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IN THE HIGH COURT OF DELHI

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Judgment reserved on :13.07.2009

Judgment delivered on: 30.07.2009

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CRL. APPEAL 688/2007

MAHAVIR SINGH ...Appellant
Through : Mr. D.C.Mathur, Sr. Adv. with
Mr. Shishir Mathur, Advocate

versus

STATE ...Respondent
Through : Mr. Pawan Sharma, Advocate

CRL. APPEAL 746/2007

SUBASH CHAND ...Appellant
Through : Mr. D.C.Mathur, Sr. Adv. with
Mr. Shishir Mathur, Advocate

versus

STATE ...Respondent
Through : Mr. Pawan Sharma, Advocate

CRL. APPEAL 107/2008

MUSTAQ ...Appellant
Through : Mr. Rajesh Arora, Advocate

versus

STATE ...Respondent
Through : Mr. Pawan Sharma, Advocate

CRL. APPEAL 108/2008

JAGPAL @ RAJU ...Appellant
Through : Mr. Rajesh Arora, Advocate

versus

STATE ...Respondent
Through : Mr. Pawan Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether judgment should be reported in Digest? Yes

: PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 10.09.2007, appellants Jagpal @ Raju, Mahavir Singh, Subash Chand @ Doctor @ Pradhan and Mustaq have been convicted for the offence of having hatched a conspiracy to murder Drav Kumar (hereinafter referred to as the "Deceased") and in pursuance of the said conspiracy having killed the deceased. Vide order dated 22.9.2007, they have been sentenced to undergo imprisonment for life and pay a fine in sum of Rs.10,000/- each; in default of payment of fine to undergo RI for one year.
2. Case of the prosecution is that the appellant Mahavir Singh and the deceased were real brothers and their relations were strained on account of a dispute pertaining to inheritance of ancestral property inherited through their father. Drav Kumar was issueless and it was the desire of Mahavir that Drav Kumar should stay with him without separation so that on the death of Drav Kumar and his wife, the property inherited through their father, could in turn be inherited by the children of Mahavir Singh. Since Drav Kumar was contemplating to

adopt a son and a daughter, Mahavir desired that Drav Kumar should adopt his son. Defying the desire of Mahavir, Drav Kumar adopted a male and a female child. This infuriated Mahavir who sought revenge. He decided to kill Drav Kumar. Fearing for his life Drav Kumar left his home-town and settled in Delhi. To give effect to his illegal desire, Mahavir Singh contacted the other three appellants. The four decided to kill Drav Kumar by injecting him potassium cyanide. Subash Chand @ Doctor @ Pradhan procured potassium cyanide and gave the vial containing potassium cyanide to Mustaq and Jagpal, who on an opportune moment were to inject the same in the body of Drav Kumar. In pursuance of the said conspiracy, appellant Mustaq befriended the deceased so as to create an opportunity to execute the object of their conspiracy. On 05.04.2004, appellants Mustaq and Jagpal visited the residence of the deceased and in a friendly manner led him to Surajmal Park. Attar Singh PW-2, a bodyguard of Drav Kumar also accompanied them. All four i.e. the deceased, Attar Singh, Mustaq and Jagpal consumed a bottle of beer each in the park and when they were returning to the residence of the deceased, all of a sudden, Mustaq caught hold of the deceased and Jagpal jabbed the syringe containing potassium cyanide in the back of the deceased and fled.

2. As per the prosecution Attar Singh PW-2 and Latesh PW-6, the wife of the deceased, removed the deceased to the hospital where he was declared brought dead.

3. As per the charge-sheet filed against the appellants, the investigating officer recovered Rs.10,000/- (being the contract money paid to Jagpal for killing the deceased) pursuant to the disclosure statement of Jagpal and upon Jagpal leading the investigating officer to the place wherefrom the money was recovered. Qua Mustaq, as per the prosecution, pursuant to his disclosure statement and at his instance he got recovered a pocket diary containing the name and telephone number of Mahavir. Qua appellant Mahavir the prosecution claims that pursuant to his disclosure statement he got recovered a vial which was detected with the presence of potassium cyanide. He also got recovered a Matiz car bearing registration No.DL-5CB-0024 in which he had transported Mustaq and Jagpal to Delhi and back to their village after the crime was committed. Qua appellant Subash Chand @ Doctor @ Pradhan the prosecution claimed that pursuant to his disclosure statement and upon his pointing out, he got recovered a paper packet containing a powdery substance which was potassium cyanide.

4. Needless to state, Attar Singh PW-2, was the lynch pin of the case of the prosecution qua its case against Mustaq and Jagpal. Sustenance was sought to corroborate Attar Singh with

the testimony of Latesh, the wife of the deceased, to prove that on 05.04.2004 the deceased was in the company of Mustaq and Jagpal. The involvement of Mahavir Singh in the conspiracy was sought to be proved by leading evidence that Mahavir Singh was in touch with Mustaq and Jagpal before and after the murder, and his having a motive to kill his brother. Evidence was sought to be led against Subash Chand @ Doctor to prove his being a conspirator with reference to his being seen in the company of Mahavir when the other two conspirators were present as also the recovery of a paper pudia containing potassium cyanide at his instance. Lastly, the proof of the fact that the deceased was killed due to cyanide poisoning.

5. Criminal law was set into motion when at around 9:30 PM on 05.04.2004, DD No.23A, Ex.PW-33/A, was recorded by the duty officer at Police Station Anand Vihar to the effect that the duty constable at GTB Hospital has informed that Drav Kumar has been admitted in an unconscious condition at the hospital by his wife Latesh and one Attar Singh.

6. On receiving a copy of the afore-noted DD Entry, SI Udaivir Singh PW-33, accompanied by Const.Suresh Kumar PW-31, proceeded to GTB Hospital. Simultaneously, Inspector Dharmender Kumar PW-50, who also received the information as recorded in DD No.23-A, reached GTB Hospital. On reaching

the hospital, the said police officers learnt that the patient named Drav Kumar had been declared brought dead. Inspector Dharmender Kumar obtained the MLC Ex.PW-34/A of Drav Kumar which records that the deceased was brought to the hospital at 9:13 PM by Latesh PW-6, the wife of the deceased and Attar Singh PW-2.

7. Attar Singh PW-2, met the police officers at the hospital. He claimed himself to be an eye-witness to the murder of the deceased. Inspector Dharmender Kumar PW-50, recorded the statement Ex.PW-2/A of Attar Singh wherein he stated that he is a resident of village Khabra, District Bulandshar, UP and was employed by the deceased who was a resident of village Nazimpur Mudu, District Bulandshar, UP and was engaged in the business of property dealing since last 3-4 months. That a dispute arose between the deceased and his elder brother Mahavir Singh qua a property situated in the village, on account of which dispute, the deceased left his native village and started residing in Delhi in a house bearing Municipal No.10/125, 18 Block, Vishwas Nagar, along with his wife, mother and two adopted children. He also used to reside with the deceased at the aforesaid house and that the deceased always used to keep him by his side. He used to help the deceased in his business. Around 1-1½ month ago, Mustaq who claimed to be a resident of Sunder Nagri started visiting

the residence of the deceased. The deceased told him that he had met Mustaq in a jail. Few days ago, he had gone to his village and returned today i.e. 5.4.2004 at around 1:00 PM. Latesh, wife of the deceased, told him that in the company of Mustaq and another boy the deceased had gone to Surajmal Park, pursuant where to he proceeded to Surajmal Park. On reaching Surajmal Park, he saw that the deceased was engaged in conversation with Mustaq and another person who was aged between 20-25 years. The said person was of medium built and had wheatish complexion and told his name as Raju. Raju had a small bag in his hand. The deceased, Mustaq, Raju and he came to the house of the deceased and had lunch. All four went to see a movie at Swaran Cinema and after watching the movie they proceeded to Surajmal Park. On the way, the deceased told them to go to Surajmal Park and that he was going to his house. Thus, three of them went to the park and engaged themselves in a conversation. After sometime the deceased came there and they continued talking to each other. Around 6:00 PM Mustaq gave him money and asked him to bring beer. He refused. Mustaq and the deceased left to buy beer. Since Mustaq and the deceased did not return after a considerable time, he and Raju went to the residence of the deceased. After sometime, Mustaq came to the house of the deceased and the three i.e. Mustaq, Raju

and he went to Surajmal Park. On reaching Surajmal Park he saw that four beer bottles were lying in front of the deceased. They consumed one bottle of beer each at an open ground near the park. After consuming the beer, at around 8:30 PM, they proceeded to return to the house of the deceased, when suddenly Mustaq caught hold of the deceased from the back and Raju pierced some object in the back of the deceased. The deceased shouted that he had been stabbed. Mustaq and Raju fled. He tried to apprehend them but failed. He inspected the back of the deceased but did not find blood. Thereafter, he and the deceased started walking towards the house of the deceased, but after covering some distance the deceased expressed his inability to walk further stating that the pain was becoming unbearable. He made the deceased sit near a drain and rushed to the house of the deceased to call the wife of the deceased. He and the wife of the deceased removed the deceased to GTB Hospital where he was declared brought dead.

8. After recoding the statement Ex.PW-2/A of Attar Singh and collecting the MLC Ex.PW-34/A of the deceased, and after seizing the body of the deceased and sending it to the mortuary of GTB Hospital, the aforesaid police officers proceeded to the place of occurrence disclosed by Attar Singh and at the place of occurrence Inspector Dharmender Kumar

PW-50 made an endorsement Ex.PW-50/A beneath the statement Ex.PW-2/A of Attar Singh at around 01:00 AM and forwarded the same through Const.Suresh Kumar PW-31 for registration of an FIR. At the police station, HC Sufal Ram PW-30, registered FIR No.137/04, Ex.PW-30/A, at 01:30 AM on 06.04.2004. HC Sufal Ram contemporaneously entered DD No.3A Ex.PW-30/B, recording the time of registration of the FIR. HC Sufal Ram also recorded DD No.4A Ex.PW-30/C, which inter-alia records that HC Sufal Ram handed over the FIR Ex.PW-30/A to Const.Satpal at 2:30 AM on 06.04.2004 for being delivered to the Area Magistrate and senior police officials.

9. Being relevant, it may be noted that FIR Ex.PW-30/A contains an endorsement that the same was received by the Area Magistrate at his residence at 09:00 AM on 06.04.2004.

10. In the meanwhile, at the spot Inspector Dharmender Kumar PW-50, seized four empty bottles of beer at CBD ground as noted in the memo Ex.PW-2/B. Inspector Dharmender Kumar prepared a rough site plan, Ex.PW-50/B, of the place of occurrence; recording therein at points 'A' and 'B' the spots where the deceased, Attar Singh and the appellants Mustaq and Jagpal consumed beer and the spot where empty bottles of beer were found and the deceased was attacked by appellants Mustaq and Jagpal. Const.Ompal Singh

(photographer) PW-17, reached the spot on being summoned. 7 photographs Ex.PW-17/1 to Ex.PW-17/7; negatives whereof are PW-17/8 to Ex.PW-17/14 were taken. The same show four beer bottles lying on the ground.

