Singh and Parvinder Singh succeeded in overpowering appellant Sanjay @ Moni. On his personal search two gold bangles and a cash amount of Rs.1507/- were recovered from right pocket of his trouser. Possession thereof he could not explain satisfactorily. After sometime Inspector S.K. Saxena, SHO PS Mangol Puri, Delhi accompanied by other police officials including Head Constable Ajay Pal and Constable Shokinder Singh also reached there around 3.15 am in the course of their night patrolling duty. Appellant

Sanjay @ Moni was produced before Inspector S.K. Saxena with recovered gold bangles and the cash amount. On being subjected to interrogation, Sanjay @ Moni allegedly disclosed that a short while ago he and his associates had committed a dacoity in a house near G Block latrines and that the gold bangles as also the cash were part of looted property. He allegedly further disclosed that in the course of dacoity, he and his associates had committed a murder also. Inspector S.K. Saxena was in the meantime joined by SI Vikram Singh who also happened to reach there. Appellant Sanjay @ Moni led the police officials to house No.G-394, Mangolpuri, Delhi, which was found bolted from outside. On entering the house a dead body was found lying there. The house belonged to one Rohtas. At some distance there was residence of his brother Jagdish. Jagdish was called from his house. He confirmed that the house in question belonged to his elder brother Rohtas. Raju, deceased as told by him was brother-in-law of both the brothers as

their respective wives were sisters. Rohtas was not at his house, as according to Jagdish, he had gone to a nursing home to take care of his nephew who was admitted there. The wife and children of Rohtas were sleeping in the house of Jagdish. The deceased Raju was alone there in the house when the incident took place. The dead body of Raju was found lying on the floor. There were multiple stab wounds on his person and a lot of blood was splattered on the floor. The almirah was found open and articles therein ransacked. The statement of Jagdish was reduced into writing on the basis of which a FIR was got registered. A disclosure by appellant Sanjay @ Moni led to recovery of a blood stained razor from a park nereby which was taken into possession by the police. This apart, the T-shirt, bearing blood stains, which appellant Sanjay @ Moni was wearing at the time of his apprehension, was also seized and taken into possession by the police. On the disclosure of appellant Sanjay @ Moni regarding his accomplices, appellants Shekhar

and Sunil @ Pandit were arrested by the police on 16th May, 2001 and 24th May, 2001 respectively. Appellant Shekhar on his arrest made a disclosure and led to recovery of a pair of golden ear tops and an iron rod from his house on the day of his arrest. Similarly, appellant Sunil @ Pandit pursuant to a disclosure by him got an amount of Rs.2,000/- and a golden chain recovered from his house.

4. Chance finger prints were lifted from the scene of crime some of which on a comparison with specimen finger prints of the appellants were opined to match with the specimen finger prints of appellants Shekhar and Sunil @ Pandit.

5. Though the appellants and two others were tried on the charges under Section 395/396/397/302/34 IPC and Section 412 IPC, eventual conviction recorded against them was under Sections 392/394/302/34 IPC and under Section 411 IPC. Their alleged two accomplices, Ishwar @ Jaggi and Praveen were held guilty for an offence punishable under Section 411 IPC only as

other charges against them were held not proved. Sixth person namely Rajesh was tried on a charge under Section 412 IPC only but convicted under Section 411 IPC.

6. Mr. Anil Soni, Amicus Curiae submitted that appellant Sanjay @ Moni was held guilty for the offences punishable under Sections 392/394/302/34 IPC and Section 411 IPC on the basis of his having led the police to the scene of crime after his apprehension by the police in addition to part of looted jewellery and cash amount being recovered from his person. Besides, the T-shirt, which he was found wearing at the time of his apprehension, bore blood stains, which were later found by the CFSL to be matching with the blood group of the deceased. Mr. Soni pointed out that though according to prosecution a razor had also been recovered at the instance of appellant Sanjay @ Moni and the doctor concerned conducting postmortem examination on the dead body of deceased Raju opined that all the stab injuries

except injury No.5 could possibly be caused by a razor of that type, the learned trial court did not base its finding of conviction against appellant Sanjay @ Moni on the basis of recovery of the razor. It was further brought out by Mr. Soni that the chance prints lifted from the scene of crime did not match with the specimen finger prints of appellant Sanjay @ Moni.

