

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Hearing: 2<sup>nd</sup> June, 2011  
Date of Decision: 12<sup>th</sup> July, 2011

+ **CRL.A. No.123/2011**

AVINASH KUMAR @ SANJAY ... APPELLANT  
Through: Mr. R.K. Singh, Advocate.

Versus

STATE ... RESPONDENT  
Through: Mr. Lovkesh Sawhney, APP for the State.  
Mr. Sumeet Verma, Advocate for the  
Complainant.

**AND**

+ **CRL.A. No.140/2011**

PRAKASH KUMAR @ MUNNA ... APPELLANT  
Through: Mr. Ajay Verma, Advocate.

Versus

STATE ... RESPONDENT  
Through: Mr. Lovkesh Sawhney, APP for the State.  
Mr. Sumeet Verma, Advocate for the  
Complainant.

**AND**

+ **CRL.A. No.168/2011**

PARVESH SHARMA @ SONU ... APPELLANT  
Through: Ms. Rekha Aggarwal, Advocate.

Versus

STATE ... RESPONDENT  
Through: Mr. Lovkesh Sawhney, APP for the State.  
Mr. Sumeet Verma, Advocate for the  
Complainant.

**AND**

+ **CRL.A. No.320/2011**

NIRMAL KUMAR ... APPELLANT  
Through: Mr. Ajay Verma, Advocate.

Versus

STATE

... RESPONDENT

Through: Mr. Lovkesh Sawhney, APP for the State.  
Mr. Sumeet Verma, Advocate for the  
Complainant.

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MR. JUSTICE G.P.MITTAL**

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

### **J U D G M E N T**

**G.P. MITTAL, J.**

1. The Appellants, Nirmal Kumar, Avinash Kumar @ Sanjay, Prakash Kumar @ Munna and Parvesh Sharma @ Sonu (hereafter referred to by their names) impugn the judgment dated 24.09.2010 and the order on sentence dated 27.09.2010 in Sessions Case No.64/08, whereby they were held guilty of the offence punishable under Sections 302/120-B/ 392/120-B/394/120-B/397/120-B of the Indian Penal Code (IPC) read with Section 27 of the Arms Act. All the Appellants were awarded sentences as under:-

*“..... Rigorous imprisonment of life imprisonment along with fine of ₹ 1,000/- (Rupees One Thousand) each, in default of payment of fine Simple Imprisonment for 6 (Six) months for offence punishable under Section 120B IPC. .... Further, Rigorous imprisonment of life imprisonment along with fine of ₹ 1,000/- (Rupees One Thousand) each, in default of payment of fine Simple Imprisonment for 6 (Six) months for offence punishable under Section 302 IPC read with Section 120B IPC.*

*Convict Nirmal Kumar, Avinash Kumar and Prakash @ Munna further sentenced to undergo Rigorous Imprisonment of 10 (Ten) years and fine of ₹ 5,000/- (Rupees Five Thousand) each, in default of payment of fine, Simple Imprisonment for 01 (One) year respectively for the offence punishable under Section 392 IPC read with Section 120B IPC.*

*All the convicts Nirmal Kumar, Avinash Kumar, Prakash @ Munna and Parvesh Sharma @ Sonu further sentenced to undergo Rigorous Imprisonment of 10 (Ten) years and fine of ₹ 5,000/- (Rupees Five Thousand) each, in default of payment of fine, Simple*

*Imprisonment of 01 (One) year respectively for the offence punishable under Section 394 IPC read with Section 120B IPC.*

*Convict Parvesh Sharma @ Sonu further sentenced to undergo Rigorous Imprisonment of 10 (Ten) years and fine of ₹ 5,000/- (Rupees Five Thousand), in default of payment of fine, Simple Imprisonment of 01 (One) year for the offence punishable under Section 397 IPC read with Section 120B IPC.*

*Convict Parvesh Sharma @ Sonu further sentenced to undergo Rigorous Imprisonment of 3 (Three) years and fine of ₹ 2,000/- (Rupees Three Thousand), in default of payment of fine, Simple Imprisonment of 6 (Six) months for the offence punishable under Section 27 Arms Act”.*

2. The Trial Court, relying on *Swami Shradhanand v. State of Karnataka, 2008 (13) SCC 767*, further ordered that the imprisonment for life in the case would be actual sentence of 30 years and grant of remission could not be considered during that period.
3. According to the prosecution, Ishwar Bansal (the deceased) owned and used to run a utensil manufacturing unit at premises No.A-73, Group Factory, Wazirpur Industrial Area, Delhi. The Appellant Nirmal Kumar was working as a *Munim* in the employment of the deceased (Ishwar Bansal), who also had a godown at 37, Suryadeep Building, Wazirpur Community Centre, Delhi.
4. On 09.12.2004 Ishwar Bansal directed Ravi (PW-12) and Nirmal Kumar (the Appellant) to go to one Subhash in Okhla for delivery of certain utensils the next day. On 10.12.2004 at about 1:30 P.M. Ravi and Nirmal took a consignment of utensils to the customer in Okhla. Subhash asked them (Ravi and Nirmal) to get the consignment weighed. Nirmal, along with Subhash's *Munim* went out for getting the consignment weighed. The consignment was brought back and unloaded, after the weighment. It is alleged that thereafter the consignment was again weighed by Subhash on his own weighing machine. There was some difference in the weight recorded in the documents carried by Ravi and Nirmal. It is alleged that after every half an hour Ishwar Bansal made a call on the mobile phone given by him to Ravi. Subhash also had a word with Ishwar Bansal about the difference in weight and this took a lot of time.
5. At about 5:00 P.M., Nirmal went outside on the pretext of making a call and returned after 10-15 minutes. The account was settled and a payment of ₹

3,20,000/- was made by Subhash as the price of the utensils. After making the payment, Subhash wanted to talk to Ishwar Bansal on phone but was unsuccessful as his (Ishwar Bansal's) telephone was busy.

6. Ravi and Nirmal left Subhash's office. They started looking out for a TSR to reach the factory in Wazirpur. In the meanwhile, Nirmal asked for his (Ravi's) mobile phone as he wanted to speak to Ishwar Bansal. Ravi handed over his mobile phone to Nirmal, who placed a telephone call to Ishwar Bansal. Nirmal continued to utter "*Hello-Hello*" on the mobile phone and then gave back the handset back to Ravi saying that the voice on the other side was not audible. When Ravi tried to speak to Ishwar Bansal, he heard the latter say, "*Maar Diya Maar Diya Chaku Maar Diya.*" Ravi immediately informed Ishwar Bansal's son Anuj Bansal that Ishwar Bansal was in some trouble and requested him to reach the factory immediately. Ravi and Nirmal also hired a TSR to reach the factory.
7. At about 6:35 P.M. DD No.21 was recorded at Police Post (PP) Wazirpur Industrial Area, Police Station (PS) Ashok Vihar that a person had been stabbed with a knife at A-73, Wazirpur Industrial Area near Pulsar factory in front of Aggarwal Sweets. PW-9 ASI Rohtash Singh along with Constable Manoj Kumar reached the spot. They came to know that the injured had been removed to Sunder Lal Jain Hospital (the hospital) by his family members. No eye witness was found at the spot. Thus, ASI Rohtash Singh proceeded to the hospital. He (ASI Rohtash Singh) collected MLC of the injured Ishwar Bansal; the doctor opined the injured was unfit to make a statement. The injured was kept under observation by the doctor. Since no eye witness was available, ASI Rohtash Singh made an endorsement on the DD entry and sent it to the Police Station for registration of a case under Section 307 IPC. Further investigation of the case was entrusted to SI Vimal Kumar (PW-24). The crime team was summoned. SI Rajesh Kumar of the crime team inspected the spot while PW-7 HC Sajjan Kumar took photographs. SI Vimal Kumar came to know that the deceased Ishwar Bansal used to run the utensils factory and had an office in the basement in the shape of a cabin. On inspection of the office, SI Vimal Kumar noticed several articles strewn around, with bloodstains on some of them. SI Vimal Kumar took into possession blood, blood stained earth, earth control and sealed them at the spot.