11. On 06.04.04 Inspector Dharmender Kumar PW-50, recorded the statement Ex.PW-6/DA under Section 161 Cr.P.C. of Latesh, the wife of the deceased. In the said statement she stated that appellants Jagpal and Mustaq had visited her residence and that after lunch all three, accompanied by Attar had left and that in the night Attar came to the house and told her that her husband had been stabbed by Jagpal and Mustaq. She and Attar took her husband to the hospital where he was declared brought dead. She further stated that her husband was having strained relations with Mahavir Singh on account of a property dispute.

12. At the mortuary of GTB Hospital, Dr.S.K.Verma PW-25, conducted the post-mortem of the deceased at around 2:30 PM on 06.04.2004 and gave his report Ex.PW-25/A, which records following external ante-mortem injuries:-

“1. A one mm diameter puncture mark having a blackish discoloration around it (size 3.5 x 3.0 cms) directed anteriorly, medially and downwards, placed 3.5 cms to the right of midline and 12 cms above the right costal margin on right side back. On exploration the injury was going upto right kidney (posterior surface) 5 mm.

2. A brownish abrasion of size 1.5 x 1.0 cms present over tip of right shoulder.”

13. It was further recorded in the post-mortem report that the opinion regarding the cause of death of the deceased would be given after receiving the report of the chemical analysis of the viscera of the deceased.

14. After the post-mortem, the doctor handed over the viscera, clothes and blood sample of the deceased on a gauze, as also tissues obtained from the punctured wound found on the person of the deceased to Const.Suresh Kumar PW-31, who in turn handed over the same to Inspector Dharmender Kumar PW-50, as recorded in the memo Ex.PW-31/A.

15. Since appellants Mustaq and Jagpal were clearly named as the ones who had injected something in the body of the deceased and Mahavir Singh was named as a suspect by Attar Singh and the wife of the deceased, the police officers set out to apprehend them.

16. As per the prosecution, on the basis of a secret information, the police party consisting of Inspector Dharmender Kumar PW-50 and SI Ram Kishore Pandey PW-28, arrested Mustaq in the presence of Attar Singh PW-2, at a place near Movie Palace Cinema, Seema Puri, Delhi at 09:30 PM on 15.04.2004 as recorded in the arrest memo Ex.PW-28/A. On being interrogated by Inspector Dharmender Kumar PW-50, in the presence of Ram Kishore Pandey PW-28 and Attar Singh PW-2, Mustaq made a disclosure statement Ex.PW-

28/C wherein he confessed to have murdered the deceased. He took the police to the spot where he claimed to have murdered the deceased and pointed out the same as recorded in the pointing out memo Ex.PW-28/D. (It may be noted here that the said spot is the same which was told by Attar Singh to the police as the spot where the deceased was stabbed with a needle i.e. the spot was already known to the police.) Thereafter, Mustaq made another disclosure statement Ex.PW-28/C wherein he stated that he can get recovered a pocket diary in which he has written the telephones numbers of Mahavir Singh and his associates. Thereafter, he led Inspector Dharmender Kumar PW-50 and SI Ram Kishore Pandey PW-28 to a STD booth in village Mohalla Noorganj, Muradnagar, UP where one Jakir Ali produced a small diary at the instance of Mustaq. The said diary was seized vide memo Ex.PW-28/E.

17. On 07.05.2004 Const.Sonu Kaushik PW-21, prepared the site plan Ex.PW-21/A to scale of the place of occurrence at the instance of Attar Singh PW-2.

18. On 31.05.2004 Inspector Aas Mohd. PW-56, took over the investigation of the case. Being relevant to note, is the fact, that Inspector Dharmender Kumar was removed as an investigating officer because he did not arrest Mahavir Singh who had responded to his notice to appear before him. After questioning Mahavir Singh, Inspector Dharmender Kumar let

him return home. Inspector Dharmender Kumar was accused of bias.

19. The prosecution claims that pursuant to a secret information, the police party consisting of Inspector Aas Mohd. PW-56, HC Chanderpal PW-11 and Const.Vikram Singh PW-13, arrested Jagpal on 19.07.04. On being interrogated by Inspector Aas Mohd in the presence of HC Chanderpal PW-11 and Const.Vikram Singh PW-13, Jagpal made a disclosure statement Ex.PW-11/B wherein he confessed to have murdered the deceased and stated that he can get recovered the sum which he had taken from appellant Mahavir Singh.

20. On 20.07.2004 Inspector Aas Mohd. filed an application Ex.PW-7/B before Metropolitan Magistrate, Delhi for conducting Test Identification of Jagpal. Rajnish Kumar PW-7, Metropolitan Magistrate, conducted the proceedings pertaining to Test Identification of Jagpal. But, Jagpal refused to participate in the said proceedings alleging that the police had already shown him to the witnesses, as recorded in the record of proceedings Ex.PW-7/A.

21. As per the prosecution on the next day i.e. 21.07.2004 Jagpal pointed out the residence of the deceased and the places where he, Mustaq, Attar Singh and the deceased consumed beer on the day of the murder of the deceased as also the place where the deceased was stabbed. (All places

already in the knowledge of the police). Thereafter, Jagpal led Inspector Aas Mohd. PW-56 and HC Krishan Pal PW-52, to a liquor canteen, situated at Kanwali Road, Dehradun and got recovered Rs.10,000/- from a drawer at the canteen in the presence of two witnesses; namely, Dharambir Singh PW-16 and Rajesh Kumar PW-51. The said sum of Rs.10,000/- was seized vide memo Ex.PW-51/A. Inspector Aas Mohd. prepared the site plan Ex.PW-56/A of the place of recovery of said sum of Rs.10,000/-. Thereafter, Mustaq led the aforesaid police officers to Hotel Rajmahal and pointed out a room where the appellants had hatched the conspiracy to murder the deceased. Two witnesses; namely, Latesh PW-6, the wife of the deceased and Prakash Chand PW-45 had witnessed the said pointing out as recorded in the memo Ex.PW-6/A. Sometime thereafter, Jagpal led the aforesaid police officers to village Tanaja and pointed out the residence of Subash in the presence of two witnesses; namely, Kiran Pal PW-46 and Chetan Singh PW-47, as recorded in the pointing out memo Ex.PW-56/B.

22. On 08.08.2004 the police party comprising Inspector Aas Mohd. PW-56, Const.Rajpal PW-32 and HC Krishan Pal PW-52 arrested Mahavir Singh. On being interrogated by Inspector Aas Mohd. PW-56, in the presence of Const.Rajpal PW-32 and HC Krishan Pal, PW-52, Mahavir Singh made a disclosure

statement Ex.PW-32/B wherein he confessed to have hatched a conspiracy to murder the deceased along with the other appellants and stated that he can get recovered the syringe and vial used in committing the murder of the deceased. He also told that the Matiz car used by him to transport Mustaq and Jagpal could be got recovered by him. On the next day i.e. 09.08.2004 a Matiz car bearing registration no.DL-5CB-0024 was recovered at the instance of Mahavir Singh in the presence of Khazan Singh PW-9, the father of the wife of the deceased. The said car was seized vide memo Ex.PW-9/A.

23. On 10.08.2004 the police party comprising of Inspector Aas Mohd. PW-56, Const.Rajpal PW-32 and HC Krishan Pal PW-52, arrested Subash Chand. On being interrogated by Inspector Aas Mohd. PW-56, in the presence of Const.Rajpal PW-32 and HC Krishan Pal PW-52, Subash made a disclosure statement Ex.PW-52/B wherein he confessed to have participated in the murder of the deceased and stated that he can get recovered the syringe, the vial and potassium cyanide used in committing the murder of the deceased. On the next day, Subash made another disclosure statement Ex.PW-9/C wherein he again stated that he can get recovered the potassium cyanide used in committing the murder of the deceased.

24. As claimed by the prosecution, appellant Mahavir Singh led Inspector Aas Mohd. to a vacant plot near Sushila Park, Bulandshar, and as recorded in the pointing out memo Ex.PW-15/B pointed out the spot from where a vial was recovered at the instance of Mahavir in the presence of three witnesses; namely, Ram Singh PW-15, Inderpal Singh PW-23 and Naresh Kumar PW-24. The said vial was seized vide memo Ex.PW-15/A. Inspector Aas Mohd. prepared the rough site plan Ex.PW-56/C of the place of recovery of said vial. Thereafter, Subash Chand led Inspector Aas Mohd. to his house situated in village Tanaja and got recovered a paper puria containing a white coloured substance from a cupboard inside his house. Three witnesses; namely, Inderpal Singh PW-23, Naresh Kumar PW-24, the brother of the wife of the deceased and Khazan Singh PW-9, the father of the wife of the deceased witnessed the recovery. The said paper puria was seized vide memo Ex.PW-23/A. Inspector Aas Mohd. prepared the rough site plan Ex.PW-56/D of the place of recovery of the said paper puria.

25. The seized materials; namely, the clothes, viscera, tissues and blood sample of the deceased; the vial recovered at the instance of Mahavir and the paper puria recovered at the instance of Subash were sent to the Forensic Science Laboratory for serological/chemical examination. Vide FSL report Ex.P-X, it was opined that the viscera, the blood sample

and tissue sample of the deceased had tested positive for the presence of cyanide. Vide FSL report Ex.P-X1, it was opined that vial and paper puria recovered at the instance of Mahavir and Subash respectively have tested positive for the presence of potassium cyanide. Vide FSL report Ex.PW-58/A it was opined that save and except the vest of the deceased, blood was not detected on the clothes of the deceased. Vide FSL report Ex.PW-58/B it was opined that human blood of group 'B' was detected on the vest of the deceased. Vide FSL report Ex.PW-58/D it was opined that the blood group of the deceased was 'B'.

26. The FSL reports pertaining to the chemical analysis of the viscera, blood sample and tissues of the deceased were sent to Dr.S.K.Verma PW-25, who opined that the cause of the death of the deceased was cyanide poisoning. The report containing the opinion of Dr.S.K.Verma is Ex.PW-25/B.

27. The investigating officer, Inspector Aas Mohd. PW-56 recorded statements of various persons, some of them threw light on the property dispute between Mahavir and the deceased. Some threw light on Mahavir meeting people. Some threw light on conduct of Mahavir in not attending the funeral of his brother. Some threw light on Mahavir allegedly absconding.

28. Armed with the aforesaid material and citing the persons whose statements under Section 161 Cr.P.C. as witnesses of the prosecution, a charge sheet was filed against the appellants, accusing them of committing offences punishable under Section 120-B IPC and Section 302 IPC read with Section 120-B IPC.

EVIDENCE LED BY THE PROSECUTION AND DEFENCE AND THE
STATEMENTS OF THE APPELLANTS

29. At the trial, 58 witnesses were sought to be examined by the prosecution. During trial, found to be irrelevant or unnecessary, some witnesses were dropped.

