

IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON: 18.08.2011
PRONOUNCED ON: 31.10.2011

+	<u>CRL.A. 317/2006</u> DILSHAD @ KALE versus STATE THRU C.B.I	 Appellant Respondent
+	<u>CRL.A. 290/2006</u> ANIL versus STATE	 Appellant Respondent
+	<u>CRL.A. 972/2006</u> DEVENDER versus STATE	 Appellant Respondent
+	<u>CRL.A. 598/2008</u> RAVINDER S/O SH. KUMUDI versus THE STATE	 Appellant Respondent
+	<u>CRL.A. 1020/2008</u> RAVI KUMAR @ SONU @ CHANDU versus STATE	 Appellant Respondent

Presence: Ms. Reena Singh, Ms. Priyanka Singh and
Mr. Ajay Singh, Advocates for appellant in CrI. A.972/2006.
Ms. Purnima Sethi, Advocate for appellant in CrI.A.598/2008 &
1020/2008.

Mr. Narender Mann, Special P.P. for CBI along with Mr. Manoj Pant, Advocate for respondent - CBI.

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CORAM:

MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE G.P. MITTAL

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

MR. JUSTICE S. RAVINDRA BHAT

The present criminal appeals are allowed in terms of the separate judgment passed today in Criminal Appeal No.497/2006 titled Satinder @ Bawa v. State through C.B.I.
For detailed order please see the above mentioned judgment.


S. RAVINDRA BHAT
(JUDGE)


G. P. MITTAL
(JUDGE)

OCTOBER 31, 2011

RESERVED ON: 18.08.2011
PRONOUNCED ON: 31.10.2011

+	<u>CRL.A. 497/2006, CRL. M.A.3290/2011</u> SATINDER @ BAWA versus STATE THR.C.B.I.	 Appellant Respondent
+	<u>CRL.A. 317/2006</u> DILSHAD @ KALE versus STATE THRU C.B.I	 Appellant Respondent
+	<u>CRL.A. 290/2006</u> ANIL versus STATE	 Appellant Respondent
+	<u>CRL.A. 972/2006</u> DEVENDER versus STATE	 Appellant Respondent
+	<u>CRL.A. 598/2008</u> RAVINDER S/O SH. KUMUDI versus THE STATE	 Appellant Respondent
+	<u>CRL.A. 1020/2008</u> RAVI KUMAR @ SONU @ CHANDU versus STATE	 Appellant Respondent

Presence: Ms. Richa Kapoor, Advocate for appellant in Crl. A.497/2006.

Ms. Reena Singh, Ms. Priyanka Singh and Mr. Ajay Singh,
Advocates for appellant in Crl. A.972/2006.

Ms. Purnima Sethi, Advocate for appellant in CrI.A.598/2008 & 1020/2008.

Mr. Narender Mann, Special P.P. for CBI along with Mr. Manoj Pant, Advocate for respondent - CBI.

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CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE G.P. MITTAL

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

MR. JUSTICE S. RAVINDRA BHAT

% 1. The Appellants Satinder (@) Bawa, Devender, Dilshad (@) Kale, Ravi Kumar @ Sonu, Anil and Ravinder, (hereafter referred to by their names) impugn a judgment and order of the Additional Sessions Judge, Karkardooma Delhi, dated 18.03.2006, in SC No. 79/2005 whereby they were convicted for committing the offences punishable under Sections 396 and 400 IPC and sentenced to life imprisonment. They were sentenced to 7 years rigorous imprisonment with ₹ 1000/- fine for the offence under Section 201 IPC and in default of payment of fine, further simple imprisonment for one month. Further, for the offence under Section 450 IPC they were sentenced to 7 years rigorous imprisonment with a fine of ₹ 1000, and in default of payment of fine, to further undergo simple imprisonment for one month.