8. On the same day at about 9:45 P.M. Ishwar Bansal succumbed to the injuries suffered by him and the case was converted from Section 307 IPC to one under Section 302 IPC. Further investigation was taken over by Inspector P.L. Kheda, SHO, PS Ashok Vihar.
9. On 11.12.2004, the postmortem examination on Ishwar Bansal's dead body was conducted by PW-1 Dr. B.N. Acharya at Babu Jagjivan Ram Memorial Hospital. PW-1 noticed the following external injuries:-
  - “1. Incised stab wound on right limber region lateral to umbilicus 4.5 cm lateral to mid limb and 22 cm below right nipple size 2.5 cm x 0.7 cm x abdominal cavity deep. Small intestine is protruding out on cut section total length is 14 cm.
  2. Linear abrasion on Lt. Arm – 3 in number of size 8.5 cm, 5 cm and 3 cm on middle and lateral aspect.”
10. Some abrasions were also noticed, which indicated marks of struggle by the deceased. PW-1 Dr. B.N. Acharya opined, “death is due to hemorrhagic shock consequent to injury to abdominal structure and vessels as described. Injury No.1 is sufficient to cause death in ordinary course of nature.”
11. The relations of the deceased were unhappy with the progress of the investigation. Certain representations were made to senior police officers including the Commissioner of Police.
12. On 19.01.2005 further investigation in the case was entrusted to Inspector Pankaj Sood of Crime Branch. He went to the spot and summoned Ishwar Bansal's son Anuj Bansal (PW-10) and elder brother Dr. Suresh Bansal (PW-19). On inquiry, Inspector Pankaj Sood learnt that at the time of the incident, the deceased was wearing a gold chain and one gold ring, which were not traceable.
13. PW-10 Anuj Bansal informed Inspector Pankaj Sood that in November, 2004 one of his father's mobile phone was stolen from the factory. PW-1 further disclosed (to Inspector Pankaj Sood) that on the morning of the incident a wrist watch was handed over by Dr. Suresh Bansal (PW-19) to his father for repair. According to Anuj Bansal, on 09.12.2004 Dr. Bimla Bansal (PW-8) wife of Dr. Suresh Bansal, had also handed over a cheque for an amount of ₹ 50,000/- to deceased Ishwar Bansal. All these articles were found missing.

14. According to the prosecution, Anuj Bansal informed the IO that Ravi and Nirmal used to collect payment from the parties and his father used to sit in the office till 5:30 P.M. to tally the accounts. Anuj Bansal stated to the IO that on the day of the incident Ravi informed him (on his phone), that there was some trouble with Ishwar Bansal (the deceased) and that he should immediately reach the factory. Anuj Bansal called up his aunt Bimla Bansal and, thereafter, both of them reached the factory, where they found Ishwar Bansal in an injured condition and removed him to the hospital.
15. After recording statement of Anuj Bansal, Inspector Pankaj Sood made inquiries from Ravi who disclosed about the facts as to what had happened. Ravi also informed Inspector Pankaj Sood that on 18.01.2005 Nirmal met him on the road near PP Wazirpur Industrial area at about 5:00 P.M. He (Nirmal) took him to his house and disclosed to him that he (Nirmal) along with his associates Avinash, Parvesh and Prakash had conspired to rob Ishwar Bansal. Nirmal further informed Ravi that he tried to contact Prakash (the Appellant) from PCO booth Okhla, but, he could not succeed and in the meanwhile other accused persons, namely, Prakash, Avinash and Parvesh committed the crime.
16. It is alleged that on 31.01.2005 Nirmal was arrested from his house. On interrogation, he made a disclosure statement Ex.PW-28/A. At his instance co-accused Prakash @ Munna and Avinash were arrested from the Central Market, Ashok Vihar while standing near the egg *rehri*. They also made disclosure statements Ex.PW-28/E and Ex.PW-28/D respectively. The Appellant Prakash's disclosure led to recovery of one mobile phone having SIM Card No.9818127376 and IMEI No.351479600619374 from a rented room in village Wazirpur. Dr. Suresh Bansal identified the mobile phone (handset) as belonging to the deceased that had been stolen from the factory in November, 2004. Similarly, Avinash (the Appellant) got recovered one gold ring belonging to the deceased. Later, on 31.01.2005, Nirmal got recovered a golden chain from a glass under the cot in his room. It was identified by Dr. Suresh Bansal as belonging to the deceased.
17. It is alleged that on 03.02.2005 Parvesh @ Sonu (the Appellant) was found in his house near Ram Lila Ground. He was interrogated in presence of Avinash (the Appellant) in the Crime Branch's office. He was wearing a wrist watch belonging to the deceased (which was pointed out by the Appellant Avinash). The Appellant

Parvesh was arrested. He made a disclosure statement Ex.PW-28/P and helped in getting two knives recovered from Sharma Studio that belonged to Manoj Sharma (PW-13), one of which was a dagger shaped knife and the other, a button actuated knife wrapped in a polythene bag. It is the prosecution case that Ravi's statement under Section 164 Cr.P.C. was recorded. A TIP of the recovered goods was conducted. The opinion of the autopsy surgeon in respect of the knives, recovered at the instance of Parvesh @ Sonu, was obtained. The IO collected call details in respect of mobile phone No. 9891203018, which was stolen in November, 2004.

18. The IO collected the call details of mobile phone (SIM) number 9891203018 belonging to the deceased Ishwar Bansal and mobile phone (SIM) number 9818127376 belonging to the Appellant Prakash @ Munna. IMEI numbers of both the handsets and calls made from them were analysed. The IO noticed the pattern of phone calls made from the factory/godown to the mobile phone (SIM) number 9818127376 belonging to Prakash. The handset Nokia 3315 belonging to the deceased, IMEI No.351479600619374/0 was used by Appellant Prakash. The SIM (number) 9891203018 was also discovered to be used by the Appellant Prakash on his handset IMEI number 520424806094410. The prosecution on the basis of the material collected during investigation concluded that all Appellants entered into a criminal conspiracy and in pursuance of the said criminal conspiracy had committed robbery in the factory of deceased Ishwar Bansal using deadly weapons. The Appellants, pursuant to the criminal conspiracy committed Ishwar Bansal's murder. Thus, a report under Section 173 Cr.P.C. was filed against the Appellants. They entered the plea of not guilty, and claimed trial.
19. In order to establish its case, the prosecution examined 29 witnesses. PW-6 Constable Manoj, PW-8 Dr. Mrs. Bimla Bansal, PW-9 ASI Rohtas Singh, PW-10 Anuj Bansal, PW-12 Ravi, PW-13 Manoj Sharma, PW-14 R.K. Singh, Nodal Officer, Bharti Airtel Ltd., PW-15 Subhash Kumar, Purchase Officer in Dimension Overseas Pvt. Ltd. (Dimension Overseas), PW-16 Anil Kumar, who runs the PCO Booth at Okhla, Phase-I, PW-17 SI Rajesh Singh, Incharge Crime Team, PW-19 Dr. Suresh Bansal, deceased's brother and a witness to various recoveries at the instance of the Appellants, PW-24 SI Vimal Kumar, initial IO, PW-25 Ms. Seema Nair, Nodal Officer, Idea Cellular Ltd., PW-26 ACP Prakash Khara, second IO of the case, PW-28 ASI Dharamvir Singh, who reached the spot

along with the first IO on the day of the incident and PW-29 Inspector Pankaj Sood, main IO, are material witnesses.