30. Not noting the testimony of few formal police officers who deposed to the receipt of various articles in the malkhana and further movement thereof to FSL, we proceed to note the testimonies of such witnesses as is necessary for adjudication of the appeals, keeping in view the contentions urged at the hearing of the appeals.

31. Attar Singh PW-2 in his testimony reiterated the contents of his earlier statement Ex.PW-2/A. However, he made two departures by adding two sequence of events i.e. improved upon his statement Ex.PW-2/A. The said improvements are:-

(i) that when he and the deceased were proceeding to the house of the deceased after the deceased was attacked by Mustaq and Jagpal, he made the deceased sit near a drain as

the deceased was unable to walk further because of unbearable pain. That one security guard was present there and he asked him to bring a rickshaw but the guard refused to do so. He requested the said guard to take care of the deceased and he went to the house of the deceased to inform the wife and the mother of the deceased about the incident. The wife of the deceased gave him Rs.10,000/- to take the deceased to the hospital. That thereafter he and the wife of the deceased came to the spot where the deceased was sitting. He brought a rickshaw and with the help of the wife of the deceased and the guard he put the deceased in the rickshaw. Thereafter they reached Jhilmil Chowk where the said guard arranged a three wheeler scooter and that they transferred the deceased to the said scooter and took him to a private hospital where the doctors refused to attend to the deceased. Thereafter they took the deceased to GTB Hospital where the deceased was declared brought dead. (It may be noted that in his statement Ex.PW-2/A he has simply stated that when the deceased expressed inability to walk further he made him sit near a drain and called the wife of the deceased and that both of them took the deceased to GTB Hospital.)

(ii) After Mustaq and Jagpal attacked the deceased, they gave a telephonic call to Mahavir in his presence.

32. Pertaining to the events after the police arrived, which needless to state related to the investigation and could obviously not form part of this statement Ex.PW-2/A, he deposed that his statement Ex.PW-2/A was recorded by the police at the police station. He deposed that after Jagpal was arrested he pointed out the residence of the deceased and the place where Mustaq, Jagpal, the deceased and he consumed beer as also the place where the deceased was attacked.

33. On being cross-examined about his relationship with the deceased, Attar Singh stated that he was the body guard of the deceased. On being cross-examined about his relations with Mahavir Singh, he stated that he along with other body guards of the deceased was arrested by the police on an earlier occasion when Mahavir Singh had opened fire on them. On being cross-examined about the details of his employment with the deceased, he stated that: (Quote) *'In June, 2003 we were arrested on that very day, when we had gone for duty as body guard of Drav Kumar and after our release on bail, we went to our respective house.....We were again called for duties on 27.12.2003, to work as body guards....I remained in the service of Drav Kumar till 05.04.2004. Myself and Ushpal were summoned for duties as body guards on 27.12.2003.....Ushpal used to sleep at the house of Drav Kumar till he remained in his services. He served Drav Kumar*

for a period of two and two and a half months.' On being cross-examined about the omission of the presence of the security guard in his statement Ex.PW-2/A, he stated that: (Quote) *'A guard was there near the drain which was about one and one fifty meters from the place where Drav Kumar was murdered, by injecting a poisonous injection to him. This fact was told by me to the IO in my statement. Confronted with the statement Ex.PW-2/DA where the facts are not so recorded....We told security guard that a blow was wielded on the back of Drav Kumar and as such he is feeling severe pain. I had told the police that security guard met us. Confronted with the statement Ex.PW-2/DA where the facts are not so recorded. He denied having illicit relations with the wife of the deceased. He pleaded ignorance about the name of the movie which was seen by him, the deceased and appellants Mustaq and Jagpal on the day of the incident (as claimed to have been seen as per his statement Ex.PW-2/A). He admitted that the deceased possessed a mobile phone but pleaded ignorance whether the same was with the deceased on the day of the incident. On being cross-examined about the handing over of money by the wife of the deceased to him on the day of the incident, he stated that: (Quote) 'After receipt of information Latesh gave me a sum of Rs.10,000/-and I ran to hire a rickshaw and Latesh ran towards drain.'* He denied having

purchased a Matiz car for a sale consideration of Rs.94,000/- or that the wife of the deceased had given him the sum of Rs.94,000/- to purchase a car. He further stated that appellant Mustaq was arrested by the police at his instance.

34. Latesh PW-6, the wife of the deceased, deposed that the relations between the deceased and Mahavir Singh were strained on account of the fact that the deceased had adopted a male child. Mahavir Singh used to extend threats to the deceased due to which they left their native village and shifted to village Devipura and thereafter to Delhi. She deposed that Mahavir Singh and his family fled from the village after the death of the deceased. On 05.04.2004 Mustaq and Jagpal @Raju visited their residence and the deceased proceeded to a park with them and the deceased instructed her to send Attar Singh to the park. At around 10:00 AM when Attar Singh came to the house she asked him to go to the park. After sometime Attar Singh returned from the park and told her that the deceased had asked her to prepare tea. She prepared tea and sent the same through Attar Singh. After some time Attar Singh again came to the house and asked her to prepare lunch upon which she asked him that they should have food at the residence itself. Mustaq, Jagpal, Attar Singh and the deceased came to the house and had lunch. They went back to the park. About 4:00 PM the deceased again came to the house and

after taking rest for 1-1½ hours he went back to the park. Sometime thereafter Jagpal and Attar Singh came to the house and told her that the deceased and Mustaq had gone to a market to purchase some articles. Around 8:00 PM Attar Singh again came to the house and informed her and her mother-in-law that Mustaq and Raju have stabbed something at the back of the deceased. She and her mother-in-law proceeded to the spot where the deceased was present and put the deceased in a rickshaw with the help of Attar Singh and one security guard present there. Thereafter they shifted the deceased to an auto and took him to a private hospital where the doctors refused to attend to him. They took the deceased to a government hospital where he was declared brought dead. That after he was arrested Jagpal pointed out the place where conspiracy to murder the deceased was hatched by the accused. The pointing out memo Ex.PW-6/A was prepared in her presence and bears her signatures.

35. On being cross-examined she denied having illicit relations with Attar Singh. On being confronted with the omission to mention the visits of Attar Singh in connection with preparation of tea and lunch and that of the deceased in the afternoon to take rest in the house in her statement Ex.PW-6/DA recorded by the investigating officer, she failed to give any satisfactory reply. On being confronted with the

portion in her statement Ex.PW-6/DA which records that Attar Singh brought the deceased in an injured condition to the house on the day of the incident, she stated (Quote) *'I had stated to the police in my statement that on 05.04.2004 Pradhan Attar Singh had brought my husband at about 8:30 PM in injured condition and thereafter I accompanied my husband and pradhanji to GTB hospital where my husband was declared brought dead'*. On being cross-examined about her relations with one Uspal Singh, she stated that she did not know any person by the name of Uspal Singh. On being cross-examined about the details of issuance of cheques by her in name of Attar Singh and Uspal Singh, she denied having issued any cheques in favour of Uspal Singh and Attar Singh on 01.01.2003, 03.01.2004, 06.01.2004 and 24.02.2004. She admitted that the deceased was having a mobile phone with him on the day of the incident.

36. Vidya Devi PW-5, the mother of the deceased and Mahavir Singh, deposed that the relations between the deceased and Mahavir Singh were strained on account of a Will executed by her husband and the fact that the deceased had adopted a male child. Mahavir Singh planned to murder the deceased, on account of which she, the deceased and the family of the deceased shifted from their native village to village Devipura and thereafter to Delhi. That one day Mustaq

and Raju came to their house and after having lunch went to the park along with her son. That the deceased never returned from the park to the house and Attar Singh informed her that the deceased had been murdered. That Mustaq and Raju used to visit their house to meet the deceased.

37. On being cross-examined about the role played by her in removal of the deceased to the hospital, she stated that (Quote) *'Deceased Drav Kumar was found dead by us when we accompanied Attar Singh to the occurrence however he was removed to the hospital but the doctor declared him dead and the froth was coming out from his mouth.'* On being cross-examined about her relations with Mahavir Singh, she stated that (Quote) *'Mahavir got me assaulted from Vinod, who is son of my son Mahavir. Jai Narain, son of my brother in law (Jeth) was armed with a rifle. Mahavir had abused me in filthiest language. This incident took place three years ago. It is correct that I am deposing against Mahavir, since he had behaved with me in aforesaid fashion. Mahavir used to abuse me treating me like his wife and not is mother.'*

38. Harbir Singh PW-3, deposed that the deceased and Mahavir Singh were known to him as they used to reside in his village. The relations between the deceased and Mahavir Singh were strained on account of the fact that the deceased had adopted a male child. The deceased and Mahavir Singh were

arrested by the police on account of an incident of firing. Mahavir Singh and his family fled from the village after the death of the deceased.

39. On being cross-examined about his relations with Mahavir Singh, he stated that (Quote) *'A dispute had taken place with accused Mahavir Singh when I sold my land to accused Mahavir Singh and one Wasim and they had not paid the sale proceeds as per our demand.'* On being cross-examined about the details of the incident of firing, he stated that: (Quote) *'At the time of firing incident between the two brothers I was also named as an accused by the accused Mahavir Singh. Deceased Drav Kumar had not named me in the said incident.'*

40. Narsi Singh PW-4, the brother of Harbir Singh PW-3, deposed that the relations between the deceased and Mahavir Singh were strained on account of the fact that the deceased had adopted a male child. Mahavir Singh used to threaten the deceased that he would kill him. Mahavir Singh and his family fled from the village after the death of the deceased.

41. Udai Veer PW-49, brother of Harbir Singh and Narsi Singh, deposed that the relations between the deceased and Mahavir Singh were strained on account of the fact that the deceased had adopted a male child. On being cross-examined he admitted that on 21.01.2004 he was made an accused in a

case registered under Sections 107 and 116 Cr.P.C. at the instance of Mahavir Singh.

42. Suresh PW-8, the brother of Latesh PW-6, deposed that the relations between the deceased and Mahavir Singh were strained on account of the fact that the deceased had adopted a male child. Mahavir Singh used to extend threats to the deceased due to which the deceased and his family left their native village and shifted to village Devipura and thereafter to Delhi. That neither Mahavir Singh nor any of his family members attended the cremation of the deceased.

43. Shanti PW-10, the sister of the deceased and appellant Mahavir Singh, deposed that Attar Singh was having illicit relations with the wife of the deceased i.e. Latesh and that the relations between the deceased and Mahavir Singh were strained as Mahavir Singh used to object to the relations between Attar Singh and the wife of the deceased. That she had asked the deceased and his family members to leave the house as their reputation was suffering because of the illicit relations between Attar Singh and the wife of the deceased. On being cross-examined by the learned APP, she stated that the deceased and Mahavir Singh were arrested in connection with a dispute between them.

44. Jai Narain PW-37, a resident of village Nazimpura, deposed that he is acquainted with appellant Mahavir Singh

and the deceased and that there was a dispute between them regarding the inheritance of property. That the mother of Mahavir Singh and the deceased had executed a Will Mark PW-37/A to settle the dispute between them and that the said Will bears his signatures.