2. A dacoity was committed at House No.B-98, Lane No.7, Phase-10 Ganga Vihar, Delhi. The premises belonged to Sh. Devi Saran. The incident occurred in the intervening night of 22/23.09.1998 during which he was killed. FIR No.703/98 was registered in Police Station Gokul Puri on 23.09.1998 under Sections 452/307/324/34 IPC against unknown persons, on the written complaint of his wife. On completion of investigation, a charge-sheet was filed U/s 452/323/307/34 IPC against one Narender Gaur, a neighbor of the deceased. The said accused was discharged on 10.09.1999 by a learned Additional Sessions Judge. In the meanwhile, in another matter, (which was handed over to CBI by the this Court on 15.03.1999 - in respect of FIR No.606/98 of Police Station Gokul Puri). during investigation, the agency, i.e. CBI came to know about involvement of a gang led by Satender @ Bawa; at its request, this Court transferred further investigations in the present case to CBI by its order dated 14.12.1999. The CBI registered the present case under Sections 452/342/307/34 IPC on

11.01.2000 and after completion of investigation, a charge-sheet was filed under Sections 450/396/398/400/201/120B IPC and also under Sections 25/27 Arms Act r/w Section 120B IPC. 20

3. The present Appellants were charged on 03.05.2001 for committing offences punishable under Sections 450/396/400/201 IPC on the ground that they along with co-accused Yusuf (who was declared PO) in the night intervening 22/23.09.1998 committed house trespass by entering into House No. B-98, Lane No.7, Phase -10, Ganga Vihar, Delhi. The house belonged to Devi Saran, Constable/ Driver of Delhi Police; it was alleged that they committed dacoity. During the commission of the offence, they allegedly, murdered Devi Saran while they were armed with deadly weapons namely knives/ *chhuries* and *Katta*. It was alleged that they were part of to a gang habitually committing dacoity. It was alleged that after committing the offences, they disposed of their blood stained clothes, bathed and concealed weapons used in the commission of offence with a view to shield themselves and caused evidence to disappear. The prosecution examined 88 witnesses, apart from placing reliance on several exhibits, to bring home the Appellants' guilt. After considering the evidence, and hearing submissions, the Trial Court convicted the Appellants, and sentenced them to undergo imprisonment for the terms indicated in the earlier part of this judgment.

4. The Trial Court primarily relied on testimonies of PWs 1 and 4 to whom extrajudicial confessions about the incident were allegedly made; PWs 6, 7 and 9 were eyewitnesses to the incident, who saw the incident and the attack on Devi Sharan. The testimony of injured eyewitness PW-8 who was attacked during the incident, and was also the complainant, is important. The IO in the case was PW-87; the Trial Court relied on his testimony too.

Appellants' contentions

5. It is argued, on behalf of Satinder that none of the eyewitnesses, i.e. PWs. 6-9 could identify that Appellant. In this context, counsel relied on the deposition of PW-6 to the effect that he had not seen his father's assailant; the witness also expressed inability to say which of the accused was holding PW-8, who had been inflicted injuries by the attackers. The witness could not also say who had escaped from Brij Lata's room, on the night of the attack. Similarly, urged counsel, PW-7 stated that he could not identify specifically the three

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assailants who had over powered Phoolwati, PW-8, caught hold of her legs, gagged her and also caught hold of her hands. He further could not say who came out from Brijlata's room.

6. Counsel further submitted that PW 8 likewise was unable to identify the assailants who killed the deceased. She made contradictory statements regarding the identity of Satinder; earlier she stated that the Surinder, Deepak and Ravi had caught hold of her. However, subsequently she stated that Satinder came out from Brijlata's room. Counsel submitted that this witness even identified Deepak as the one who stabbed her when in fact he was not an accused in the present case. She acknowledged in cross examination that she could not identify the two or three persons who were involved in the attack. Furthermore, she is alleged to have seen four assailants; yet the prosecution argued that seven attackers were involved. Another aspect highlighted by the Appellants was that PW-8 deposed having seen Dilshad running away with a *katta*; yet, concededly she did not anywhere mention that it was used. Learned counsel argued that PW 9 Brijlata could not identify any of the accused and specify the roles played by them, even though she was injured in the incident. Therefore from the statement of the eye witnesses PW6, 7, 8 and 9 it is clear that none of them could specify or establish the identify the accused and especially of the assailants who killed the deceased or the role played by the accused; in fact they parroted each other, strongly suggesting that they had been tutored beforehand to implicate the accused.