20. PW-6 Constable Manoj testified that on 10.12.2004 he was posted at Police Post (PP) Wazirpur Industrial Area, Police Station (PS) Ashok Vihar. That day on receipt of phone call that someone was stabbed at A-73, Group Factory, Wazirpur Industrial Area, DD No.21 was recorded, in the Police Station. He accompanied ASI Rohtash Singh to the spot. They were informed that the injured had been removed to the hospital by his relatives. He accompanied ASI Rohtash Singh to the hospital. The ASI collected the MLC of Ishwar Bansal, who was declared unfit to make a statement. ASI Rohtash Singh made endorsement Ex.PW-9/A on the DD entry. He carried the rukka to the Police Station on the basis of which FIR No.914/2004 was recorded. He along with the ASI returned to the spot. The crime team was present there. The spot was photographed by the crime team. The witness deposed about seizure of blood and certain other articles from the spot. PW-9 ASI Rohtash Singh deposed on the lines of PW-6 Constable Manoj.
21. PW-8 Dr. Mrs. Bimla Bansal is the wife of the deceased's brother. She deposed that on 10.12.2004 her nephew Anuj Bansal (PW-10) came running to her and informed her about having received a telephone call from their driver Ravi that some untoward incident had taken place in the factory. She accompanied him on his motorcycle to the deceased's factory. The factory door was bolted from outside. She opened the door and went down to the basement. She found blood lying in front of the cabin, which too was bolted from outside. On opening the cabin door they noticed Ishwar Bansal lying there with extensive injuries. They noticed injuries on the right side of deceased's abdomen. She deposed that the deceased was removed to the hospital. PW-10 Anuj Bansal is deceased's son. He deposed on the same lines as PW-8. He testified that on 10.12.2004 he received a call from Ravi's mobile phone number 9213190362 on his mobile number 9868241730. Ravi informed him that something had happened to his father in the factory and he asked him to reach there immediately. He disclosed this information to his aunt Dr. Mrs. Bimla Bansal. He, along with his aunt reached the factory and took Ishwar Bansal to the hospital.
22. PW-13 Manoj Sharma, according to the prosecution, is a witness to the recovery of two knives alleged to have been kept in a polythene bag by Appellant Parvesh

Sharma @ Sonu. He did not support the prosecution version. In cross-examination by the learned APP he admitted that he was running a Photo Studio in front of N-9, C-11, Ram Lila Ground, Lal Bagh, Delhi. He denied that on 03.02.2005 Appellant Parvesh Sharma @ Sonu was brought to his Studio by the police. He denied that Appellant Parvesh on 24-25/12.2004 gave him an envelope to be handed over to his friend Munna. He denied that he placed that envelope on the shelf (*tand*) of his shop without checking it and produced the same before the police when Appellant Parvesh brought the police to his Photo Studio. The witness was confronted with his statement Ex.PW-13/A purported to have been recorded by the IO. The witness denied having made the said statement and was confronted with the specific portions 'A to A' to 'F to F'. The witness admitted his signatures on the sketch of the dagger Ex. PW-13/A and sketch of knife Ex. PW-1/DX. The witness explained that the police had obtained his signatures on some blank papers.

23. PW-14 R.K. Singh is Nodal Officer, Bharti Airtel Ltd. He produced the call details in respect of mobile phone number 9818127376 for the period 01.11.2004 to 31.12.2004 alleged to have been recovered from Appellant Parvesh. He testified that IMEI number of the handset used by the subscriber on 01.11.2004 was 520424806094410. He stated that the last digit denotes the operator use only. PW-25 Ms. Seema Nair, Nodal Officer, Idea Cellular Limited provided the call details in respect of mobile (SIM) number 9891203018 (which belonged to deceased Ishwar Bansal) as Ex.PW-25/A. She deposed that in Ex.PW-25/A she referred 'I' for incoming calls and 'O' for outgoing calls.
24. PW-12 Ravi is the star witness of the prosecution, to prove the extra judicial confession alleged to have been made by Appellant Nirmal. PW-12 also deposed about the details as to how he accompanied Appellant Nirmal to Dimensions Overseas, situated at B-133, Okhla Industrial Area, Phase-I, New Delhi; how the utensils were weighed before its delivery was accepted by PW-15 Subash Kumar; Nirmal's leaving the premises of Dimension Overseas to make some call at about 5:00 P.M. and then hearing the words "*Maar Diya Maar Diya Chaku Maar Diya*" when Appellant Nirmal handed over his (PW-12's) handset to him after connecting it to the deceased. He deposed about working as a driver with Ishwar Bansal, who used to run a utensils factory in Wazirpur Industrial Area. On

09.12.2004 Ishwar Bansal directed him to take the utensils consignment to one Subhash at Okhla on the next morning. He deposed that he along with Appellant Nirmal took the consignment to the destination at Okhla on 10.12.2004 and reached there at 1:30 P.M. Consignee Subhash asked them to get the weight of consignment. The Appellant Nirmal and he got the consignment weighed and unloaded the same at Subhash's factory. He deposed that Subhash again weighed the utensils consignment on his own weighing machine. There was some difference in the weight which was recorded on the documents carried by them. The witness deposed that after every half an hour their employer Ishwar Bansal used to make a telephone call to them on the mobile phone in his possession (which was given to him by Ishwar Bansal). The consignee Subhash also talked to Ishwar Bansal about the difference in the weights. At about 5:00 P.M. Appellant Nirmal went outside saying that he would return after making a telephone call. Appellant Nirmal returned after 10-15 minutes. He and Nirmal went upstairs in the office of the consignee (PW-15 Subhash). After sometime Subhash made the accounts and paid them ₹ 3,20,000/- towards the utensils supplied. After paying the money Subhash tried to contact Ishwar Bansal but the telephone was busy, Subhash then asked them to go.

25. After leaving Subhash's factory they (PW-12 Ravi and the Appellant Nirmal) searched for a TSR to reach the factory. Since it was not available, they started moving on foot. Appellant Nirmal wanted to speak to Ishwar Bansal on telephone. He (PW-12) handed over the mobile phone to Nirmal. Nirmal connected the phone to Ishwar Bansal and continued uttering the words "*Hello-Hello*" and then handed over the handset to him in the pretext that nothing was audible from the other end. He deposed that he uttered the words "*Hello-Hello*" at which he (Ishwar Bansal) spoke "*Maar Diya Maar Diya Chaku Maar Diya*". On hearing this he became perplexed and informed Anuj Bansal, his employer's son that there was some trouble with Ishwar Bansal and requested Anuj Bansal to reach the factory immediately. Thereafter, they hired the TSR and reached the factory where they found a crowd at the factory's gate. He handed over the cash collected from Subhash to Ishwar Bansal's relatives. After the date of the incident the factory was closed down and he was rendered jobless. He contacted different establishments in search of a suitable job for him.