45. Rakesh Kumar PW-36, Dinesh PW-41, Jugnu PW-42 and Upendra PW-54, deposed that the deceased was their landlord and that they are not aware about any dispute between the deceased and appellant Mahavir Singh regarding the ownership of the shops occupied by them. (It be noted here that two witnesses of the prosecution namely, Jugnu and Balwant Singh, have been numbered as PW-42).

46. Balwant Singh PW-42, deposed that he is the neighbour of appellant Mahavir Singh. He denied having made any statement to the police with regard to the present case. On being cross-examined by the learned APP, he stated that he is not aware about any dispute between the deceased and Mahavir Singh. That Mustaq Ali did not reside as a tenant in his house and that he has no knowledge regarding the association between Mahavir Singh and Mustaq. He denied knowledge of the fact that Raju used to visit Mustaq or that Mahavir Singh and Mustaq absconded after the death of the deceased.

47. SI Udaivir Singh PW-33, deposed that on 05.04.2004 at around 9:30 PM he received information regarding the

incident, pursuant whereto he proceeded to GTB Hospital. That the statement Ex.PW-2/A of Attar Singh was recorded by Inspector Dharmender Kumar at the hospital. That thereafter he proceeded to the place of occurrence to conduct spot investigation. On being cross-examined qua the time at which he reached GTB Hospital he informed that he reached the hospital around 10/10:15 PM.

48. Const.Suresh Kumar PW-31, deposed that on 05.04.2004 at about 11:30 PM he received information regarding the incident pursuant whereto he accompanied SI Udaivir Singh PW-33 to GTB Hospital and that Inspector Dharmender Kumar PW-50 was also present at the hospital. SI Udaivir Singh recorded the statement Ex.PW-2/A of Attar Singh at the hospital. Thereafter they proceeded to the place of occurrence where SI Udaivir Singh seized the beer bottles found therein and photographs of the place of occurrence and the surrounding area were taken. SI Udaivir Singh prepared the rukka and at around 1.30 P.M. he took the same to the police station, where Const.Suresh Kumar PW-30 registered the FIR Ex.PW-30/A. That he handed over the clothes, blood sample and tissues of the deceased to Inspector Dharmender Kumar vide memo Ex.PW-31/A after they were handed over to him by the doctor who conducted the post-mortem of the deceased. On being cross-examined about the presence of the wife and

mother of the deceased at the hospital, he stated that they were not present at the hospital.

49. Sufal Ram PW-30, deposed that the FIR Ex.PW-30/A and the DD entries Ex.PW-30/B and Ex.PW-30/C were recorded by him.

50. Inspector Dharmender Kumar PW-50, deposed that on 05.04.2004 he reached GTB Hospital on receipt of information about the incident and recorded the statement Ex.PW-2/A of Attar Singh at the hospital. Thereafter he proceeded to the place of occurrence where he prepared the rukka and conducted spot investigation. SI Ram Avtar Yadav had also joined him at the spot investigation. On 15.04.2004 he arrested Mustaq who led him to a STD shop located in village Noorganj, Murad Nagar, UP where one Jakir Ali produced a small diary at the instance of Mustaq. A perusal of the diary revealed that the telephone numbers of appellant Mahavir Singh, one Kishore and Krishan were written therein.

51. On being cross-examined, Inspector Dharmender Kumar PW-50 admitted: (Quote) *'It is correct that a departmental proceedings are pending against me in the matter related to accused Mahavir present in the court. Disciplinary Authority is proceeding with the matter since there are allegations against me that I had not arrested accused Mahavir in this case on 15.04.2004 or on intervening night of that day.....On 7.4.2004*

I had sent notice u/s 160 Cr.P.C. to Mahavir Singh. Mahavir Singh had received the same. Mahavir Singh had come to PS Anand Vihar in pursuance to this notice'. On being cross-examined about the preparation of the rukka, he stated that: (Quote) 'Rukka was recorded by Ram Avtar SI, on my dictation. It was recorded in GTB Hospital around 10.30 PM.' He further stated that he did not obtain the specimen of handwriting of Mustaq and Jakir for the purposes of comparison with the handwriting contained in the diary purportedly recovered at the instance of Mustaq.

52. SI Ram Kishore Pandey PW-28, deposed that Mustaq was arrested by Inspector Dharmender Kumar PW-50 on 15.04.2004 in his presence and that the arrest memo Ex.PW-28/A bears his signatures. That Mustaq made a disclosure statement and pointed out the place where the deceased was murdered. That Attar Singh PW-2 was also present at the times when Mustaq was arrested and pointed out the place where the deceased was murdered. That Mustaq led the police party to the house of one Jakir Ali situated at village Noorganj, Muradnagar where Jakir Ali produced one small diary at the instance of Mustaq in his presence.

53. Inspector Aas Mohd. PW-56, deposed that he took over the investigation of the present case on 31.05.2004. That the investigation conducted by him revealed that a Matiz car

bearing registration no.DL-5CB-2024 is involved in the present case. That one Javed who is a resident of village Bulandshar informed him that he had sold the said vehicle to Asad who in turn sold the same to Mahavir Singh. On 19.07.2004 he arrested Jagpal and recorded his disclosure statement Ex.PW-11/B. On 21.07.2004 Jagpal pointed out the place where the deceased was murdered and that on 25.07.2004 Jagpal led him and other police officials to a liquor canteen situated in Dehradun and got recovered a sum of Rs.10,000/- from a drawer in the said canteen in the presence of two public witnesses; namely, Rajesh and Dharamvir. Thereafter, Jagpal led him and other police officers to hotel Rajmahal and pointed out a room where the conspiracy to murder the deceased was hatched by the appellants. Thereafter he led him and other police officials to village Tanaja and pointed out the residence of Subash in the presence of two public witnesses; namely, Kiran Pal and Chetan Singh. On 08.08.2004 he arrested Mahavir Singh and recorded his disclosure statement Ex.PW-32/B and that thereafter he recovered the Matiz car bearing registration No.DL-5CB-2024 at the instance of Mahavir Singh in the presence of Khajan Singh. On 10.08.2004 he arrested Subash at the instance of Mahavir Singh and recorded the disclosure statement Ex.PW-52/A made by Subash. Thereafter, Mahavir Singh and Subash led

him and other police officers to a vacant plot near Sushila Park, Bulandshar, where one empty vial was recovered from the grass at the instance of Subash in the presence of two public witnesses; namely, Chaudhary Ram Singh and Naresh and that no article was recovered at the instance of Mahavir Singh. That thereafter he recorded the second disclosure statement Ex.PW-9/C of Subash pursuant where to Subash got recovered a paper pudia containing a white coloured substance from a cupboard lying in his house in the presence of two public witnesses; namely, Inderpal and Naresh Kumar. On being cross-examined about the presence of gatekeepers at Surajmal Park on the day of the incident, the witness stated that: (Quote) *'I had tried to contact the gatekeeper of Surajmal Vihar park, who had prevented complainant Attar Singh to consume beer inside the park, but complainant Attar Singh could not point out the said gatekeeper. I had contacted two gatekeepers of Surajmal Vihar Park, who were on duty on relevant time, but complainant Attar Singh had not identified those gatekeepers to be the persons who had prevented them to consume the beer inside the park.'* On being cross-examined about the factum of recording of the statements two witnesses namely, Ram Bhool and Shri Ram, by him during the course of the investigation, the witness stated that *'Statements of witnesses, Shri Ram and Ram Bhool were*

recorded by me. Several members were present at that time, they were village people of Panchayat. Due to misconception, statements of Ram Bhool and Shri Ram were recorded. Subsequently, I came to know that they had expired prior to date of alleged recording of their statements. I was misguided by the persons present there.'

54. HC Chanderpal PW-11 and Const.Vikram Singh PW-13 deposed on same lines that after Jagpal was arrested he made a disclosure statement Ex.PW-11/B in their presence.

55. Ajit Singh PW-43, who claimed himself to be the son of one Yadram Singh and resident of the house bearing Municipal No.1449/M16, Gali No.9, Durga Puri, Shahdara, Delhi deposed that on 21.07.2004 Inspector Aas Mohd. interrogated Jagpal and recorded the contents of said interrogation on a paper in his presence.

56. Sushil PW-1, deposed that he had let out the first floor of his house to the deceased and that the deceased along with his mother, wife and two children used to reside there. He denied that Jagpal had pointed out the place of the residence of the deceased in his presence to the police.

57. Prakash Chand, Chetan Singh and Kiran Pal Singh, the stated witnesses to the pointing out by Jagpal of the residence of Subash and the place where conspiracy to murder was

hatched by the appellants, were given up by the prosecution as being unnecessary witnesses.

58. Dharambir Singh PW-16, the stated witness to the recovery of Rs.10,000/- at the instance of Jagpal was also dropped as an unnecessary witness.

59. Rajesh Kumar PW-51, deposed that he is employed at a liquor canteen situated at Kanwali Road, Dehradun. That Jagpal joined the said canteen in the month of May 2004 and left the job within 10-15 days thereafter. On 26/27 July 2004 the police officers along with Jagpal came to the said canteen and made enquiries from him. That no money was got recovered by Jagpal in his presence. That he had signed the memo Ex.PW-51/A at the instance of the police.

60. HC Krishan Pal PW-52, deposed that he was present when Mahavir Singh and Subash were arrested on 08.08.2004 and 10.08.2004 respectively. That Jagpal made a disclosure statement and got recovered a sum of Rs.10,000/- from the drawer at a liquor canteen in his presence. Thereafter Jagpal led him and other police officials to village Tanaja and pointed out the residence of Subash. A Matiz car bearing registration No.DL-5CB-2024 was recovered at the instance of Mahavir Singh in his presence. Mahavir Singh and Subash made disclosure statements Ex.PW-32/B and Ex.PW-52/A respectively in his presence.

61. On being cross-examined about the factum of pointing out the residence of Subash, he stated that: (Quote) '*Mahavir identified the house of Subash. Again said, identification was done by Jagpal. On 25.07.04, when he had gone to house of accused subash after returning from there at that time apart from accused Jagpal and Mahavir, IO of the case Sh.Aash Mohd., one constable and me were in the police team.*'

62. Const.Rajpal PW-32, deposed that Mahavir Singh was arrested on 08.08.2004 and in his presence. Thereafter he made a disclosure statement and got recovered a bottle and syringe from a vacant plot situated in village Bulandshar in his presence. That on 11.08.2004 Subash Chand was arrested in his presence. At this juncture, said witness was dropped by prosecution as being an unnecessary witness.

63. Khajan Singh PW-9, the father of the wife of the deceased, deposed that in the month of September – October 2004 he had gone to village Bulandshar to visit his daughter when he saw Mahavir Singh and his associates having conversation in a room at Hotel Rajmahal and that he does not know the details of the conversation which was going on between them. He deposed that a vehicle was seized by the police at the instance of appellant Mahavir Singh and that the memo Ex.PW-9/A prepared in said regard bears his signatures.