7. Counsel relied on the decision of the Supreme Court in case titled as *Akilesh Hajam Vs. State of Bihar* 1995 (Suppl.3) SCC 357, to the effect that

"though it appears that in all probability the appellant may be the culprit but probabilities and moral convictions have no place or any role to play to convict a person in the absence of legal evidence. There is a long distance to be traveled between the expression "may be" and "must be". Howsoever strong the emotional considerations may be, but the same cannot take the place of proof."

8. It was submitted next that none of the eye witnesses could identify/specify the weapons carried by the accused, which considerably weakened the prosecution case. Counsel highlighted that the evidence and analysis by the Trial Court showed that there is a contradiction in the number of accused named and charged in the earlier case investigated by police. In the present case, the number of accused named and charged increased to seven. It

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was urged that the appellants were falsely implicated in the present case, apparent because this case pertained to the murder of a police official; also there was a property dispute between the deceased and his brother-in-law PW 41, another police official. The statement of PW 9 (wife of deceased), PW 38 (sister of deceased) and PW 41 (brother in law of deceased) regarding the ownership of property, on the part portion of the house where incident took place had been constructed, demonstrated this motive. Further, the fact that the earlier FIR (FIR703/98) was recorded on the statement of PW 8 was registered against PW 20 also established the property dispute. The present appellants were named after a period of over 1 ½ years, which was an unexplained delay, fatal to the prosecution case.

9. It was submitted that the evidence of PW-87 was that all the accused were arrested during the investigation of case RC 2 (S) 99/SIUT/SICT and on direction of this Court (in that case) the investigation - of present case- was handed over to CBI and case no. RC2 (S) 2000/SIUT2/SICI was registered on 11.1.2000. Counsel submitted that PW-87 could not even mention the date when Satinder, Dilshad and Ravi Kumar were arrested in the other case and when their disclosure statements were recorded. It was emphasized that the accused were already in police custody and were arrested in the present case after obtaining the permission of the court. PW-87, submitted the Appellants' counsel, could not remember the date when for the first time he came to know about the involvement of accused persons in the present case. However, he deposed having suspected the accused's involvement, in the case, before registration of the FIR, on 11-01-2000. The Appellants' counsel argued that the disclosure statement of Satinder was recorded (in the present case) on 10.03.2000 after two months of registration of case when they were already in the custody of CBI and the IO had suspicion about their role; in the crime.

10. It was next urged that the extra judicial confessions before PW-1 and P-4 are inadmissible and unreliable as the witnesses admitted that PW-1 was part of the gang of accused persons and thus himself a culprit. The counsel relied on the decision of this court, in *Harish Yadav and Ors. v. CBI*, 2007 (1) AD (Del) 703, in which the present accused persons were arrested, where it observed that the Court has to be satisfied that the extra judicial confession was made before a person of credibility so as to be safely believed and also that no time and even the date of occurrence were given by the witness to extra judicial confession.

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The Court in that case disbelieved the extra judicial confession which is in the same terms, in both cases. It was also emphasized that PW-4 had deposed in Court, that the accused had told him that they shot the police man whose house they had looted; however, no bullet injuries were found on the deceased. This threw a doubt on the veracity of the witness' entire testimony.

11. Dealing next with the refusal of the Appellants to participate in the TIP, it was urged that the application for Satinder's TIP was moved on 21.3.2000 and he refused TIP on the same date because he was already seen by the witnesses and his photographs was taken by the CBI. In fact the TIP of all the four accused persons i.e. Satinder, Devinder, Anil and Dilshad were done on same date i.e. 21.3.2000, which was two months after the registration of the present case. This delay was unexplained, and could not be held against the Appellant.