26. He testified that on 18.01.2005 at about 5:00 P.M. Appellant Nirmal met him on the road near PP Wazipur Industrial Area. They both talked about their unemployment. The Appellant Nirmal took him to his house in Lal Bagh. The Appellant Nirmal took out a bottle of liquor. He (PW-12) informed him that he did not take liquor. Thereupon, Appellant Nirmal arranged tea for him through someone and he started taking liquor. During their interaction, the Appellant Nirmal told him that he had advised Munna not to go to the factory. On enquiring the reason for this Nirmal disclosed that he had hatched a conspiracy with Munna, Sonu and Avinash to commit robbery at Ishwar Bansal's factory. He (PW-12) told Nirmal that what he did was not good. The Appellant Nirmal started giving oath to him that he should not disclose this to anyone. He (PW-12) got frightened and immediately left Nirmal's room and confined himself in his house. On 19.01.2005 police came to him at his house and he narrated the entire story to the police.
27. PW-15 Subhash Kumar corroborated the prosecution version regarding utensils supplied by Ishwar Bansal and Ravi and Nirmal's visit to their godown on 10.12.2004 at about 12:00 noon. He deposed that Shri B.N. Kejriwal was the owner of Dimension Overseas. He tried to contact Ishwar Bansal on his telephone but phone was found engaged. Shri B.N. Kejriwal made the payment of ₹ 3,20,000/- to Nirmal, who seemed to be in panic and hurry and urged him to make the payment quickly. The witness was unable to identify Appellant Nirmal on the ground that he saw him only on 10.12.2004, just 3-4 times. He denied the suggestion that he had refused to identify the Appellant Nirmal as he was getting threats from Nirmal's family.
28. PW-16 Anil Kumar runs the MTNL PCO Booth at his grocery shop at S-183/157, Majdoor Camp, Okhla Phase-I with telephone number 26812628. He produced the original bill Ex.PW-16/A in respect of the telephone calls stated earlier. In cross-examination this witness deposed that he had no record of telephone calls made from his PCO.
29. PW-17 SI Rajesh Singh was in-charge of the Crime Team, North West District. He deposed about his visit to the spot along with other members of the team, taking of the photographs by the photographer of their team and his effort to

develop the chance prints. He deposed that from the chance finger prints lifted from the spot, no finger print could be developed.

30. PW-19 Dr. Suresh Bansal (deceased's brother) is another important witness examined by the prosecution. He deposed that in the year 2004 he was staying in a joint family with his younger brother Ishwar Bansal (the deceased). Ishwar Bansal used to run a factory for manufacturing stainless steel utensils at A-73, Wazirpur Industrial Area. He had a godown at 37, Surya Deep Building, Wazirpur Community Center. On 10.12.2004 it was the wedding anniversary of Ishwar Bansal. At about 6:30 P.M. Dr. Suresh Bansal came to know that someone had stabbed his brother (the deceased) with a knife in his factory and that Ishwar Bansal had been removed to Sunder Lal Jain Hospital. He immediately rushed to the hospital. He reached the hospital where he found his brother was in a very serious condition. He testified that his brother succumbed to the injuries and the dead body was received by him after the post mortem examination.
31. After the *Tervi Ceremony*, his family members sat together to analyse as to how the incident had taken place. They were in a state of shock. He and his family members started recalling the events and the articles which his brother used to wear. They recollected that Ishwar Bansal used to wear a gold chain which was gifted to him ten years back by him. The same was missing and was not handed over to them even after the postmortem examination. Ishwar Bansal used to wear a gold ring on which letter 'I' was engraved in letter 'C'. It had a net design on the sides. He recollected that he had given a wrist watch HMT Swarna with white dial and a golden chain to the deceased, which had to be repaired. They also recollected that one mobile handset Nokia 3315 was stolen from Ishwar Bansal's factory and could not be traced. His brother had made a complaint and got the SIM cancelled and a duplicate SIM was issued. He apprised the IO about all the missing articles. On 31.01.2005 he went to the Crime Branch office of Delhi Police at Chanakya Puri and reached there at about 2:30 P.M. He saw Appellant Nirmal present in the office of Inspector Pankaj Sood. IO Inspector Pankaj Sood informed him that their *Munim* Nirmal along with his three associates, namely, Avinash, Prakash @ Munna and Parvesh @ Sonu was involved in his brother's murder. The witness testified that Appellant Nirmal made a confessional statement to him and disclosed that his financial requirements had increased due

to his illicit relations with a girl. He started committing small thefts in the factory. In mid November, 2004 he got committed theft of a mobile phone and some cash from Ishwar Bansal's factory. Nirmal further disclosed to him that on 09.12.2004 in the evening Ishwar Bansal had informed him that utensils worth ₹ 3,25,000/- to ₹ 3,50,000/- were to be supplied to a factory at Okhla on 10.12.2004 for cash. He deposed that Appellant Nirmal disclosed that on the night of 09.12.2004 he (Nirmal) hatched a conspiracy with co-accused Avinash, Prakash and Parvesh @ Sonu that he would bring cash at about 5:00 P.M. to the factory and the workers would leave the factory at about 5:30 P.M. Nirmal further disclosed that he directed his co-accused to commit robbery and take away the cash at any cost. Nirmal further disclosed to him that payment for the utensils was delayed. He (Nirmal) contacted Appellant Prakash on his mobile phone which was attended to by his father and, therefore, he could not inform Prakash asking him not to commit the robbery on that day. He disclosed that his associates could not get the money and, therefore, they stabbed the deceased and bolted the office from outside.

32. The witness then deposed about the recovery of the mobile phone Nokia 3315 (belonging to his deceased brother) by Appellant Prakash from a *Tand* (a shelf near the roof used to store goods) of his room, which was seized by the police by memo Ex.PW-19/B. The same was stolen from the factory in mid November, 2004. Appellant Prakash also got recovered a gold ring from a *lota* (*metal pot*). The ring was identified by him as belonging to his deceased brother. The ring was seized by memo Ex.PW-19/C. The witness then deposed about the recovery of a gold chain at the behest of Appellant Nirmal from the first floor of his house No.A-9, Gali No.9, Lal Bagh, which was seized by memo Ex.PW-19/D. The witness then deposed about the identification of the HMT wrist watch in the TIP held by the learned Metropolitan Magistrate on 15.02.2005.
33. PW-24 SI Vimal Kumar carried out the initial investigation of the case. He deposed about the seizure of certain articles from the spot.
34. PW-26 ACP Prakash Khera, (Inspector/SHO at the time of the incident), carried out investigation after Ishwar Bansal succumbed to the injuries. He conducted the inquest proceedings Ex.PW-26/A-1 and sent the dead body for postmortem examination. He deposed that on 18.01.2005 PW-19 Dr. Suresh Bansal,

deceased's brother produced one sweater in the Police Station stating that it was worn by the deceased at the time of the incident. The sweater was seized by memo Ex.PW-19/A.