64. On being cross-examined by the learned APP, he stated that Mahavir Singh had pointed out the place where he hatched the conspiracy along with the other accused and that memo Ex.PW-9/B prepared in said regard bears his signatures. He deposed that Subash got recovered a paper puria from a cupboard in his house. On being cross-examined about the number of persons sitting with Mahavir Singh when he had seen him talking with his associates, he stated that: (Quote) *'I am not aware how many persons were sitting with the accused Mahavir Singh'*.

65. Ram Singh PW-15, deposed that he is acquainted with Mahavir Singh as he resides in his neighbourhood. That on 11.08.2004 the police along with Mahavir Singh and another person had come to his house. He cannot identify the other person who was accompanying them. Neither any article was recovered by the police nor any person pointed out any place to the police in his presence and that the memos Ex.PW-15/A and Ex.PW-15/B were signed by him at the instance of the police. On being cross-examined by the learned APP, he stated that: (Quote) *'It is correct that the other person who had accompanied the police alongwith accused Mahavir was accused Subash @ Pradhan @ doctor. I cannot say if accused Subash now present in court today was the same person who had accompanied accused Mahavir with the police'*.

66. Naresh Kumar PW-24, the brother of the wife of the deceased, deposed that on 11.08.2004 he had gone to visit his sister at her residence at village Bulandshar where he came to know that officials of Delhi Police along with Subash and Mahavir Singh had come there to investigate the murder of his brother-in-law, pursuant to which he went to a vacant plot situated near house bearing Municipal No.26/27. In his presence, appellants Mahavir Singh and Subash pointed out the place where they had thrown the syringe. The pointing out memo Ex.PW-15/A was signed by him. Subash Chand got recovered a vial in his presence and that memo Ex.PW-15/B prepared in said regard bears his signatures. Thereafter Subash Chand led the police officers to his house and got recovered a paper puria from a cupboard in his house. The recovery was in his presence and that the memo Ex.PW-23/A bears his signatures.

67. On being cross-examined about the articles purportedly recovered at the instance of Subash, he stated that: (Quote) *'The sringe got recovered by accused Subash was ordinary sringe. I cannot tell its size. The said sringe was lifted from the spot by accused Subash. I do not know who cleaned the sringe. The police had prepared the pulanda of the sringe and had sealed the same. The sringe was empty.....Police had shown me the sringe at the spot before lifting the same. There*

was needle in the sringe at the time of its recovery.' On being cross-examined as to where he was standing when the paper puria was recovered, he stated:- *'I had not entered inside the house of accused Subash. Vol. I continued to stand outside his house.'* On being further questioned as to whether any other person was present at the time of the recovery, he stated that one Inder Pal was also present.

68. Inderpal Singh PW-23, deposed that he is acquainted with Subash Chand since they are residents of the same village. In the month of August 2004 when he came to know that Subash Chand has been arrested by Delhi Police he came to the office of DCP, Vishwas Nagar, to meet Subash where Inspector Aas Mohd. made certain enquiries from him and obtained his signatures on certain papers. That he had no knowledge about the present case and that no article was recovered by the police at the instance of Subash Chand in his presence.

69. Suresh Chand Sharma PW-14, deposed that on one occasion the police had brought a person to his STD booth and that he had told the police that he has no knowledge whether said person made any calls from his STD booth at any point of time. That the police disclosed the name of said person as Jagpal and that he cannot identify the person brought by the police.

70. Javed PW-12, deposed that a vehicle was sold by him to Attar Singh on 14.04.2004 for a sum of Rs.94,000/-. He denied that a Matiz car bearing registration No.DL-5CB-2024 was sold by him to Mahavir Singh on 04.04.2004 in his presence.

71. HC Dal Chand PW-18, deposed that kalandara Ex.PW-20/A (Ex.PW-18/A) dated 21.01.2004 was prepared by HC Ramesh Chand. HC Ramesh Chand PW-20, deposed that Kalandara Ex.PW-20/A (Ex.PW-18/A) was prepared by him. The said kalandara records that Mustaq was found quarrelling in front of the gate of GTB Hospital and was booked under Sections 107/151 Cr.P.C. on 21.01.2004. HC Satnam Singh PW-33, deposed that kalandara Ex.PW-19/A was prepared by him, which kalandara records that the deceased was found abusing the crowd at Jalebi Chowk, Sultan Puri and was arrested on being booked under Sections 107/151 Cr.P.C. on 23.01.2004. SI Todar Singh PW-48, deposed that kalandara Ex.PW-22/A was prepared by him, which kalandara records that the deceased was found abusing one Jyoti Parsad and was arrested on being booked under Sections 107/151 Cr.P.C. on 08.03.2004.

72. Const.Om Pal Singh PW-17, deposed that the photographs Ex.PW-17/1 to Ex.PW-17/7; negatives whereof are Ex.PW-17/8 to Ex.PW-14, were taken and developed by him. Const.Sonu Kaushik PW-21, deposed having prepared the site plan to scale Ex.PW-21/A of the place of occurrence at the

instance of Attar Singh on 07.05.2004. Rajnish Kumar PW-7, Metropolitan Magistrate, Delhi deposed that test identification of Jagpal was conducted by him and record Ex.PW-7/A of the said proceedings was prepared by him. Dr.S.K. Verma PW-25, deposed that the post-mortem report Ex.PW-25/A and the opinion Ex.PW-25/B regarding the cause of the death of the deceased was prepared by him. Dr.Parmeshwar Kumar PW-34, deposed that the MLC Ex.PW-34/A of the deceased was prepared by Dr.Santosh Kumar Pratinidhi and that he is familiar with the handwriting of the said doctor. Shashi Bala PW-58, deposed that the FSL reports Ex.PW-58/A, Ex.PW-58/B, Ex.PW-58/C and Ex.PW-58/D were prepared by her.

73. In their examination under Section 313 Cr.P.C., the appellants denied everything and pleaded false implication. Additionally, appellant Mahavir Singh stated that Latesh, the wife of the deceased, and Attar Singh were having illicit relations. That they have murdered the deceased and have false implicated him in connivance with the police officials.

74. In support of his defence, Mahavir Singh examined 11 witnesses. D.R.Punia DW-1, Officer Punjab National Bank, Bulandshar, UP produced and proved Ex.DW-1/A, being statement of account pertaining to the saving account No.9591 maintained by Latesh, the wife of the deceased, at Punjab National Bank.

75. Relevant would it be to note that a perusal of the statement DW-1/A shows that Latesh had issued 3 cheques in the name of one Ushpal Singh, which cheques were got encashed on 01.01.2004, 03.01.2004 and 15.01.2004 respectively. A further perusal thereof shows that Latesh has issued a cheque in sum of Rs.90,000/-in the name of Attar Singh, which cheque was got encashed on 25.02.2004. It may be noted that DW-1 was not subjected to any cross-examination by the learned APP.

76. Naeem DW-2, Record Keeper, Nagar Palika Parishad, Bulandshar, UP proved the death certificate Ex.DW-2/, which certificate records that Sri Ram whose statement was purportedly recorded by Inspector Aas Mohd during the course of investigation of the present case had died on 07.11.1999.

77. Mir Singh DW-5, Assistant Director, Horticulture Zone – 9, DDA, Ashok Vihar, Delhi deposed that on 05.04.2004 two security guards namely Ajit and Brahm Singh were stationed at CBD grounds and that their duty hours were 5:00 PM to 01.00 AM.

78. N.P.Kaushik DW-9, deposed that he is resident of a house bearing Municipal No.1449/16, Street No.9, Durga Puri, Delhi and that the person named Ajit Singh is neither known to him nor resides in his house.

79. Shanker Singh DW-10, deposed that he is a resident of house bearing Municipal No.1449/M16, Durga Puri, Delhi and that Ajit Singh who is his brother has never resided in his house.

80. Vinod DW-3, son of Mahavir Singh, deposed that on 08.04.2004 the police officials had forcibly lifted his father from their residence and that he had got sent telegrams Ex.DW-3/A, Ex.DW-3/B and Ex.DW-3/C to National Human Rights Commission in said regard on the same day itself. That his father was released by the police after about one week and was again lifted on 07.08.2004. That one Ram Bhool whose statement was recorded by Inspector Aas Mohd. during the course of investigation of the present case had died on 18.11.2000 as recorded in the death certificate Mark-4.

81. Dharam Pal DW-4, a resident of village Nazim Pura, deposed that the relations between Mahavir Singh and the deceased were cordial and that Latesh, the wife of the deceased, and Attar Singh were having illicit relations. On being cross-examined about the relations between the deceased and appellant Mahavir Singh, the witness stated that: (Quote) *'On account of altercation between two brothers, Drav Kumar came to Delhi along with his family....It is correct that Mahavir Singh has been arrested for alleged murder of Drav Kumar.'*

82. Ram Rattan Singh DW-5, the brother-in-law of Mahavir Singh, deposed that there was no dispute between the deceased and appellant Mahavir Singh and that relations between them were cordial. That Latesh, wife of the deceased, had confessed having illicit relations with Attar Singh at a panchayat.

83. Pintu DW-7, deposed that he was employed with the deceased since last 16 years and that Attar Singh used to visit the house of the deceased and the shop of the deceased. That on one occasion he had seen Attar Singh and the wife of the deceased in a compromising position.

84. Sarvesh Kumar DW-8, deposed that he runs a security agency under the name and style Bharat Security at Bulandshar, UP and that a person named Attar Singh was never employed in his agency. However, on being re-examined by prosecution under Section 311 Cr.P.C., the witness stated that Attar Singh was employed in his agency and that he had sent Attar Singh to the deceased for the purposes of security of the deceased.

85. S.P. Singh DW-11, a handwriting expert, deposed that the report Ex.DW-11/A which inter-alia records that the signatures of the deceased on the copies of the complaints Mark A-1 to Mark A-6 purportedly written by the deceased against appellant Mahavir Singh do not tally with each other and that

the signatures appearing on the copy of the receipt pertaining to the delivery of a Matiz bearing registration no.DL-5CB-2024 are not that of appellant Mahavir Singh was prepared by him.

IMPUGNED JUDGMENT AND THE ARGUMENTS ADVANCED ON
BEHALF OF THE STATE

86. As already noted hereinabove, vide impugned judgment and order dated 10.09.07, the learned Trial Judge has convicted the appellants. A perusal of the impugned judgment which spans 95 pages shows that after noting the broad contours of the case set up by the prosecution against the appellants; the testimonies of the witnesses of the prosecution and the defence and the arguments advanced by the defence, in a cursory manner, the learned Trial Judge has returned a finding of guilt against the appellants. No intelligible reasoning is forthcoming from the impugned judgment and order which could justify the finding of guilt returned by the learned Trial Judge against the appellants, which fact was conceded by the learned counsel for the State. However, the learned counsel for the State had contended that there is sufficient material on record to bring home the guilt of the appellants.