12. Counsel urged that the "pointing out" memo regarding the incident i.e. house of the deceased (as also the house of eye witnesses) pursuant to the disclosure statement of Satinder was done on 11.03.2000. This, however, was of no consequence as there was no evidence that he was taken to the place of incident with a muffled face. It was submitted in this case, the Appellant was already in the custody of the CBI before the present case was registered in January, 2000. Therefore no adverse inference could be drawn for refusal of TIP.

13. The recoveries of weapons of offence i.e. four *churris*/knives alleged to have been recovered at the instance of Satinder, in the year 1999 in the other case No. RC 2(S)/1999/SIUT/SICT could not have been used to implicate him. The evidence of recoveries of the *churries*/knife was inadmissible because they were never shown to the eye witnesses and were not even shown to the appellant and the same was disbelieved by this court in *Harish Yadav & Ors.* - i.e. the case where the statements were recorded. Further, argued counsel, expert medical expert opinion of PW 15 is against prosecution so far as fatal injuries No.5, 6 and 7 are concerned which according to the witness were stated to be the cause death and PW 15 had deposed that injury No.5,6,7,10,11,12,13 are spindle shaped injuries which can be caused by double edge weapon and thus not by the *churris* shown to him.

14. It was urged that the prosecution had blatantly sought to implicate the Appellants, falsely, because they are alleged to have made disclosure statement leading to recovery of articles, particularly murder weapons, which was highly improbable.

Contentions of the prosecuting agency, the CBI

15. The CBI submits that there was no occasion for the independent witnesses PW-6, 7, 8 and 9, to see the accused when they were taken for spot identification during the course of the investigation, as they had already sold the said house to one Shri Sushil, S/o Shri Dev Dutt. Therefore, an adverse inference may be drawn for refusal of the TIP by the Appellants. The CBI relies, in this context on the testimony of PW-6 that after performing the last rites of his father, the witness left the house of occurrence and after some days he had completely left that house.

16. It is next urged that PW-87 in his statement deposed that the accused Ravinder himself offered to point out the place of incident and led him (the IO) to crime scene. The witness did not prepare any document to the effect that accused himself offered to point out the place of incident. The owner of house at the place of incident or his son was present and he permitted ingress in the house of place of incident. There were two other witnesses present there at that time. The house, i.e. place of incident had been sold by the widow of deceased and she had left for her village.

17. In the pointing out memo dated 15.01.2000 of accused Anil and Dilshad, exhibited as EXPW34/D, it is argued that on reaching house of Devisharan situated in Gali No. 7, one Shri Shushil, s/o Shri Dev Dutt met the police; he said that he had purchased the house of deceased Devi Sharan few months previous to his date of deposition.

18. Learned counsel urged that the testimony of eye witnesses PW 8 Smt. Phool Wati, PW 6 Ajay Kumar, PW 7 Jitender Kumar and PW 9 Brij Lata clearly identified the accused. PW 8 Smt. Phool Wati had identified accused Dilshad @ Kale, Satender @ Bawa and Ravi as part of the group of gang along with Deepak, who had gone and conducted the attack, with the motive of robbery. Deepak, argued counsel for CBI, is not accused in the present case but was present in Court because he was an accused in the connected case. Due to passage of time and the trauma experienced by PW-8 due to loss of her husband in the incident and according to deposition of PW 23 Neeraj, her condition had deteriorated after the death of Devi Sharan, the initial mistake in identification was explainable; yet she correctly identified accused Dilshad @ Kale, Satender @ Bawa and Ravi Kumar later.