7. Referring to recovery of part of jewellery items and cash from appellants Shekhar and Sunil @ Pandit it was argued by Mr. Soni that all the recoveries of incriminating articles from the appellants were witnessed by the police officials only and in the absence of any independent witness to such recoveries particularly in case of appellants Shekhar and Sunil @ Pandit, these recoveries could not have been held proved. It was contended that the incriminating items allegedly recovered from respective appellants were packed and sealed in different parcels using the same seal on different dates and as the seal continued to be retained by the

Investigating Officer himself although, there was every likelihood of the articles of jewelery and cash allegedly recovered at the instance of respective appellants being shown to PW Rohtas before the same were put to identification by him before the Metropolitan Magistrate concerned. It was further argued that neither at the time of registration of the FIR nor thereafter any list of robbed articles was furnished to the police by PW Rohtas and in the circumstances it is not proved that the cash and jewelery items allegedly recovered from the appellants were actually part of the robbed items. Mr. Soni also contended that the claim of the police of solving a blind case of robbery and murder by virtue of apprehension of appellant Sanjay @ Moni in the course of their patrolling falls flat in view of no DD entries being proved on record to establish that the police officials concerned were actually present in the area at the relevant time in connection with their night patrolling duty.

8. Mr. Soni cited three Supreme Court

decisions in **Mohd. Aman, Babu Khan & Anr. Vs. State of Rajasthan**; (1997) 10 SCC 44, **Paramasivam @ Paraman @ Kottiyan & Anr. Vs. State of Tamil Nadu**; JT 2002 (8) SC 214 and **Rajesh Jagdamba Avasthi Vs. State of Goa**; 2005 (9) SCC 773 in support of his arguments that tampering with chance finger prints before the same were sent to Finger Print Bureau for comparison with specimen finger prints of appellants Shekhar and Sunil @ Pandit could not be ruled out and that as the packets of the incriminating articles allegedly recovered from the respective appellants and the seal, continued to be with the Investigating Officer only there was every possibility of the same being tampered with.

9. Ms. Fizani Hussain, learned Addl. P.P. representing the State canvassed, to sustain the impugned conviction and sentence, on the strength of apprehension of appellant Sanjay @ Moni shortly after the commission of murder and robbery and recovery of jewelery and cash amount forming part

of looted property, besides recovery of blood stained T-shirt which he was found wearing and the blood stains on his T-shirt being found matching with blood group of deceased Raju. Ms. Fizani further submitted that the recovery of incriminating articles effected from respective houses of appellants Shekhar and Sunil @ Pandit pursuant to their disclosure, coupled with evidence with respect to their finger prints being found at the scene of crime conclusively establish their complicity in commission of the crimes. She contended that the deficiencies in the evidence pointed out by learned counsel for the appellants do not materially affect the final outcome of appellants being held guilty of the offences as recorded by the learned trial court. Ms. Fizani Hussain sought to rely upon a Supreme Court decision in **Praveen Kumar Vs. State of Karnataka; (2003) 12 SCC 199** to supplement her contention that in view of recovery of robbed jewellery and cash from the respective appellants, an inference could be

drawn that they must have robbed the same and in the process committed the murder as well.

10. We have heard Mr. Anil Soni, Advocate for the appellants and Ms. Fizani Hussain, Addl. P.P. for the State.

11. Want of direct evidence connecting the appellants with the commission of the crimes made the prosecution to fall back upon circumstantial evidence to prove the guilt of the appellants. The circumstances constituting basis for impugned conviction are as follows :

- (i) apprehension of appellant Sanjay @ Moni by the police shortly after commission of robbery and murder on the same night at a short distance from the scene of crime;
- (ii) recovery of two gold bangles and a sum of Rs.1507/- from his person being part of robbed property;
- (iii) the police being led by appellant Sanjay @ Moni to the house of PW Rohtas where the robbery and murder had been committed;
- (iv) blood stains on the T-shirt which appellant

Sanjay @ Moni was found wearing at the time of his apprehension by the police and which on chemical examination were found to match the blood group of the deceased ;

(v) arrest of appellants Shekhar and Sunil @ Pandit on 16th May, 2001 and 24th May, 2001 respectively pursuant to their names being disclosed by appellant Sanjay @ Moni as his accomplices and recovery of part of robbed property from their respective houses at their instance apart from recovery of an iron rod from the house of appellant Shekhar; and

(vi) presence of chance finger prints of appellants Shekhar and Sunil @ Pandit on steel almirah, refrigerator and a steel glass out of which some were found identical with specimen finger prints of appellants Shekhar and Sunil @ Pandit.