35. PW-29 Inspector Pankaj Sood is the main Investigating Officer. He deposed that on 19.01.2005 he was posted as Inspector Inter State Cell, Crime Branch, Chanakya Puri, Delhi. On the directions of the Commissioner of Police the investigation of the case was transferred to the Crime Branch and was assigned to him. He perused the case file and summoned Dr. Suresh Bansal and Anuj Bansal, brother and son of the deceased respectively at the place of occurrence i.e. A-73, Wazirpur Industrial Area at 5:00 P.M. He recorded the statement under Section 161 Cr.P.C. Anuj Bansal (besides other facts) informed him that when he and his aunt Dr. Bimla Bansal took his injured father to the hospital he found the ring and gold chain, which his father used to wear, were not on his person. He also informed that in the mid November, 2004 a Nokia 3315 handset of his father having mobile number 9891203018 was stolen from the factory. He inspected the spot and then along with the staff he visited CA-37A, Shalimar Bagh i.e. house of Ravi (PW-12), the former driver of Ishwar Bansal. On inquiry, he (PW-12) informed that on 18.01.2005 the Appellant Nirmal met him in Wazirpur Industrial Area. Nirmal took him (Ravi) to his house. After taking liquor, Nirmal disclosed to him about the incident. Inspector Pankaj Sood testified that he directed the police staff to search for Nirmal at his house i.e. A-9, Gali No.9, Lal Bagh Delhi and at other places. On 31.01.2005 he, with ASI Dharamvir and another police personnel reached the house of Nirmal at 10:30 A.M; he was interrogated but he did not cooperate. He took Nirmal to his office at Chanakyapuri where he interrogated and confronted him with the statement made by Ravi (PW-12), the former driver of Ishwar Bansal. Nirmal broke down and told him the true facts by confessing his guilt before him. He arrested him at about 2:30 P.M. by arrest memo Ex.PW-20/B. Dr. Suresh Bansal (PW-19) reached the Crime Branch office at 2:45 P.M. He informed Dr. Suresh Bansal about arrest of Appellant Nirmal and his having confessed his guilt. Appellant Nirmal made a confession in the presence of Dr. Suresh Bansal which was reduced into writing by memo Ex.PW-28/A. The IO then deposed about the arrest of Appellants Prakash @ Munna and Avinash at about 4:00 P.M. by memos Ex.PW-28/F and PW-28/G respectively.

He testified that Appellant Avinash made a disclosure statement Ex.PW-29/D and Prakash @ Munna made a disclosure statement Ex.PW-28/E. Dr. Suresh Bansal also reached Central Market. He along with police staff, Appellant Prakash and Avinash (as also Appellant Nirmal) reached house No.WZ-363, Village Wazipur Delhi. Appellant Nirmal was left in the vehicle. Appellant Prakash and Avinash led the police party and Dr. Bansal at their house on first floor. Prakash assisted in recovery of the mobile phone from underneath the clothes from a *Tand* (a shelf near the roof to store goods). The said mobile phone Nokia 3315 was identified by Dr. Suresh Bansal to be belonging to deceased Ishwar Bansal and stolen from the deceased's factory in November, 2004. The mobile phone was switched off. He opened the mobile phone and took out the SIM card from it. The SIM card was issued by Airtel. Appellant Prakash disclosed its number as 9818127376. He placed the said SIM in the same mobile, sealed it with the seal of PS and seized the same by memo Ex.PW-19/B. Appellant Avinash then got recovered a gold ring lying in a *lota* from the left side of the *tand*, which was also sealed and seized by memo Ex.PW-19/C. He deposed that mother of Appellant Avinash and Prakash was available, but she refused to sign the recovery memos.

36. PW-29 testified that Appellant Nirmal then took the police party and the complainant Dr. Suresh Bansal to his room on the first floor at A-9, Lal Bagh. Nirmal opened the door and produced a gold chain from a brass glass lying among the utensils underneath the cot. The gold chain was identified by Dr. Suresh Bansal as belonging to the deceased and having been gifted by him to the deceased 10-15 years back. The police party was sent to Kankhal, Haridwar in search of Appellant Parvesh @ Sonu. Parvesh @ Sonu, however, was not available at Kankhal and was ultimately arrested on 03.02.2005 from his house N-9/C-1, Ram Lila Ground, Lal Bagh at 1:30 P.M. Appellant Parvesh was brought to the Crime Branch office and was confronted with Avinash. At that time Appellant Parvesh was wearing the wrist watch which was identified by Avinash to be the part of the property removed from the deceased. The wrist watch was seized. On interrogation, Appellant Parvesh made a disclosure statement Ex.PW-28/P and led the police party to the shop of Manoj Sharma and took out a polythene bag from *Tand*. On checking the polythene bag two knives wrapped in

an old English newspaper were recovered. One was a dagger and the other was a *buttondar* knife.

37. When examined under Section 313 Cr.P.C., the Appellants denied the incriminating evidence produced by the prosecution and pleaded false implication. Appellant Prakash and Avinash pleaded *alibi*. They examined Sunil Kumar Mishra (DW-1) in their defence to prove that the two Appellants worked as Peon in the office of Rainbow Security and Detective Services at Noida in the month of November and December, 2004. Office used to open at 8:00 A.M. and the closing time of the office was 8:00 P.M. – 9:00 P.M.
38. By impugned judgment, the trial court believed the extra judicial confession allegedly made by the Appellant Nirmal to Ravi (PW-12), incriminating all the Appellants. The trial court found that the Appellants had entered into a criminal conspiracy to do illegal acts in furtherance of which they committed Ishwar Bansal's murder and held that the recoveries of the mobile phone with the IMEI number 351479600619374/0 containing SIM number 9818127376 from Appellant Prakash, gold ring from Appellant Avinash, gold chain from Appellant Nirmal and HMT Swarna wrist watch, knife and a dagger from Appellant Parvesh @ Sonu were proved. The Appellants were convicted and sentenced as noticed in the preceding portion of the judgment.
39. We have heard Mr. R.K. Singh, learned counsel for the Appellant Avinash Kumar @ Sanjay, Mr. Ajay Verma, learned counsel for the Appellants Prakash and Nirmal Kumar, Ms. Rekha Aggarwal, learned counsel for the Appellant Parvesh, Mr. Lovkesh Sawhany, learned Additional Public Prosecutor for the State and Mr. Sumeet Verma, learned counsel for the Complainant and have perused the record.
40. There is no direct evidence in the case. The prosecution case squarely rests on circumstantial evidence. The circumstances relied upon are:-
  - (a) The extra judicial confession made by the Appellant Nirmal to PW-12 Ravi.
  - (b) Recovery of a gold ring, a gold chain and HMT *Swarna* wrist watch from Appellant Avinash, Nirmal and Parvesh respectively.
  - (c) Recovery of a *buttondar* knife and a dagger at the instance of Appellant Parvesh.

(d) Recovery of Nokia 3315 mobile phone having SIM number 9818127376 at the instance of Appellant Prakash and other articles from the three Appellants mentioned earlier and the call details in respect of the phone (SIM) number 9818127376 from Bharti Airtel (Ex.PW-14/A) and phone (SIM) number 9891203018 of Nokia 3315 from Idea Cellular Ltd. (Ex.PW-25/A) respectively to show that there was meeting of minds amongst the Appellants.