19. It was argued that PW -8 had named seven accused persons before the police but the IO had instead told her to name only four accused persons. As far as the remaining accused were concerned, her explanation is that due to passage of time, she was unable to identify them. Next, it was submitted that PW 6 Ajay Kumar, son of the deceased had also furnished particulars regarding the incident and even correctly identified all the accused. His detailed cross-examination by learned counsel for the accused could not shake his testimony. He also dismissed the theory of involvement of their neighbor Narender Gaur in the murder of his father. He was unsure about Harish and had identified him as being an accused in the present case although he is an accused in case No. RC2 (S)/99/SIC.1/New Delhi. It might have happened due to joint trial of case as long time had elapsed between the date of incident and the date of his deposition in Court. These, however, could not result in discarding his testimony. Next, it was urged that PW 7, the deceased's nephew was also present in the house on the day of the incident. He correctly identified all the accused, involved in the case and he did not identify Deepak and Harish Yadav, who were facing trial in the connected matter. Since evidence was being recorded in both the cases together, therefore, the two accused were also present in Court but he was specific in not identifying those two accused persons as assailants in this case. As regards the discrepancy between his testimony and that of PW-8, it is submitted that besides identifying all accused, the latter witness claimed to have seen Harish at the time of the incident but as per the version of the prosecution, he is not an accused in this case. The other accused were correctly identified by PW 7 and PW 6. PW 8 was able to identify accused Dilshad @ Kale, Satender @ Bawa and Ravi Kumar. PW 8 was under trauma and was not able to come to terms with reality as she had lost her husband and she had suffered a lot and such loss of memory was natural. Yet, in view of her identification in clear terms about the other accused, the court should consider her deposition, along with that of PW-6 and PW-7.

20. Counsel for CBI further submitted that the extra judicial confessions deposed to by PW-1 and PW-4, have a ring of truth, and should not be discarded. These witnesses would have had no occasion to go to the court and get their statements recorded U/s 164 Cr. PC in which they had stated that the accused had confessed before them to having looted the house of a police officer (deceased in this case), stabbed him and his wife and when the noise was

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raised, they ran away from the spot without carrying anything. No motive could be attributed for false implication.

21. It was further argued that all witnesses to the disclosures were independent public witnesses like Shri A.S. Mann, a Government servant, at the relevant time (examined as PW 30); Suraj Prakash (PW 32) and Pritam Singh (PW 34). The Appellants could not elicit anything from them, during cross examination to point to any motive to depose falsely. The CBI also joined the local witnesses at the time of search to evidence it; the search list was also signed by them. The initial version of Delhi Police as spoken to by SI Kanchan Lal was that PW 20 Narender Gaur, who was involved in this crime, was acquitted by the Court. According to PW 17 Dr. Sudhir, the portion of statement of Devi Saran Ex. P.17/B marked X to XI was written later, implicating PW 20 Narender Gaur. It was urged that PW 8 stuck to her version that she had told that there were 7 -8 assailants but the police recorded only about 4 assailants to dilute the case. Other witnesses have also supported her version. Under these circumstances, it is quite clear that local police did not conduct the investigation fairly, perhaps to shield the real offenders. Having regard to all the conspectus of circumstances, this court, submitted counsel, should affirm the findings of conviction recorded in the impugned judgment.

The Evidence

22. As noticed earlier, PW-20 Narender Gaur was implicated for the offence, as an accused, and made to stand trial. However, the prosecution could not, in that case, prove his guilt. In the meanwhile another Sessions case, involving dacoity was pending; the CBI, which was in charge of the investigation, was directed by this court, in another proceeding, to take over investigations in this case. PW-72 deposed having received information while on duty in the PCR, around 03-29 AM in the morning of 23-09-1998, about the incident. A wireless message was flashed; it was received by ASI Dineshwar Prasad PW-78, at 03:30 AM; this was recorded as Ex. PW-78/A and B. PW-71, a constable posted in the GTB hospital, mentioned receiving information that the deceased and his wife were taken to the hospital at around 04:00 AM; they were brought by their neighbours. He deposed that the deceased's wife, PW-8 told him that 6-7 people had trespassed into their house, and attacked her husband.