12. The trial court found the aforesaid circumstances taken together unerringly pointing to the guilt of the appellants and accordingly convicted them as stated earlier.

13. To say the least, text of the judgment does not present a very happy reading for lack of analytical approach on the part of the learned trial court, which was essential for proper evaluation of evidential value of the depositions of material prosecution witnesses. In the face of absence of statement of reasons supporting the finding of conviction, it becomes imperative to make a critical examination and evaluation of the evidence on record, adduced by the prosecution, to find the sustainability or otherwise of the impugned conviction. This sets out the stage for an analytical processing of relevant prosecution evidence available on record, related to individual circumstances as detailed in para 11 (i) to (vi).

14. It is not the investigative acumen rather a chance catch which treads the path of acclaimed success in solving a blind case of dacoity/robbery and murder in the given case. Such a success story begins with alleged apprehension of appellant Sanjay @ Moni at a short distance from the scene of

crime. Constable Bodh Raj Singh, PW-10 and Constable Parvinder Singh PW-14 are credited with effecting his apprehension in the course of their night petrolling in blocks A, B, C, D and E of Mangol Puri. Noticing 6/7 boys coming from E-Block side they asked them to stop. The boys however, instead of abiding by their command started running away. A chase by the two constables resulted in appellant Sanjay @ Moni being apprehended. The fact that the aforesaid two constables had apprehended appellant Sanjay @ Moni is supported by other police officials, namely Head Constable Ajay Pal, PW-3, Constable Shokinder Singh, PW-8 and Inspector S.K. Saxena, PW-16 who claimed to have had reached the place of apprehension of the said appellant in the course of their night patrolling of the area. SI Vikram Singh, PW-15 had, as stated by him, also reached that place on way back to Police Station Mangol Puri after attending a call at Sanjay Gandhi Hospital.

15. Departure entries in the daily diary, in

connection with patrolling in the area, could have been better established by placing on record extracts thereof. However, no DD entry in respect of any of the aforesaid police officials including Constable Bodh Raj Singh, PW-10 and Constable Parvinder Singh, PW-14 is proved on record to establish that they were actually present in the area at the relevant time in connection with patrolling of the area or that SI Vikram Singh, PW-15 had gone to Sanjay Gandhi Hospital to attend a call there. This omission apart, a comparative reading of the statements of the aforesaid witnesses concerning sequence of developments following alleged apprehension of appellant Sanjay @ Moni, also confounds the situation. Afflicted by glaring contradictions, the depositions of these witnesses fall short of being assuring from prosecution's point of view. It is to be noticed that according to Constable Bodh Raj Singh, PW-10, Head Constable Ajay Pal, PW-3 and Constable Shokinder Singh, PW-8 had arrived about 30 minutes after the

apprehension of appellant Sanjay @ Moni. Within another 15 minutes SI Vikram Singh, PW-15, accompanied by Constable Raghvinder also reached there. Appellant Sanjay @ Moni, states Constable Bodh Raj Singh, PW-10, was subjected to personal search by Constable Parvinder Singh, PW-14, leading to recovery of two gold bangles and an amount of Rs.1507/-, in the presence of Head Constable Ajay Pal, PW-3 and Constable Shokinder Singh, PW-8. On the contrary, Constable Parvinder Singh, PW-14 affirmed that it was Head Constable Ajay Pal, PW-3, who had conducted the personal search of the appellant Sanjay @ Moni yielding the said recoveries. On the point as to who had conducted personal search of appellant Sanjay @ Moni, statements of Constable Bodh Raj Singh, PW-10 and Constable Parvinder Singh, PW-14 are thus contradictory to each other. The testimony of neither of them is supported by Head Constable Ajay Pal, PW-3 or Inspector S.K. Saxena, PW-16. Head Constable Ajay Pal, PW-3 and Inspector S.K.