87. The circumstances enumerated by the learned counsel for the State to prove the guilt of appellant Mustaq were: (i) eye-witness account of Attar Singh PW-2, that appellants Mustaq and Jagpal attacked the deceased in his presence,

which account is corroborated from the testimonies of Latesh PW-6 and Vidya Devi PW-5, the wife and mother respectively of the deceased, to the effect that the deceased left his residence along with Attar Singh and appellants Mustaq and Jagpal on the day of the incident; and (ii) recovery of a diary at the instance of appellant Mustaq which contains the telephone number of Mahavir Singh, a co-accused. The circumstances enumerated by the learned counsel for the State to prove the guilt of appellant Jagpal are (i) eye-witness account of Attar Singh PW-2, that appellants Mustaq and Jagpal attacked the deceased in his presence, which account is corroborated from the testimonies of Latesh PW-6 and Vidya Devi PW-5, the wife and mother respectively of the deceased, to the effect that the deceased left his residence along with Attar Singh and appellants Mustaq and Jagpal on the day of the incident; (ii) recovery of Rs.10,000/- at the instance of appellant Jagpal and (iii) refusal of appellant Jagpal to participate in the Test Identification Parade. The circumstances enumerated by the learned counsel for the State to prove the guilt of appellant Subash are (i) recovery of a paper puria which tested positive for the presence of potassium cyanide at the instance of appellant Subash. The circumstances enumerated by the learned counsel for the State to prove the guilt of appellant Mahavir Singh are (i) abscondence of appellant Mahavir Singh

since the day of the murder of the deceased till his arrest; (ii) recovery of a diary containing the telephone of Mahavir Singh at the instance of co-accused Mustaq; (iii) evidence of Khazan Singh PW-9, pertaining to factum of conversation between appellant Mahavir Singh and his associates; (iv) motive of appellant Mahavir Singh to murder the deceased and (v) conduct of appellant Mahavir Singh of not attending the cremation of the deceased. (vi) recovery of a vial at the instance of Mahavir which was detected with the presence of cyanide.

LAW OF CONSPIRACY

88. Since conspiracy is the primary charge against the appellants, we first advert to the law of conspiracy – its definition, essential features and proof.

89. Section 120-A of the Penal Code defines a criminal conspiracy. Same reads as under:-

"120A. Definition of criminal conspiracy.

When two or more persons agree to do, or cause to be done, -

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

90. Section 120-B IPC prescribes punishment to be imposed on a party to a criminal conspiracy. With regard to essentials of the offence of conspiracy, following observations made by Hon'ble Supreme Court in the decision reported as Major E.G. Barsey v State of Bombay AIR 1961 SC 1762 needs to be noted:-

"...the gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredients of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts".

91. In the decision reported as State v Nalini (1999) 5 SCC 253, the Supreme Court pointed out that that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is a sine qua non of the criminal conspiracy. In the said decision, after a survey of the case law, Supreme Court made following pertinent observations:-

"In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those sharing the information some or all may form an intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can

be inferred. It is not necessary that all the conspirators should participate from the inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences."

92. Proof of a criminal conspiracy by direct evidence is not easy to get and probably for this reason Section 10 of the Indian Evidence Act was enacted. It reads as under:-

"10. Things said or done by conspirator in reference to common design.

Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

93. Thus, the substantive section of the IPC i.e. Section 120-A adumbrated thereon Section 10 of the Indian Evidence Act give us the legislative provisions applicable to conspiracy and its proof.

94. If conspiracies are hatched in the darkness of secrecy and direct evidence is seldom forthcoming and if the offence is to be proved in relation to the acts, deeds or things done by the co-conspirators, the question would arise as to what is the nature of these acts, deeds or things. Is merely moving around together or seen in each other's company sufficient? If not, what more should be there from which it could be inferred that the conspirators were acting to achieve the desired offence in furtherance of a crime.

95. In the decision reported as State of Maharashtra and Ors. v. Som Nath Thapa and Ors. (1996) 4 SCC 659 illuminating on this grey area, the Supreme Court observed that for a person to conspire with another, he must have knowledge of what the co-conspirators were wanting to achieve and thereafter having the intent to further the illegal act takes recourse to a course of conduct to achieve the illegal end or facilitate its accomplishment. Except for extreme cases, intent could be inferred from knowledge for example whether a person was found in possession of an offending article, no legitimate use of which could be done by the offender. To illustrate, a person is found in possession of 100 Kg. of RDX, is proved to be visiting or visited by "A" against whom there is a charge of conspiring to blow up a public place. Here, the recovery of the offending article would be enough to infer a charge of

conspiracy. However, such instances apart, it was held that law would require something more. This something more would be a step from knowledge to intent. This was to be evidenced from informed and interested cooperation, simulation and instigation.

96. To elucidate further, it is most apposite to quote following observations of Supreme Court in the decision reported as Kehar Singh v State (Delhi Administration) AIR 1988 SC 1883:-

“The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se enough.

.....It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved nor is it necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient.....”

97. Thus, the proof of offence of conspiracy would require, in most cases, some kind of physical manifestation of agreement. The physical manifestations may not be proved by overt acts but may be evidenced by conscious acts or conduct of parties and reasonably clear to mark their concurrence. Where

evidence is clear, offence of conspiracy may be proved by necessary implications. Innocuous, innocent or inadvertent acts and events should not enter the judicial verdict. Since more often than not, conspiracy would be proved on circumstantial evidence, four fundamental requirements as laid down as far back as in 1881 in the judgment reported 60 years later at the suggestion of Rt. Hon'ble Sir Tej Bahadur Sapru i.e. 1941 All ALJR 416, Queen Empress v. Hoshhak may be re-emphasised:-

I. That the circumstances from which the conclusion is drawn be fully established;

II. That all the facts should be consistent with the hypothesis;

III. That the circumstances should be of a conclusive nature and tendency;

IV. That the circumstances should, by a moral certainty, actually exclude every hypothesis but the one proposed to be proved;

98. The discussion pertaining to standard of proof required for proving the offence of conspiracy can be summarized by the following observations of Supreme Court in the decision

reported as State (NCT of Delhi v Navjot Sandhu AIR 2005 SC 3820:-

“A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused in the offence of criminal conspiracy.

DISCUSSION

99. Before proceeding to deal with the circumstances enumerated by the learned counsel for the State to bring home the guilt of the appellants, we consider it necessary to analyze the evidence pertaining to the registration of the FIR in the present case. The reason is that if there are traces of the FIR being deliberately registered belatedly thereby making available time to think for the maker of the FIR, the same would have to be seen very carefully because more often than not when a person buys time to make a statement, he does so to deliberate and reflect on what he wants to speak and thereby taints his statement with the taint of not being a spontaneous statement but the result of a pre-conceived mind.

100. The first information regarding the incident in question was received by the police at 09.30 P.M. on 05.04.04 as evidenced from the DD Entry Ex.PW-34/A. It has further come in the evidence on record that the police officers who reached GTB Hospital after receipt of the information; namely, Dharmender Kumar PW-50, SI Udaiveer Singh PW-33 and

Const.Suresh Kumar PW-31, met Attar Singh PW-2 at the hospital. It can reasonably be assumed that at the most, it would have taken 2 hours for the aforesaid police officers to reach the hospital, record the statement of Attar Singh and prepare the rukka on the basis of the said statement of Attar Singh. A perusal of the rukka Ex.PW-50/A shows that the said rukka was prepared at 01.30 A.M. on 06.04.04. The said time difference of 4 hours between the receipt of the first information of the incident and the preparation of the rukka, particularly when Attar Singh was found present at the hospital by the police officers involved in making of the said rukka is excessive keeping in view the fact that the police officers claimed to have immediately left for and reach the hospital.

101. A perusal of the testimony of Sufal Ram PW-30, the scribe of the FIR Ex.PW-30/A registered in the present case, and the contents of the DD Entries Ex.PW-30/B and Ex.PW-30/C shows that the FIR Ex.PW-30/A was dispatched at 2.30 A.M. on 06.04.04 for delivery to the Area Magistrate and senior police officials. The FIR Ex.PW-30/A contains an endorsement that the said FIR was received by the Area Magistrate at 09.00 A.M. on 06.04.04. It has to be noted here that the police official who had delivered the FIR Ex.PW-30/A to the Magistrate has not been examined by the prosecution. The said difference of 7 hours between the dispatch of the FIR Ex.PW-30/A from the

police station and its receipt by the Magistrate, when coupled with the fact that the official who had delivered the FIR in question to the Magistrate has not been examined by the prosecution shrouds the time of registration of the said FIR in great suspicion suggestive of the fact that probably the rukka was not dispatched as claimed by the police at 1:30 AM nor was the FIR registered and dispatched at 2:30 AM.

102. As already noted hereinabove, Inspector Dharmender Kumar PW-50, SI Udaiveer Singh PW-33 and Const.Suresh Kumar PW-31, claimed to have participated in the investigation conducted in the present case till the registration of the FIR. Const.Suresh Kumar PW-31, deposed that SI Udaiveer Singh is the scribe of the rukka Ex.PW-50/A which is contrary to the recording contained in the said rukka that Inspector Dharmender Kumar PW-50, is the scribe of the said endorsement. Const.Suresh Kumar further deposed that the wife and the mother of the deceased were not found present at the hospital on the day of the incident whereas MLC Ex.PW-34/A of the deceased establishes the presence of the wife of the deceased at the hospital on the day of the incident. It is also relevant to note the deposition of Const.Suresh Kumar PW-31, that the information of the incident was received by him and SI Udaiveer Singh PW-33 at 11:30 P.M. on 05.04.2004, which is in contradiction to the testimony of SI Udaiveer Singh,

as per whom the information of the incident was received by him at 09:30 P.M. on 05.04.2004 and that he and Const.Suresh Kumar reached GTB hospital at 10-10.15 P.M. in pursuance of the said information.

103. In this regard, it is also relevant to analyze the testimony of Inspector Dharmender Kumar PW-50. Inspector Dharmender Kumar deposed in his examination-in-chief that rukka in the present case was prepared by him at the place of occurrence, whereas in his cross-examination he stated that rukka was prepared by him at the hospital. The said discrepancy needs to be coupled with the deposition of Attar Singh PW-2, that his statement which formed the basis of the rukka in question was recorded at the police station; which is in complete contradiction to the recording contained in the rukka that the statement of Attar Singh was recorded at the hospital. Inspector Dharmender Kumar further deposed that SI Ram Kumar Yadav also participated in the spot investigation; whereas SI Udaiveer Singh and Const.Suresh Kumar have not deposed a word about the presence of SI Ram Avtar Yadav at the time of spot investigation.

104. The cumulative effect of the above discussion is that the time gap of 4 hours between the receipt of first information of the incident and the preparation of the rukka and the time gap of 7 hours between the dispatch of the FIR

from the police station and its receipt by the Magistrate leads to a very strong inference that the rukka/FIR prepared/registered in the present case were ante-timed, which inference is further reinforced by the fact that the police officials and other witness namely Attar Singh who played a role in the spot investigation, preparation of the rukka and registration of the FIR have contradicted themselves and each other in material particulars.

105. The necessary corollary which emerges from the aforesaid inference that rukka/FIR prepared/registered in the present case were ante-timed is that Attar Singh PW-2, gained time before giving his version pertaining to the incident of the murder of the deceased. In these circumstances, the testimony of Attar Singh PW-2, needs to be viewed with caution and subjected to a very close scrutiny.