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as well as herself. PW-73 deposed to receiving a report (PW-43/C) from the Police Station, and having gone to the hospital to deliver it to HC Ram Kishen, along with Constable Subhash. He says that Ram Kishen handed over the *rukka* containing her statement, which was taken to the hospital, and registered as FIR. This document (Ex. PW-75/B) was recorded by HC Jagdish Prasad. PW-82 deposed that he received the wireless message at 03:36 AM about the trespass incident and attack, having gone to the spot, learnt that the injured were taken to GTB hospital, where he went to. The deceased was in the emergency ward; his wife too was injured in the attack; she said that the knife used in the attack was lying on the bed where she had slept. The witness mentioned that the knife was seized by him, after he went to the crime scene. PW-85 Rakesh deposed that he photographed the scene on the directions of SI Kanchan Lal. At a later stage, after the investigation was handed over to CBI, he went along with the CBI team to Pradeep's house, and interrogated him. The latter disclosed that a *desi katta* was given by Devender, which he lent to his cousin Sandeep. The CBI team went to Sanauli, conducted a search and recovered a *katta*; the seizure memo was produced as Ex. PW-37/B. The accused Ravinder was arrested from NOIDA, on 18-01-2001. This was sought to be supported by PW-37 Anis. The arrest of Ravinder was also spoken to by PW-30, A.S. Mann. He is also witness to the disclosure statement allegedly made on 27-01-2001, and the "pointing out" by that accused, of various places, as well as the crime scene. PW-34 deposed about Satinder's disclosure statement, on 03-03-2000.

Eyewitnesses

23. PW-6: Ajay Kumar, the deceased's son was present in the house at the time of the incident. He stated that at 2.30- 2.45 A.M, when he was sleeping, in a room near the kitchen, he heard his mother shrieking. He, and his cousin Jitender, (who was also sleeping near the kitchen), woke up and looked out of the window; they saw his mother with three accused. All of them had knives. Two of them were holding her leg, one struck her on her hips with the knife and did not remove it. On hearing their cries the accused ran, leaving the knife thrust in his mother's hip. When they ran towards the room (where his sister and his brother were sleeping), they saw three others run away with blood stained knives. Then they went to the room where his father was sleeping. They saw him standing by the side of the room, next to the wall. He was covered in multiple stab wounds. Another accused came out of this room,

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with a *katta* in his hand and he warned them that if they raised an alarm, he would kill them. PW-6 then tried to staunch a bleeding wound on his father's stomach, using his father's lungi which lay on the floor. They made him rest on the *charpai* and then went outside and raised an alarm. His *phupa* and the two tenants of his *phupha*'s house came first to their help, then two neighbours Visheshar and Jail Singh arrived, and moved Devi Sharan on to a *charpai* and took him to Kanti Nagar Bus Stand, from where they took him to Guru Tegh Bahadur Hospital, Shahdara. in a three-wheeler. His sister, one Shri Karanpal, and he went to the hospital in an auto rickshaw. On 23.9.1998, when he came back to his house, he discovered that the local police had recovered a knife, an iron rod, one bed sheet, and broken pair of Hawaii *chappals*. His mother had pulled out the knife from her hips and thrown it in the room, which was recovered later by the police.

24. The witness further deposed that his father expired on 3.10.1998, and a post mortem was conducted on his body. He identified all the accused but made an error in stating that Deepak had also been a part of the attack, whereas Deepak had been present in Court, for a connected Trial, and was not an accused in this case. He stated that during the time of the incident, his house was lit by a bulb. He also stated that his cousin Jitender's house was adjacent to his house and that he had not seen those who had attacked his father. He also stated that he could not specify which of the accused had held his mother, due to passage of time, neither could he specifically identify which of the accused he had seen running away from Brij Lata's room. Harish was shown to the witness, and he was asked whether he too was there in the house with the other accused; he replied in the affirmative. He could not identify which weapons had been held by each of the accused due to passage of time. He denied that his family had a dispute with his uncle regarding the plot adjacent to his house. He denied that he had been called from his village to identify the accused. He identified them for the first time in Court.