Saxena both stated that on their reaching the place where appellant Sanjay @ Moni was being detained by Constable Bodh Raj Singh, PW-10 and Constable Parvinder Singh, PW-14, the appellant Sanjay @ Moni was produced before Inspector S.K. Saxena, PW-16 alongwith two gold bangles and a sum of Rs.1507/-. Clearly, according to Head Constable Ajay Pal, PW-3 and Inspector S.K. Saxena, PW-16 the personal search of appellant Sanjay @ Moni had already been carried out before their reaching the place. Constable Shokinder Singh, PW-8 on the other hand came out with an altogether different version. According to him the personal search of appellant Sanjay @ Moni was conducted by Inspector S.K. Saxena, PW-16 only resulting into said recoveries. Mutually contradictory statements of these witnesses, as noticed, apart from putting a question mark on the alleged apprehension of the appellant Sanjay @ Moni and recovery of the two gold bangles and an amount of Rs.1507/- from him also appear to negate their very presence in the

area as claimed.

16. Another aspect of the matter impacting the claim of the aforesaid police officials of being present in the area on night petrolling is that neither Constable Bodh Raj Singh, PW-10 nor Constable Parvinder Singh, PW-14 spoke about the presence of Inspector S.K. Saxena, PW-16 either at the time when alleged recovery of the two gold bangles and Rs.1507/- was effected from appellant Sanjay @ Moni or when the said appellant was produced before Head Constable Ajay Pal, PW-3. From the statements of both these witnesses it turns out that Head Constable Ajay Pal, PW-3 and Constable Shokinder Singh, PW-8 were not keeping company with Inspector S.K. Saxena, PW-16 when they had arrived at the place of apprehension of appellant Sanjay @ Moni, though Inspector S.K. Saxena, PW-16, Head Constable Ajay Pal, PW-3 and Constable Shokinder Singh, PW-8 claimed that they had reached there together. The statement of Constable Bodh Raj Singh, PW-10 rather discloses

that Inspector S.K. Saxena, PW-16 had arrived at the scene of crime only. To the same effect is the statement of Constable Parvinder Singh, PW-14 as well. Thus, if testimony of both these constables are to be accepted, Inspector S.K. Saxena, PW-16 was nowhere in picture at any point of time before they reached the place of crime. This is clearly in contradiction to the statements of Inspector S.K. Saxena, PW-16, Head Constable Ajay Pal, PW-3, Constable Shokinder Singh, PW-8 and SI Vikram Singh, PW-15 to the effect that the appellant Sanjay @ Moni had led the police officials, headed by Inspector S.K. Saxena, to the place of crime. Thus doubt regarding actual presence of the aforesaid police officials in the area in connection with night petrolling in the absence of relevant DD entries being proved on record grows stronger in view of aforesaid inconsistencies in the statements of the said prosecution witnesses in regard to the apprehension and arrest of appellant Sanjay @ Moni as also recovery of two gold bangles and cash

amount of Rs.1507/- from him. In the given situation where the very apprehension and recovery of aforesaid incriminating items from the person of the appellant Sanjay @ Moni are rendered suspect, the prosecution case that the appellant Sanjay @ Moni had led the police party to the scene of crime can also be not viewed beyond doubt.

17. Shifting to crime scene, in the face of doubt in regard to the police officials being led thereto by the appellant Sanjay @ Moni, the factum of police officials reaching there at about 3.45 am is also difficult to accept for the simple reason that if the alleged pointing out of the place of crime by the appellant Sanjay @ Moni on his apprehension is left apart, the police officials could not have had any clue of the crimes being committed there at that hour of night. If one goes by the statement of Jagdish, PW-1, Inspector S.K. Saxena, PW-16, accompanied by some police officials, would appear to have first visited his house at about 4.30 am on 12th May, 2001 to take him along to the place of

crime i.e. House No.G-394 Mangol Puri, Delhi belonging to his brother Rohtas, PW-2. Inspector S.K. Saxena, PW-16 SI Vikram Singh, PW-15, Head Constable Ajay Pal, PW-3, Constable Shokinder Singh, PW-8, Constable Bod Raj Singh, PW-10 and Constable Parvinder Singh, PW-14 however testified that all of them had reached the scene of crime only and Jagdish, PW-1 was called from his house later on noticing a dead body lying there and the house being found ransacked. If such statements of said police officials are to be believed, Jagdish, PW-1, on his reaching the house of his brother Rohtas, PW-2, would have come across with Inspector S.K. Saxena, PW-16 and other police officials being already present inside the house but that was not so. According to Jagdish, PW-1 when he reached the house of his brother, he saw two police officials present there outside the house. Further, from his statement it is noticed that he as well as the police officials entered the house No.G-394 Mangol Puri, Delhi simultaneously. Had Inspector S.K. Saxena,

PW-16 and other police officials been already present inside the house there could be no reason for Jagdish, PW-1 making statement to the said effect belying their presence at the scene of crime before his reaching there. Contradictory position emerging out of the affirmations of Jagdish, PW-1 on one hand and that of the said police officials on the other also causes doubt on prosecution's claim that the police officials headed by Inspector S.K. Saxena, PW-16 were led to the scene of crime by the appellant Sanjay @ Moni.