CASE AGAINST APPELLANT MUSTAQ

106. Since the first circumstance enumerated by the learned counsel for the State against appellant Mustaq is predicated upon the testimonies of Attar Singh PW-2, Latesh PW-6 and Vidya Devi PW-5, we proceed with the appreciation of the ocular evidence of the said witnesses.

107. A perusal of the testimony of Latesh PW-6, shows that according to her, Attar Singh visited her house five times on the day her husband was murdered. The first visit was around

10:00 A.M. in the morning when she instructed Attar Singh to go to the park to meet the deceased; the second visit of Attar Singh was in the afternoon for the purposes of taking tea to the park; the third visit of Attar Singh was again in the afternoon for the purposes of taking lunch to the park but that she did not give him lunch and asked him to bring the deceased and appellants Mustaq and Jagpal to the house for taking lunch; the fourth visit of Attar Singh was again in the afternoon when he had come with the deceased and appellants Mustaq and Jagpal for eating lunch and the fifth visit of Attar Singh was around 8 PM in the night when he came to inform her about the incident. However, a perusal of the testimony of Attar Singh PW-2, shows that there is no mention of the visits pertaining to bringing of tea and lunch to the park in his testimony.

108. Latesh PW-6 and Vidya Devi PW-5, have deposed in their respective testimonies about the presence of Vidya Devi at the time of the removal of the deceased to the hospital, whereas Attar Singh in his testimony did not depose a word about the presence of Vidya Devi at the said time.

109. The admission of Latesh PW-6, in her cross-examination that she had stated in her statement Ex.PW-6/DA given to the police that Attar Singh brought the deceased in an injured condition to her house creates a serious doubt on the

genuinity of her testimony as also of that of Attar Singh and Vidya Devi, that Attar Singh had come to the house of the deceased to inform the family members of the deceased about the incident, pursuant to which, Attar Singh, Latesh and Vidya Devi proceeded to the spot where the deceased was sitting and removed him to the hospital.

110. Another fact of great significance is that there is a material omission in the statement Ex.PW-2/A of Attar Singh vis-à-vis his testimony in the Court, inasmuch as, in Ex.PW-2/A Attar Singh did not state a word about the presence of the security guard around the place of occurrence and the role played by him in removal of the deceased to the hospital. It is further relevant to note the following statement of Inspector Aas Mohd. PW-56, who, in his cross-examination stated that: *'I had tried to contact the gatekeeper of Surajmal Vihar park, who had prevented complainant Attar Singh to consume beer inside the park, but complainant Attar Singh could not point out the said gatekeeper. I had contacted tow gatekeepers of Surajmal Vihar Park, who were on duty on relevant time, but complainant Attar Singh had not identified those gatekeepers to be the persons who had prevented them to consume the beer inside the park.'* The said deposition implies that Attar Singh told Inspector Aas Mohd that one gatekeeper had prevented him, the deceased and the appellants Mustaq and

Jagpal from consuming beer inside Surajmal Park. The failure of Attar Singh to identify the gatekeepers who were on duty at Surajmal Park at the relevant time when coupled with the fact that Attar Singh did not depose a word about the incident pertaining to consumption of beer at Surajmal Park, strongly suggests that Attar Singh told a lie to Inspector Aas Mohd. that he, the deceased and the appellants Mustaq and Jagpal were prevented by a gatekeeper from consuming beer inside Surajmal Park.

111. The cumulative effect of the aforesaid discrepancies in the evidence of Attar Singh PW-2, Latesh PW-6 and Vidya Devi PW-5, is that the said witnesses are 'unreliable witnesses' and thus no reliance can be placed on their evidence. In coming to the conclusion that Attar Singh is an untruthful witness, we are greatly influenced by the fact that Attar Singh gained time before getting recorded his first version regarding the incident of the murder of the deceased.

112. At this stage, the defence set up by the appellants, particularly appellant Mahavir Singh, is worthy of a glance. The defence taken by appellant Mahavir Singh was that Latesh, the wife of the deceased, and Attar Singh were having illicit relations; they have murdered the deceased and have falsely implicated him in connivance with the police officials.

113. Eschewing reference to the testimonies of the witnesses of the defence and Shanti PW-10, the sister of the deceased and appellant Mahavir Singh, who have deposed about the factum of illicit relations between Latesh and Attar Singh, we proceed to note five facts. The first fact is that Latesh and Attar Singh denied in their respective testimonies that a sum of Rs.90,000/- was paid by Latesh to Attar Singh. However, the said claim of Latesh and Attar Singh is belied from the statement of account Ex.DW-1/A of Latesh which records that a cheque in sum of Rs.90,000/- was issued by Latesh in favour of Attar Singh and that the said cheque was got encashed on 25.02.04. The second fact is that Attar Singh deposed that one Ushpal was also a bodyguard of the deceased and used to reside at the residence of the deceased. In her testimony, Latesh, denied knowing any person by the name of Ushpal. However, a perusal of the statement Ex.DW-1/A shows that various cheques were issued by Latesh in the name of Ushpal. The third fact is that Attar Singh deposed in his testimony that Latesh had given a sum of Rs.10,000/- to him on the day of the murder of the deceased for the purposes of arranging a rickshaw for removal of the deceased to the hospital. The question which arises is that why did Latesh gave a huge sum of Rs.10,000/- to Attar Singh for the purposes of arranging a rickshaw. The fourth fact is that the prosecution has sought to

establish that a Matiz car was purchased by appellant Mahavir Singh and used by him in the commission of the murder of the deceased. However, Javed PW-12, who was examined by the prosecution to prove the purchase of Matiz by appellant Mahavir Singh deposed that a Matiz car was purchased by Attar Singh ten days after the murder of the deceased for a sale consideration of Rs.94,000/-. It may be remembered here that Latesh had given a sum of Rs.90,000/- to Attar Singh on 25.02.04 evidenced from the statement Ex.DW-1/A.

114. We have already held that the FIR registered in the present case has traces of being ante-timed. From the afore-noted five facts, it can logically be deduced that there is something more between Attar Singh and Latesh than what meets the eye.

115. There is a strong probability that Attar Singh and Latesh have conspired. Unfortunately, the features noted by us hereinabove have been ignored by the learned Trial Judge.

116. This takes us to the second and last circumstance enumerated by the learned counsel for the State against appellant Mustaq; namely, the recovery of a diary at his instance.

117. It is a settled legal position that the connection between the object recovered and the offence with which an accused is charged must always be exclusively established by evidence

‘aliunde’. However, where the gist of the offence is possession or concealment, the admissible portion of the confession of the accused may itself connect the accused with the offence. It is permissible to connect the accused and the object with each other through the information but not either of them with the crime. It is not at all permissible to directly connect the accused with the crime through his own mouth. (See the celebrated decision of Privy Court reported as Pulukuri Kottaya v Emperori AIR 1947 PC 67).

118. In the instant case, save and except a bald deposition of Inspector Dharmender Kumar PW-50, there is no evidence to show that any of the telephone numbers found written in the diary purportedly recovered at the instance of appellant Mustaq was that of appellant Mahavir Singh or his associates or the other appellants. There is also no evidence to show that the handwriting contained in the said diary is that of appellant Mustaq. No specimen of the handwriting of appellant Mustaq were taken by the police for the purposes of comparison with the handwriting contained in the said diary as admitted by Inspector Dharmender Kumar in his testimony. In light of the fact that no evidence has been adduced by the prosecution to establish the connection between the diary purportedly recovered at the instance of appellant Mustaq and the offences with which he is charged, nothing much turns on the

circumstance that a diary was got recovered by appellant Mustaq.

119. Be that as it may, even the evidence led by the prosecution to prove the factum that a diary was got recovered by appellant Mustaq is uninspiring. Whereas Inspector Dharmender Kumar PW-50, has deposed that the diary in question was recovered from STD shop of Jakir Ali, SI Ram Kishore Pandey PW-28, deposed that the same was recovered from the residence of Jakir Ali.

CASE AGAINST APPELLANT JAGPAL

120. The first circumstance enumerated by the learned counsel for the State against appellant Jagpal has already been rejected by us in the foregoing paras i.e. paras 106 to 115 above. The same applies good even to appellant Jagpal.

121. The second circumstance enumerated by the learned counsel for the State against appellant Jagpal is that a sum of Rs.10,000/- was got recovered by appellant Jagpal.

122. Again, there is no evidence to establish the connection between the sum of Rs.10,000/- allegedly got recovered by appellant Jagpal and the offence with which he was charged. There is no evidence to show that the said sum was given to appellant Jagpal by any of the other appellants in furtherance of the conspiracy to murder the deceased.

123. Be that as it may, we proceed to deal with the evidence led by the prosecution to prove the factum of recovery of Rs.10,000/- at the instance of appellant Jagpal.

124. Dharambir Singh PW-16, Rajesh Kumar PW-51, HC Krishan Pal PW-52 and Inspector Aas Mohd PW-56, were claimed to be witnesses to the recovery of Rs.10,000/- at the instance of appellant Jagpal.

125. As already noted in the foregoing paras, Dharambir Singh PW-16, was dropped by the prosecution as being an unnecessary witness. Rajesh Kumar PW-51, did not support the case of the prosecution and denied that any article or sum of money was got recovered by appellant Jagpal in his presence.

126. This takes us to the analysis of the testimony of HC Krishan Pal PW-52. We need not labour much on the testimony of HC Krishan Pal, save and except to note that he deposed that appellant Mahavir Singh was also present with the police party when appellant Jagpal pointed the house of appellant Subash on 25.07.2004. The aforesaid deposition of HC Krishan Pal shows that he is an untruthful witness inasmuch appellant Mahavir Singh could not have been present with the police on 25.07.2004, inasmuch as he was arrested on 08.08.2004 as claimed by the prosecution. It is apparent that HC Krishan Pal who has spoken an obvious lie with reference to the presence of Mahavir Singh when Jagpal allegedly pointed out the house

of Subash could well be a telling a lie pertaining to the recovery of Rs.10,000/-.

127. There is yet another fact which needs to be noted. Rajesh Kumar PW-51, deposed that appellant Jagpal joined in May 2004 as an employee in the canteen from where the purported recovery was made. He deposed that Jagpal left the said employment within 10-15 days of joining. The recovery in question was allegedly made on 25.07.2004. It does not stand to reason that appellant Jagpal would leave behind the considerable sum of Rs.10,000/- at the canteen and not take the same with him at the time of leaving employment.

128. In view of above discussion, we hold that the prosecution has not been able to successfully establish that a sum of Rs.10,000/- was got recovered by appellant Jagpal.

129. The last circumstance enumerated by the learned counsel for the State against appellant Jagpal is the refusal of appellant Jagpal to participate in the Test Identification.