25. PW-7 Jitender Kumar was the deceased's nephew and was in the latter's house at the time of the incident. He deposed that he was sleeping near the kitchen where his cousin Ajay was sleeping as well. At about 2.30/2.35 AM, he heard his aunt screaming. He and Ajay woke up and knocked the door to the gallery (where she was sleeping); they looked through the window, and he saw that three persons had overpowered his aunt, and all three had knives.

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One man had gagged her mouth, another was holding down her feet, and a third was holding her hands. The man who was holding her hands was stabbing her on her hips with his knife. When they raised an alarm, all three ran towards the staircase. He and Ajay then entered the room where Brij Lata, Buntty and Lalit were sleeping. They saw the three other accused run out towards the staircase, with blood stained knives. Then they went to Devi Sharan's room, from where he saw another accused with a *Katta*, who threatened to kill them if they raised an alarm. He ran towards the staircase leading to the roof. He followed his cousin into the room and saw his uncle bleeding with multiple stab injuries, by wall. His cousin tried to staunch the stomach injury using a lungi that was lying on the floor. They took him out to the gallery and made him rest on the *charpai*. On hearing their cries, the tenants from the neighbouring house, came in to help. Another neighbour Jail Singh also came. His uncle told them to take him to the hospital. They took him on the charpai to Shanti Nagar Bus Stand, from where they took him to Guru Tegh Bahadur Hospital in a three-wheeler. He came back home from the bus stand, but Ajay, Brij Lata, Phoolwati, Karan Pal, and one Masterji accompanied them to the hospital. He said he could see all the accused since the lights were on at the time of commission of the offence. In cross examination, he stated that his aunt had removed the knife from her hips. There were two bulbs that switched on at the time of the incident; one in Devi Sharan's room, and the other in the gallery where his aunt had been sleeping. He says that the CBI recorded his statement twice. He also deposed that he could not attribute specific weapons to each of the accused but could remember that most of them had knives and one had a *katta*, and that he could not specifically identify which one of them had attacked his aunt.

26. PW-8 Phoolwati, is the deceased's wife. She deposed to sleeping in the gallery, and that her husband was sleeping in a room adjacent to her room. At about 2.30 AM, three accused persons entered the house; one of them stabbed her on the hips, another gagged her mouth, and a third had held her legs. On being stabbed she screamed, and Ajay and Jitender came towards her. On seeing them, the three accused ran away and left the knife thrust into her hips. She pulled it away and threw it on the floor and they went to her husband's room. There, she saw him lying on the floor with multiple stab injuries. The wall and the floor were covered in blood. When she was entering the room, another accused came out with a *Katta* and threatened that if they raised an alarm, he would kill them. They went to the room where

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Brijlata, Lalit and Bunty were sleeping; three accused ran away with blood stained knives towards the staircase. The witness identified Dilshad @ Bawa as the accused armed with the katta, and also identified Satinder @ Bawa, Deepak and Ravi. She deposed that Ravi and Deepak had stabbed her, and she had seen Satinder come out of Brijlata's room. She supported PW-7 and PW-6 about taking Devi Sharan to the hospital, and stated that she, along with her daughter, son, Karanpal and Masterji went to the hospital; she was given first aid, after which she came back home on 23. 9.1998. Her husband died after ten days. She said that in her statement to the IO she categorically mentioned about involvement of seven people, but the IO had insisted that she should only mention about four accused. She also deposed to never implicating Narender Gaur in the crime. However, she stated that on the night of occurrence, he had been sitting on her staircase. She also deposed that she was unable to identify two-three of the accused due to the passage of time and also as she was shocked and disturbed by the event. She was cross examined by the CBI where she admitted that the knife taken out by her from her hips, was taken away by the police officials of PS Gokul Puri and she also admitted to have stated to CBI that she was told by her nephew that one iron rod and one Hawai Chappal were left behind on the roof of the house by the assailants which were handed over to the local police. She did not remember whether her thumb impressions were taken on certain blank papers by local police but she was sure that local police did not read over the contents of her statement to her and it was the IO who had pressurized her to name only four persons as offenders; she did not name Narender Gaur as the offender or he was sitting on their staircase on the night of occurrence. She admits that due lapse of time, she could not identify 2/ 3 remaining persons who had assaulted them as because of occurrence, she was in great shock and disturbed state of mind.