18. According to prosecution version, the appellant Sanjay @ Moni apart from disclosing the names of accomplices in his alleged disclosure statement also led to recovery of a razor Ex. P-1 from a nearby park. Recovery of razor Ex. P-1 was not taken as part of incriminating circumstance to hold the appellant Sanjay @ Moni guilty of the charges of robbery and murder. A reference to this recovery would nevertheless be not out of place to test the credibility and fairness of investigative

exercise. Strangely, inspite of presence of a large number of people from the neighbourhood none of them was joined to witness the alleged recovery of razor Ex. P-1. Inspector S.K. Saxena, PW-16 found it more convenient to associate his subordinates, namely, SI Vikram Singh, PW-15 and Head Constable Ajay Pal, PW-3 only as witnesses to such recovery vide Ex. P-3/D. Even though Jagdish, PW-1 has not signed the seizure memo Ex. P-3/D as a witness to recovery of razor Ex.P-1, from the statement of Head Constable Ajay Pal, PW-3 it is gathered that he was also present at the relevant time of recovery of razor Ex. P-1. Jagdish PW-1 also stated that the recovery of razor Ex. P-1 was effected in his presence. He, of course, did not support the statements of Head Constable Ajay Pal, PW-3, SI Vikram Singh, PW-15 and Inspector S.K. Saxena, PW-16 that the razor Ex. P-1 was the same which had been recovered at the instance of the appellant Sanjay @ Moni. There is no unanimity on the part of Head Constable Ajay Pal, PW-3, SI

Vikram Singh, PW-15 and Jagdish PW-1 in regard to actual place of recovery of razor Ex. P-1 and its blade being found blood stained. Head Constable Ajay Pal, PW-3 testified that “ the razor Ex. P-1 was recovered from outside the boundry wall from the park near the road”. According to SI Vikram Singh, PW-15 “the razor was lying in the corner of the park”. Head Constable Ajay Pal, PW-3 and SI Vikram Singh, PW-15 both affirmed that at the time of recovery of razor Ex.P-1 its blade was blood stained. Jagdish, PW-1 on the other hand in the first instance stated that the recovery of razor Ex. P-1 was effected “from near the wall and a nala” and on being reexamined by learned Addl. P.P. he added that the recovery was in fact from the nullah near the wall of the park and the razor Ex.P-1 was taken out by the appellant Sanjay @ Moni from the mud of nullah. This witness did not support the statements of the said two police officials that the blade of razor Ex. P-1 was blood stained at the time of its recovery. Given the nature of statements of

the said witnesses to recovery of razor Ex. P-1 the learned trial court did well by ignoring recovery thereof and not taking the same into account as one of the circumstances for convicting appellant Sanjay @ Moni.

19. Adverting to seizure of blood stained T-Shirt Ex. P-9 from the person of appellant Sanjay @ Moni the way such seizure was stated to have been made is not free from doubt. According to Head Constable Ajay Pal, PW-3, Constable Shokinder Singh, PW-8, Constable Bodh Raj Singh, PW-10, Constable Parvinder Singh, PW-14 and Inspector S.K. Saxena, PW-16, appellant Sanjay @ Moni was wearing T-Shirt Ex. P-9 at the time of his apprehension with blood stains on it. Having come to the finding that the apprehension of the appellant Sanjay @ Moni at the given time and place has not been proved beyond doubt, the seizure of T-Shirt Ex. P-9 from his person is also rendered questionable. Additionally, there is another aspect related to such seizure which cannot be lost sight