41. We shall deal with the circumstances one by one.

(A) **EXTRA JUDICIAL CONFESSION MADE BY APPELLANT NIRMAL**

42. It is not in dispute that Ishwar Bansal sustained stab injuries in his abdomen on 10.12.2004 evening. He was admitted to the hospital at about 06:50P.M. He succumbed to the injuries the same evening.

43. According to the prosecution Appellant Nirmal met PW-12 Ravi on 18.01.2005 at about 5:00 P.M. and took Ravi to his house and made an extra judicial confession of having committed robbery and the murder of Ishwar Bansal on 10.12.2004 in conspiracy with the other Appellants. PW-12 Ravi deposed that the extra judicial confession was made after Nirmal took some liquor while he (Ravi) gave him company with a cup of tea.

44. It is urged by the learned counsel for the Appellants that an extra judicial confession is a weak type of evidence. (*Jagta v. State of Haryana, 1974 (4) SCC 747*). An extra judicial confession to be relied by the Court to base conviction of an accused must be true and voluntary (*State of Rajasthan v. Raja Ram, 2003 (8) SCC 180*) and that a confession made under the influence of liquor cannot be said to be voluntary (*C.K. Raveendran v. State of Kerala, 2000 (1) SC 225*).

45. It is contended on behalf of the Appellants that it is highly improbable that after more than a month of the incident Nirmal would blurt out an extra judicial confession to the driver of his previous employer knowing fully well that he could disclose the same to the deceased's family.

46. On the other hand, it is contended on behalf of the State / Complainant that the Court cannot start with a presumption that extra judicial confession is a weak type of evidence. It is urged that the extra judicial confession if proved to be true and voluntary can be the sole basis for conviction of an accused. Learned counsel for

the complainant places reliance on *Raja Ram (supra)*. Learned counsel for the complainant tried to distinguish *C.K. Raveendran (supra)* where the confession made after consuming liquor was not relied upon on the grounds that in the cited case the accused as well as the witness had consumed liquor and both were drunk whereas in the present case only the maker of the confession consumed liquor.

47. On behalf of the State reliance is placed on *Sansar Chand v. State of Rajasthan, 2010 (10) SCC 604*, to contend that an extra judicial confession is not only proved to be true and voluntary but is also corroborated by several important pieces of incriminating evidence like the recovery of stolen property i.e. mobile phone, a gold ring, a gold chain and an HMT *Swarna* wrist watch from the Appellants and most importantly the call records which unerringly point out that there was a conspiracy amongst the Appellants and in pursuance of the criminal conspiracy Ishwar Bansal was done to death with the purpose of robbery.
48. In a Division Bench judgment of Himachal Pradesh High Court in *Nirmal Singh v. State of Himachal Pradesh, 1987 CrL LJ 1644*, where the incident took place on 22.08.1983, the confession made after a lapse of two weeks of the incident without any plausible ground was held to be unconvincing. Para 22 of the report is extracted below:-

*“22. Now coming to the so-called extra judicial confession alleged to have been made by the appellant, we are again constrained to remark that the learned trial Judge ignored the very basic principles and guidelines governing the proof of confession while jumping at his conclusion that the appellant had actually and voluntarily confessed his guilt before Antar Singh (PW6), Chunan Singh (PW 5) and Hem Raj (PW 4). It need not be emphasised that a confession is required to be proved like any other fact and the standard of proof is the same as of any other fact in a criminal trial. The value of evidence of a confession would depend upon the veracity of the witnesses before whom it is alleged to have been made. The position of the person to whom the confession is alleged to have been made in relation to the person making the confession, the time lapse between the occurrence and the making of confession and the circumstances in which the confession is alleged to have been made are some of the relevant factors which need to be taken into account while appreciating such evidence. Another factor which cannot be ignored in this connection is the normal human psychology that a man, unless he is a hardened criminal, after the commission of a grave offence especially murder, has a natural tendency to unburden*

himself and share his terrible secrets with somebody else. Given time to ponder over, the fear of the consequences of his conviction may start acting in restraint of his natural impulse to confess. With the passage of time also this desire to confess may evaporate. Another surprising fact revealed by experience, and that should always be borne in mind, is that in our country extra-judicial confessions are generally introduced in evidence only when there is no direct, cogent and reliable evidence available to connect the accused with the crime. It is of very rare occurrence that evidence of confession is adduced when proof of accused's involvement in the offence is otherwise satisfactory. There is no plausible explanation as to why this impulse to confess should be stronger in so-called blind cases only.”(emphasis supplied)

49. There is no dispute about the proposition of law held in the catena of judgments including the *State of Rajasthan v. Raja Ram (supra)* and *Sansar Chand v. State of Rajasthan (supra)*, relied upon on behalf of the State. The Courts in this country have considered an extra judicial confession to be a weak type of evidence on the premise that every guilty person has an instinct to escape the law and, therefore, is unlikely to blurt out the wrongs committed by him in the past. The Courts have consistently emphasized that an extra judicial confession has to be proved like any other evidence; it depends upon the veracity of the witness to whom it has been made and the Court must be satisfied that it is true and voluntarily.
50. We are not inclined to reject the extra judicial confession merely because Appellant Nirmal had consumed liquor as there is nothing on record brought in the cross-examination to show that the Appellant was so drunk as to affect the voluntary nature of the confession, particularly, when as per PW-12 Ravi, he did not take liquor (though offered to him).
51. As stated earlier, in this case the incident took place on 10.12.2004 whereas the extra judicial confession is alleged to be made on 18.01.2005 i.e. after lapse of more than a month. It is highly improbable that after such a lapse of time Appellant Nirmal would have a desire to unburden himself and share his secret with somebody else. PW-12 Ravi used to work as a driver with deceased Ishwar Bansal and was rendered jobless because of the closure of the factory. It has to be borne in mind that normally, a driver is considered to be close to the master as well as to the members of the master's family. It is unlikely that a former co-employee would make an extra judicial confession to a driver knowing fully well that it could be disclosed to the deceased's family. As observed in *Nirmal Singh*

(supra) the desire to confess evaporates with the passage of time. Though, according to the prosecution an extra judicial confession has been corroborated by the recovery of the stolen property, particularly, the mobile phone and the call details. However, we are not inclined to believe the recovery of the stolen property except the mobile phone to which we shall advert a little later. The call details are also not of much importance as no inference can be drawn that a number of calls were made by Appellant Nirmal to Appellant Prakash.

52. The investigation of this case was with the PS Ashok Vihar from the date of the incident i.e. 10.12.2004 upto 18.01.2005. The investigation was ordered to be transferred to the Crime Branch on 19.01.2005 and was assigned to Inspector Pankaj Sood. It is very interesting to note that he immediately proceeded to the residence of Ravi. Ravi was available right in his house and he disclosed about the confession made by Appellant Nirmal to the IO.
53. Inspector Pankaj Sood might have preferred to approach PW-12 Ravi as he took the goods to the Dimension Overseas and Ishwar Bansal was murdered while he along with Appellant Nirmal was away for delivery of the utensils consignment. Inspector Pankaj Sood deposed that he deputed his staff to search out Nirmal at his residence and elsewhere. It is very strange that Inspector Pankaj Sood is silent about the efforts made by him to contact Appellant Nirmal, let alone to apprehend him when he became a suspect on the basis of Ravi's statement recorded by the IO on 19.01.2005. In the circumstances, it is doubtful that any extra judicial confession was made by Appellant Nirmal to PW-12 Ravi.