130. As already noted hereinabove, appellant Jagpal refused to participate in the test identification proceedings on the ground that the police had already shown him to the witnesses. We have already held that there are traces of the FIR being ante-timed. We shall be highlighting that the investigation conducted by the police in the present case was most perfunctory and that the police officers who

subsequently participated in the investigation in the present case were prejudiced against the appellants. In that view of the matter, the ground taken by appellant Jagpal for refusing to participate in the proceedings pertaining to conduct of his Test Identification cannot be said to be unfounded and thus no adverse inference can be drawn against appellant Jagpal on account of the said refusal.

CASE AGAINST APPELLANT SUBASH

131. The only circumstance enumerated by the learned counsel for the State against appellant Subash is that a paper puria containing a white substance was recovered at his instance, said articles and the white substance was found to contain potassium cyanide and the cause of death of the deceased was cyanide poisoning.

132. Ram Singh PW-15, Inderpal Singh PW-23, Naresh Kumar PW-24, Khazan Singh PW-9 and Inspector Aas Mohd PW-56, were claimed to be witnesses to the recovery of the vial and paper puria at the instance of appellant Mahavir and Subash respectively.

133. At the outset, it is most relevant to note the testimony of Const.Rajpal PW-32, who deposed that a bottle and a syringe was recovered at the instance of appellant Mahavir Singh in his presence. The aforesaid testimony of the said witness

seriously damages the case of the prosecution since no syringe was claimed to be recovered.

134. Be that as it may, Ram Singh PW-15 and Inderpal Singh PW-23, did not support the case of the prosecution and denied having witnessed recovery of any article at the instance of appellant Subash and Mahavir.

135. Naresh Kumar PW-24, the brother of the deceased, deposed that a vial and a 'syringe' were recovered at the instance of appellant Subash and Mahavir in his presence. The witness went on to describe the syringe recovered at the instance of appellant Subash. As per the prosecution, the articles purportedly recovered at the instance of appellant Subash was a paper puria. No syringe was claimed to be recovered at the instance of appellant Subash and Mahavir by the prosecution. When no syringe was recovered at the instance of appellant Subash and Mahavir, then how could Naresh Kumar witness the recovery of a syringe and even describe the syringe so recovered, is a mystery. Naresh Kumar further deposed that appellant Subash got recovered a paper puria from a cupboard lying in the house of appellant Subash in his presence. On being questioned as to where he was standing when paper puria was recovered, he stated that he did not enter the house of appellant Subash and was standing outside the said house. If Naresh Kumar was standing outside

the house of appellant Subash, then how could he see that a paper puria was recovered, from a cupboard lying inside the said house, is again a big mystery. Obviously, Naresh Kumar is telling a lie that he was present when the recoveries were made at the instance of appellant Subash.

136. This brings us to the analysis of the testimony of Khazan Singh PW-9, the father of the deceased, who deposed having witnessed the recovery of a paper puria at the instance of appellant Subash. We need not labour on his testimony save and except note the fact that the presence of Khazan Singh at the time of recovery of paper puria does not find a mention in the testimonies of the other so-called witnesses to the said recovery; namely Inspector Aas Mohd PW-56 and Naresh Kumar PW-24. It is also relevant to note that Khazan Singh did not depose a word about the said recovery in his examination-in-chief but stated the same when he was cross-examined on behalf of the prosecution. The reason given by him for not stating the said fact in the first instance that he is an illiterate person and thus forgot to mention the said facts due to inadvertence, is highly unconvincing. In such circumstances, no reliance can be placed on the testimony of Khazan Singh for the purposes of proving the factum of recovery of paper puria found to be containing potassium cyanide at the instance of appellant Subash.

137. As a result, we are only left with the testimony of Inspector Aas Mohd PW-56. In view of the fact that the public/independent witnesses examined by the prosecution to prove the factum of recoveries purportedly made at the instance of appellant Subash either did not support the case of the prosecution or are found to be 'wholly unreliable', no reliance can be placed on the testimony of Aas Mohd. who was the Investigating Officer in the present case and thus highly interested in the success of the prosecution for proof of the said fact.

138. Besides, the vial has obviously being seized from an open plot of land. The recovery thereof is on 12.8.2004. The date of murder of Drav Kumar is 5.4.2004. As per the charge sheet, after committing the murder, Mustaq and Jagpal met Mahavir the same day and left Delhi in the Matiz car of Mahavir. Further, as per the charge sheet, the vial and the syringe were handed over to Mahavir who threw the same. Thus, the vial was thrown in early part of April 2004. The month of June receives pre-monsoon showers in northern India. The months of July and August are monsoon season. We are surprised that the vial (a small bottle) thrown in the open field and subjected to the vagaries of nature could show traces of cyanide even after being recovered after two months of lying in an open field and being subjected to rain water. Besides, the

prosecution has sought to lead inchoate evidence as to who actually disclosed about the place where the vial was thrown. In the confessional cum disclosure statements of Mahavir and Subash both have spoken of the vial. According to the prosecution, both Mahavir and Subash searched for the vial. As noted above, one witness of the prosecution speaks of Mahavir recovering the vial and others speak of Subash doing so. The pointing out memo Ex.PW-15/B of the place from where the vial was recovered is shown to be at the pointing out of Mahavir. The seizure memo Ex.PW-15/A records that Subash recovered the vial from within grass. Everything is inchoate and clouded.

139. The net result of the above discussion, it is apparent that the evidence pertaining to the recoveries attributed to Subash are highly doubtful; are tainted and hence most unreliable evidence against Subash.

CASE AGAINST APPELLANT MAHAVIR SINGH

140. The first circumstance enumerated by the learned counsel for the State against appellant Mahavir Singh is that appellant Mahavir Singh was absconding since the day of the murder of the deceased till the time of his arrest. The witnesses examined by the prosecution to prove abscondence of appellant Mahavir Singh are Harbir Singh PW-3, Narsi Singh PW-4, Latesh PW-6 and Inspector Aas Mohd PW-56.

141. In said regards, it is most relevant to note the testimony of Vinod DW-3, the son of appellant Mahavir Singh, who deposed that on 07.04.2004 appellant Mahavir Singh was forcibly lifted by the police from his residence. To substantiate his claim, the witness produced three telegrams Ex.DW-3/A, Ex.DW-3/B and Ex.DW-3/C dated 08.04.2004 issued by him to National Human Rights Commission in the said regard.

142. We disagree with the contention urged by learned counsel for the State that the sons of Mahavir are crafty persons and to create proof that Mahavir did not abscond, but was lifted by the police, have sent the aforesaid telegrams. Why should the sons of Mahavir do so? Surely, they do not know the law of evidence that under Section 3 of the Evidence Act a mental condition of a person is a fact and that under Section 8 of the Evidence Act the conduct of an accused is admissible evidence and that Courts have held that where an accused absconds a presumption of his guilty mind can be drawn by the conduct of fleeing from justice.

143. Besides, Mahavir Singh has not absconded. Inspector Dharmender PW-50, admitted during cross examination that Mahavir Singh responded to his notice dated 7.4.2004 issued by him under Section 160 Cr.P.C. and made himself available for interrogation at PS Anand Vihar. He admitted that he was facing departmental proceedings in connection with an

allegation that by not arresting Mahavir Singh on 15.4.2004 when Mahavir Singh came to the police station. Thus, it is apparent that Mahavir Singh did not abscond.

144. The next circumstance enumerated by the learned counsel for the State is that a diary containing the telephone of appellant Mahavir Singh was recovered at the instance of co-accused Jagpal. As already noted hereinabove, save and except a bald deposition of Inspector Dharmender Kumar PW-50, there is no evidence to show that any of the telephone numbers found written in the diary purportedly recovered at the instance of appellant Jagpal was that of appellant Mahavir Singh. In that view of the matter, the mere circumstance that a diary was recovered at the instance of appellant Jagpal and that some telephone numbers were found to be written in the said diary can hardly be used as an incriminating circumstance against appellant Mahavir Singh. Besides, as noted hereinabove while discussing the alleged incriminating evidence against co-accused Jagpal, the recovery of the diary itself is highly tainted. Qua the recovery of the vial we have discussed the evidence relating thereto while discussing the evidence qua the recovery of the paper puria and have noted the serious infirmities therein, which renders the recovery of the vial as claimed by the prosecution, highly doubtful.

145. No doubt, through the testimony of PW-3, PW-4, PW-5, PW-8, PW-9, PW-36, PW-37, PW-41, PW-42 and PW-49 it does stand somewhat established that the deceased and Mahavir were not on good terms and therefore it can certainly be urged that Mahavir had a motive to kill his brother.

146. But, mere existence of motive by itself without any other evidence cannot form a complete chain of circumstances wherefrom an inference of guilt can be drawn. (See the decisions of Supreme Court reported as Keshav v State of Maharashtra (2007) 14 SCALE 174, Ramesh Baburao Devaskar v State of Maharashtra (2007) 12 SCALE 272 and Girija Shanker Misra v Nathu Singh AIR 1993 SC 2618.)

147. That Mahavir did not attend the funeral of Drav Kumar is nothing but a fact of his ill will towards his brother and is the other side of the face of the coin: motive.

PERFUNCTORY INVESTIGATION BY THE POLICE

148. The investigation conducted by the police in the present case is most perfunctory. We have already demonstrated that the FIR registered in the present case has a strong suspicion of it being ante-timed and that some of the police officers who ostensibly participated in the investigation in the present case have deposed most inchoately. There are three more facts which would highlight the defective nature of the investigation conducted by the police. The first fact is that Latesh PW-6, the

wife of the deceased, deposed that the deceased was having a mobile phone at the time of the incident. No evidence was collected by the police pertaining to the record of the mobile phone of the deceased, which if collected, could have given important leads to the police. The second fact is that the persons namely Ram and Ram Bhool Singh, whose statements were purportedly recorded under Section 161 Cr.P.C. in connection with the present case, had expired much before the incident of murder of the deceased, which fact has been admitted by Inspector Aas Mohd, the scribe of the said statements. This shows that somebody was attempting to introduce false witnesses. The third fact is that the defence prove that Ajit Singh PW-43, who was examined by the prosecution to prove the recording of disclosure statement of appellant Jagpal, did not reside at the address given by him in his testimony, which implies that the said witness was planted.

CONCLUSION

149. As observed by the Supreme Court in the decision reported as State (NCT of Delhi) v Navjot Sandhu AIR 2005 SC 3820 that '*few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused in the offence of criminal conspiracy*'. In the instant case, there is no evidence show that there was any association, much less meeting of minds, between the

appellants. Thus, we hold that the prosecution has not been able to establish that a conspiracy was entered into by the appellants to murder to the deceased.

150. The necessary corollary of the aforesaid conclusion is that the prosecution has not been able to establish that the appellants murdered the deceased in pursuance of the conspiracy entered into by them.

151. The net result is that the appeals are allowed. The appellants are acquitted of all the charges framed against them. The impugned judgment and order dated 10.9.2007 convicting the appellants is set aside. The appellants are directed to be set free forthwith unless required to be kept in custody in some other case.

152. Copy of this order be sent to the Superintendent Central Jail Tihar for compliance.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

JULY 30, 2009
dk/mm