of. SI Vikram Singh, PW-15 initially in the course of his examination in chief recorded on 26th July, 2003 and 19th August, 2003 did not make any specific mention of seizure of T-Shirt Ex. P-9 from the person of the appellant Sanjay @ Moni. He rather stated that Inspector S.K. Saxena, PW-16 apart from lifting blood, blood stained earth and earth control from the spot also took into his possession some blood stained clothes lying there. Inspector S.K. Saxena, PW-16, Head Constable Ajay Pal, PW-3, Constable Shokinder Singh, PW-8, Constable Bodh Raj Singh, PW-10 and Constable Parvinder Singh, PW-14 do not speak of seizure of any blood stained clothes from the spot. In the context of aforesaid initial statement of SI Vikram Singh, PW-15 it is significant to make a note of the statement of Jagdish, PW-1 in this connection. He testified that at the spot he noticed the appellant Sanjay @ Moni wearing a Baniyan and a pant and his shirt was lying near the dead body. This part of statement of Jagdish, PW-1 appears to be in line with the aforementioned

initial statement of SI Vikram Singh, PW-15. SI Vikram Singh, PW-15 made amends in his said initial statement in the course of recording of his further statement on 1st September, 2003 while identifying T-Shirt Ex. P-9 and adding that the same was being worn by the appellant Sanjay @ Moni on the relevant date and time before its seizure vide memo Ex. P-3/C. Anyway, since the very apprehension of the appellant Sanjay @ Moni as also his leading the police officials to the place of crime has been held not proved beyond doubt, the seizure of T-shirt Ex. P-9 which was on examination by serology division of CFSL found to bear blood stains matching deceased's blood group is also liable to be treated on the same plane. The presence of blood on T-Shirt Ex. P-9 matching the blood group of the deceased in the circumstances cannot be treated to provide a basis to connect the appellant Sanjay @ Moni with the given robbery and murder.

20. Co-appellant Shekhar and Sunil @ Pandit were held guilty and convicted for robbery and

murder as also under Section 411 IPC on the basis of two incriminating circumstances, namely, recovery of part of jewelery items and some cash amount at their instance as also in view of their finger prints being found at the scene of crime. Appellant Shekhar was arrested on 16th May, 2001 and he allegedly led to recovery of a pair of ear tops and an iron rod from his house in the presence of SI Vikram Singh, PW-15 and Head Constable Ajay Pal, PW-3 vide Ex. P3/G. Similarly, his co-appellant Sunil @ Pandit on his arrest on 24th May, 2001 got a golden chain and a cash of Rs.2000/- recovered from his house in the presence of SI Vikram Singh, PW15 vide Ex. P-15/D. The pair of ear tops Ex. P-4/1-2 and the chain Ex. P-14 as well as cash amount of Rs.2000/- Ex. P-13/1-20 were identified as part of robbed property, by Rohtas PW-2. Interestingly, either at the time of lodging the FIR or at any point of time thereafter, no list of jewelery and cash which had been robbed was ever furnished to the police. Though Inspector S.K.

Saxena, PW-16 in the course of his cross examination stated that he was provided a list of such property by Rohtas PW-2 but no such list has been proved on record. It was only in the course of his deposition that Rohtas, PW-2 for the first time furnished details of jewellery items which were robbed from his house. Not only that no list of jewellery items was ever furnished to the police, even the amount of cash, which had been robbed with the jewellery items, was also not mentioned. In a situation where no list of robbed items was made available to the police it is rendered difficult to find that the pair of ear tops and the chain with cash amount of Rs.2,000/- claimed to have been recovered at the instance of appellants Shekhar and Sunil @ Pandit were actually part of property robbed from the house of Rohtas PW-2. Further, these items according to the witnesses of recovery, were packed and sealed by Inspector S.K. Saxena, PW-16 with his seal. That seal continued to be retained by Inspector S.K. Saxena, PW-16 himself

all the time. In such a situation the apprehension expressed by learned counsel for the appellants that the recovered items could have been shown to Rohtas, PW-2 before the same were put to test identification before the Metropolitan Magistrate concerned cannot be brushed aside as unfounded. Viewed in this context, the identification of the items recovered at the instance of the two appellants, by Rohtas, PW-2 cannot be of much avail.

21. Yet another reason for being sceptical about the said recoveries from appellants Shekhar and Sunil @ Pandit is the absence of testimony of any independent witness from public. No reason for refrain to join witnesses from public at the time of respective recoveries inspite of a good number of people being present is not forthcoming. Inspector S.K. Saxena, PW-16 categorically admitted that he had omitted to join any person from public to witness the recovery. Given the questionable manner of handling of the investigation as noticed

heretofore, non-joining of any witness from public cannot be taken to be just an innocent omission on the part of the Investigating Officer and in the circumstances, it sounds highly unsafe to hold that the aforesaid recoveries were actually effected pursuant to disclosures by appellants Shekahr and Sunil @ Pandit respectively. Such recoveries thus cannot be taken to constitute an incriminating circumstance to find their complicity.