**(B) RECOVERY OF A GOLD RING, A GOLD CHAIN AND HMT WRIST WATCH SWARNA BELONGING TO THE DECEASED FROM APPELLANTS AVINASH, NIRMAL AND PARVESH RESPECTIVELY.**

54. As stated earlier, the stabbing incident took place in the factory premises of Ishwar Bansal on 10.12.2004 in the evening resulting into his death the same evening in the hospital. According to the prosecution version a gold ring, a gold chain which belonged to the deceased and an HMT Swarna wrist watch which was handed over by PW-18 Dr. Suresh Bansal to the deceased (for repair) were found missing and were ultimately recovered from Appellants Avinash, Nirmal

and Parvesh on 31.01.2005 and 03.02.2005. The FIR was recorded on the basis of rukka sent by PW-9 ASI Rohtash Singh. The endorsement Ex.PW-9/A on the DD No.21 stated that no eye witness was available when ASI Rohtash Singh reached the hospital. PW-29 Inspector Pankaj Sood testified that Anuj Bansal informed him on 19.01.2005 that while his injured father was being removed to the hospital he found the gold ring and the gold chain which his father used to wear were not on his person. Thus, immediately family members of the deceased Ishwar Bansal became aware that two valuable pieces of jewellery worn by the deceased were missing. Yet, the statement with regard to the missing jewellery of Anuj Bansal was recorded only on 19.01.2005. Similarly, PW-19 testified that he had given a wrist watch HMT *Swarna* (with white dial and golden chain) for getting it repaired to Ishwar Bansal a day prior to the incident. It was natural for Dr. Suresh Bansal to have looked for the said wrist watch at least after Ishwar Bansal succumbed to the injuries to assess if robbery was the cause of the deceased's murder.

55. It has emerged from the testimony of PW-10 Anuj Bansal and PW-19 Dr. Suresh Bansal that after *Tervi Ceremony* the family members sat together to analyse as to how the incident had taken place. PW-19 stated that they recollected that Ishwar Bansal used to wear a gold chain which was gifted by him ten years back and a gold ring on which letter 'I' was engraved in letter 'C'. The *Tervi Ceremony* might have taken place on 22.12.2004 or 23.12.2004. We are not inclined to believe the version as given by PWs 10 and 19. In fact, in Hindu mythology after the cremation and before *Tervi Ceremony* the family members sit for condolence. Perhaps this could have been the best time when the deceased family, particularly, his son and the brother (PW-10 and PW-19) would have tried to reconstruct the events leading to deceased's murder. Thus, PWs 10 and 19 would have definitely known that some valuables consisting of a gold chain, a gold ring and an HMT wrist watch were missing on 12-13.12.2004. Assuming for the sake of arguments that the family sat together after the *Tervi Ceremony* which might have taken place on 22 or 23.12.2004 the family would have been aware of the stolen articles on 23-24.12.2004. However, the record shows that the statement with regard to the missing articles was recorded by the IO only on 19.01.2005.

56. It is urged by the learned APP that the deceased's family was not satisfied with the investigation which is why some representations were made to the Police Officers resulting into transfer of the investigation to the Crime Branch. Obviously, if a father or brother is brutally murdered and the local police fail to get any clue, the victim's relatives are bound to approach senior police officers. It is not the version given by PWs 10 and 19 that their statements were not recorded by the SHO, PS Ashok Vihar, who took up the investigation after the case was converted to one under Section 302 IPC. Thus, disclosing the theft of the recovered items for the first time on 19.01.2005 i.e. after a period of 38 days of the incident raises strong suspicion that the articles recovered might have been planted on the Appellants.
57. PW-19 Dr. Suresh Bansal, PW-28 ASI Dharamvir Singh and PW-29 Inspector Pankaj Sood are the witnesses to the recovery of the gold chain in pursuance of the disclosure statement made by Appellant Nirmal. PWs 19 and 29 are the witnesses to the recovery of the gold ring at the instance of Appellant Avinash on 31.01.2005 and HMT *Swarna* wrist watch from Appellant Parvesh on 03.02.2005. It is true that there is no legal requirement that an independent witness must be joined for effecting a recovery in pursuance of Section 27 of the Evidence Act (*State v. Sunil* (88) 2000 DLT 260). However, we are not inclined to believe the recovery of the gold ring, gold chain and HMT *Swarna* wrist watch at the instance of Appellant Avinash, Nirmal and Parvesh respectively as the stolen property was disclosed after a lapse of 38 days and there is every possibility that the articles might have been planted on the Appellants.

**(C) RECOVERY OF A BUTTONDAR KNIFE AND A DAGGER AT THE INSTANCE OF APPELLANT PARVESH**

58. Appellant Parvesh was arrested from his house in Lal Bagh on 03.02.2005. According to the prosecution after he was brought to the Crime Branch office and interrogated, he made a disclosure statement Ex.PW-28/P and led the police party to the Photo Studio of PW-13 Manoj Sharma. Appellant took out a polythene bag from the *Tand*, the words *Shivam Garments* was printed on the said polythene and on checking the packet, the IO discovered two knives i.e. a dagger and a *buttondar* knife. PW-13 from whose Photo Studio the packet containing the knife was recovered, did not support the prosecution version. The witness was

confronted with his previous statement from portions 'A to A' to 'F to F'. We would have believed the recovery of the knives in spite of PW-13's not supporting the prosecution version but for our conclusion that the stolen property appears to have been planted on the Appellants. Otherwise also the recovery of the buttondar knife Ex. P-1 and the dagger Ex. P-2 is inadmissible in evidence as no blood could be detected on the dagger Ex.P-2 whereas *buttondar* knife Ex. P-1 was found to contain only human blood. In *Keshav v. State of Maharashtra*, 2008 (1) Crimes 88 (SC) it was held that the discovery in terms of section 27 of the Evidence Act would be admissible in evidence provided the recovery was of a fact that was relevant to connect the same with the commission of the crime. Keeping of a weapon at the instance of an accused which has no nexus with the cause of death of the deceased is inadmissible in evidence. Since the *buttondar* knife Ex.P-1 and the dagger Ex.P-2 could not be connected as the same did not contain the blood group of the deceased, the same would not be admissible in evidence. Thus, this circumstance even if taken as proved, does not help the prosecution. In *Mani v. State of Tamil Nadu, JT (2008) (1) SC 191* it was held by the Supreme Court that the discovery is a weak evidence and cannot be wholly relied upon and conviction for a serious offence like murder cannot be based simply upon discovery of any fact.

**(D) RECOVERY OF MOBILE PHONE NOKIA 3315 WITH SIM NUMBER 9818127376 AND CALL DETAILS OF THE TWO TELEPHONES**

59. It is urged by the learned APP that recovery of mobile phone Nokia 3315 and use of its SIM card by Appellant Prakash shows the conspiracy between the Appellants to commit the crime and this circumstance by itself is sufficient to uphold the judgment of the trial court.
60. It is proved on record that two mobile handsets (including Nokia 3315 bearing IMEI No. 351479600619374) were purchased in the name of Anuj Bansal from M/s. Shiv Shakti Telecom on 13.08.2003 by memo Ex.PW-19/A. PW-19 who proved the receipt was not cross examined on purchase of mobile phone. Thus, it is established that Nokia 3315 handset bearing IMEI No. 351479600619374 containing SIM number 9818127376 belonged to the deceased Ishwar Bansal.

61. PW-10 Anuj Bansal deposed that in mid November, 2004 his father's mobile phone bearing number 9891203018 make Nokia 3315 was misplaced and was stolen by someone from the factory. After searching the mobile for a couple of days, his father lodged a complaint with the police and received a duplicate SIM. The prosecution has not placed on record any missing report or even any complaint to the service provider i.e. Idea Cellular Ltd. to show that the handset was stolen along with SIM card. We would advert a little later whether telephone number 9818127376 really belonged to Appellant Prakash or was recovered from him. It is, however, established from the call details Ex.PW-14/A that a call was made on telephone 9818127376 IMEI number 520424806094410 on 16.11.2004 at 09:42 A.M. from telephone number 27372430 installed at the factory of the deceased bearing address A-73, Wazirpur Industrial Area. Another call was made from the godown on 16.11.2004 at 12:28 noon. Yet another call was made from the factory on that very day at 2:39 P.M. It is contended that the Appellant Nirmal made a disclosure statement to the effect that in mid November, 2004 at about 9:30 A.M. he made a call to Munna (Parvesh) at his mobile phone to reach the factory (to commit theft of a mobile phone and cash kept by Ishwar Bansal in the drawer). It is urged that the part of the disclosure statement regarding the call from the mobile phone number 9818127376 recovered from the Appellant Prakash on the said date and time is admissible in evidence as this fact was discovered later on by the call details Ex. PW-14/A obtained from Bharti Cellular Limited.
62. As per the disclosure statement a call was made by Appellant Nirmal on 10.12.2004 to Appellant Munna at number 9818127376 from the godown's landline number 27373444 which fact is also discovered from the call details Ex.PW-14/A. Similarly, making of a call by Appellant Nirmal at about 5:00 P.M. from PCO belonging to PW-16 Anil Kumar having number 26812628 to Appellant Prakash's number 9818127376 was discovered from the call details and these parts of the disclosure statement are accordingly admissible in evidence.
63. We have perused the call records. It is true that aforesaid calls were made on the aforesaid date and time to number 9818127376 which was allegedly recovered from Appellant Prakash. However, no evidence was led by the prosecution to show that these call details were collected by the police after the date of making of

the disclosure statement by Appellant Nirmal on 31.01.2005. In this view of the matter, there is no discovery of any fact and the portions of the disclosure statements aforesaid are not admissible in evidence under Section 27 of the Evidence Act.

64. It is also established on record that the SIM card number 9891203018 was being used in the deceased's handset on 16.11.2004 till 1:30 P.M. and the SIM card was put in the another handset which was using SIM number 9818127376 from 16.11.2004 to 19.11.2004. A SIM card continued to be used on the handset which was being used on the number 9818127376 alleged to be belonging to the Appellant Prakash. It is quite intriguing to note that the IO botched up the investigation completely; except for the alleged recovery of the SIM bearing number 9818127376, no evidence was collected by the prosecution that this SIM was ever allotted to Appellant Prakash. Rather, evidence was produced to show that in July, 2005 number 9818127376 was allotted to one *Harish Chander*. There were number of calls outgoing and incoming on phone number 9818127376. Even if the prosecution was unable to get the details as to who was allotted this number by Bharti Cellular services, the recipient of the calls from 9818127376 and the makers of the call to 9818127376 could have been examined by the prosecution to establish the identity of the person who was using this SIM card. Unfortunately, it has not been done by the prosecution. Similarly the prosecution did not make any effort to record statements of the persons who were called by Appellant Prakash after he allegedly committed theft of the deceased's mobile from his factory on 16.11.2004. Important pieces of evidence were thus abandoned by the prosecution for the reasons best known to it.
65. Assuming that the recovery of the handset Nokia 3315 bearing IMEI No.351479600619374/0 and the SIM card number 9818127376 as proved from the Appellant, what can be inferred is that the stolen handset belonging to the deceased Ishwar Bansal was being used for some time by Appellant Prakash. No report of theft of mobile number 9891203018 and handset Nokia 3315 was lodged with the police and the Appellants Prakash and Nirmal were not tried for the offence of theft of the said mobile phone. Thus, the use of the stolen mobile phone by Prakash (even if the recovery from him is believed) is of no consequence. The only evidence produced by the prosecution is that one call was

made in the morning by some person from the godown telephone number 27373444 to Appellant Prakash and then perhaps Nirmal made a call from PCO booth number 26812628 to Appellant Prakash on the same day at 4:59 P.M.

66. In our opinion, there are too many gaps in the prosecution version. From these stray acts no inference of a criminal conspiracy to commit an illegal act of robbery and murder of Ishwar Bansal can be drawn against any of the Appellants. It is true that direct evidence of hatching a conspiracy by the conspirators is seldom available; at the same time, indirect evidence has to be clear, cogent and must show that there was meeting of minds for a particular purpose.
67. It is well settled law that where the prosecution case is based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must, in the first instance, be fully established; the circumstances should be of definite tendency unerringly pointing out towards the guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probabilities the offence was committed by the accused and none else and that the circumstances established must be incapable of explanation of any other hypothesis other than the guilt of the accused. (*Hanumanth Govind Nargundkar v. State of M.P*, AIR 1952 SC 343 and *Padala Veera Reddy v. State of A.P.*, AIR 1990 SC 79).
68. The circumstances of placing certain calls from the mobile phone belonging to the deceased and from the factory of the deceased to the mobile of Appellant Prakash, even if accepted, do not lead to any conclusion that the Appellants entered into conspiracy and committed the offence of robbery and murder.
69. We are conscious of the fact that an accused cannot be acquitted simply because of some defects in the investigation carried out by the investigating agency designedly or because of negligence, the Court is required to examine the evidence *de hors* such omission to find out whether the said evidence is reliable or not and is sufficient to bring home the guilt of the accused or not. (*Paras Yadav v. State of Bihar*, 1999 (2) SCC 126). In this case there are not only lapses on the part of the investigating agency but the evidence produced is too insufficient to bring home the guilt of the accused beyond the shadow of reasonable doubt. The

evidence produced simply creates some suspicion against Appellants Nirmal and Prakash. Suspicion, however strong, cannot take place of proof.

70. It seems that the investigating agency shuffled through the call details of the mobile phone belonging to the deceased and somehow came to the conclusion that anybody using the said mobile phone was the author of the crime.
71. In our view, the prosecution has failed to establish its case against the Appellants beyond the shadow of reasonable doubt. The Appeals, therefore, have to succeed. Accordingly, we set aside the judgment of conviction and the order on sentence in respect of the Appellants. The Appellants are acquitted of the charges and are ordered to be set at liberty.
72. The Appeals are allowed in the above terms. The appellants shall be released forthwith.

**(G.P. MITTAL)**  
**JUDGE**

**(S. RAVINDRA BHAT)**  
**JUDGE**

JULY 12, 2011  
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