22. Presence of chance finger prints of appellants Shekhar and Sunil @ Pandit was accepted by the learned trial court as another circumstance, apart from aforesaid recoveries of part of robbed property, for holding them guilty of robbery and murder as also for being in possession of stolen property. Barring inspector S.K. Saxena, PW-16, no other police official, who are shown to have been present at the scene of crime from the very start, deposed that any chance finger prints were lifted from the scene of crime. They simply affirmed about crime team visiting the spot. While other police officials

were not questioned in regard to the time of arrival of the crime team at the spot, Inspector S.K. Saxena, PW-16 and SI Vikram Singh, PW-15 made statements inconsistent with each other. Contrary to Inspector S.K. Saxena's claim of crime team visiting the spot at 7.00 am or thereabout, SI Vikaram Singh, PW-15 mentioned the time of crime team's visit to the spot at about 10/11.00 am. SI Anuj Kumar Bhati, PW-20 who was stated to have lifted the chance finger prints from the spot claimed to have reached the place of crime at about 8.00 am. He, as stated by him, lifted the chance finger prints from an almirah, a refrigerator and a steel glass, developed the chance finger prints so lifted and left the spot at about 9.00 am after handing over his report to Inspector S.K. Saxena, PW-16. Inspector S.K. Saxena, PW-16 is however silent on developed photographs of chance finger prints lifted from the spot alongwith report being handed over to him at the spot by SI Anuj Kumar Bhati, PW-20. No memo in regard to developed photographs of chance finger

prints and report as mentioned by SI Anuj Kumar Bhati, PW-20 was prepared at the spot as documentary proof of the said fact. None of the items from where the chance finger prints had been lifted were taken into possession by the police to preserve and produce the same as piece of evidence. Further, even though the developed photographs of chance finger prints were made available by SI Anuj Kumar Bhati, PW-20 to Inspector S.K. Saxena, PW-16 on 12th May, 2001 itself and specimen finger prints of appellant Sanjay @ Moni were also available in view of his being already in police custody, the specimen finger prints and chance finger prints were sent to finger print bureau for comparison as late as in July 2001 only after appellants Shekhar and Sunil @ Pandit were arrested on 16th May, 2001 and 24th May, 2001 respectively. The reason for such delay in sending the developed chance finger prints and specimen finger prints of appellant Sanjay @ Moni as also of appellants Shekhar and Sunil @ Pandit are not decipherable from record.

Needless to point out that the chance finger prints initially sent to finger print bureau in July, 2001 for comparison with specimen finger prints of appellant Sanjay @ Moni did not match his finger prints. Notably, even though according to Inspector S.K. Saxena, PW-16 the specimen finger prints of appellants Shekhar and Sunil @ Pandit were also available and could have been sent to finger print bureau for comparison alongwith specimen finger prints of appellant Sanjay @ Moni but for reasons not indicated on record this was not done. The specimen finger prints of appellants Shekahr and Sunil @ Pandit were sent for comparison as late as on 24th February, 2004 when the trial had almost come to a close. Viewed in the light of aforesaid, there is a nagging doubt in regard to the chance finger prints, which were sent for comparison with specimen finger prints of appellants Shekhar and Sunil @ Pandit, being actually lifted from the scene of crime on 12th May, 2001 as claimed.

23. In view of aforesaid, it is difficult to subscribe

to the view taken by the learned trial court that the circumstances brought out by the prosecution to sustain an inference of guilt against the appellants stand firmly established and the same unerringly point towards guilt of the appellants. The impugned conviction and sentence are thus liable to be set aside.

24. Both the appeals are accordingly allowed and the judgment of conviction and order of sentence against the appellants are set aside. Consequently, the appellants are acquitted of the charges and are directed to be released immediately unless required to be detained in connection with any other case. Sh. Anil Soni shall be paid a fee of Rs.25,000/- for representing the appellants.

(B.N.CHATURVEDI)
JUDGE

February 15, 2008
sa

(G.S. SISTANI)
JUDGE