27. PW-9, Brij Lata, the deceased's daughter deposed that she was sleeping in a room with her younger brother Lalit and her cousin Bunty. Her father was sleeping in the adjacent room and an electric bulb was switched on in her father's room. At about 2.30 AM, she heard some people enter her house and she heard her mother's screams. She tried to get out of her *charpai*, but one of the assailants grabbed her mouth and held a knife to her throat. She says that on hearing her mother's screams, Ajay and Jitender went to her, and the three assailants who were in that room, ran towards the staircase leading to the roof of the house. She saw that her

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mother had been stabbed on her hips, and the wound was bleeding. She saw her mother pull out the knife and throw it on the floor. They then went to her father's room. Another assailant carrying a katta was coming out of his room and he threatened them that if they raised an alarm, he would kill them, and then, ran towards the staircase. They went inside her father's room, and saw him sitting on the floor, bleeding. Her brother had tied a *lungi* around his wounds. Her father was crying, asking to be taken to the hospital. He had multiple stab wounds, the floor around him and his clothes were soaked in blood. Her brothers, her neighbor's tenants and her mother took him to Shanti nagar Bus Stand on a *charpai*, and then her mother, her elder brother Ajay, Bisheshar and Karan Pal took him in a two wheeler to GTB Hospital, Shahdara. After her father was admitted and her mother had received first aid, she and her mother were taken to the house of Khushi Ram in Shiv Vihar. Her mother had stated that there were seven assailants, but the police pressurized her into saying that there were only four assailants as otherwise the case would become too complicated.

28. PW-1 deposed to being approached by Satinder to be a member of his gang; he claimed to have met the accused. He gave details of the modus operandi of the accused. They used to assemble at the bank of a canal, and commit crimes in the locality of Mohalla No. 2. Satinder had given him a *katta*. During the looting of a person, he was commanded to point the *katta* at the person's neck. If the person used to raise an alarm, Satinder and Kale used to stab them. He says he had seen them stab people on three or four occasions. He deposed about two looting incidents that this gang had perpetrated and had been told about. In the first, he was told that they had looted a house in Ganga Vihar, which they had entered, in which lived a family of three, a couple and their son; all three persons were attacked, the man died and his wife and son sustained injuries. They looted an amount of about Rs. 20,000/- in cash, jewellery and bidi cigarettes. They told him that they escaped using the *nala* to put the police and dogs were put off trail. This loot was done with another person named Harish. Some of the accused had absconded to Vaishno Devi. After coming back from Vaishnodevi, ₹ 10, 000 of the loot was given by Satinder to Harish. After some days, they came back to his house, and told him about another house that they had looted the previous night from which they had had a narrow escape. He says that they had told him that they had gone to the house of a police man, and in the course of the looting they had stabbed the police man and his wife, and that

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some members of the family had woken up, raised an alarm in the street, and they had had to make their escape without taking anything from the house. Satinder had also told them that while they were escaping PW-1 jeeja Shaym had seen them, and they had threatened to kill him if he raised an alarm. One of the accused, Chandu, told him that during the commission of the crime, some blood had fallen on his shoes and clothes which he had thrown into the *nala* while escaping from the spot. He identified accused Dilshad as the secret informer who would tell the gang about where to loot next.

29. PW-1 then deposed that the accused Satinder had given him a country made pistol to dispose off/to sell as this *katta* had been used by him in several dacoities in and around Ganga Vihar. He refused, but Satinder threatened to kill him if he did not do so. He even identified the *katta* in Court. He said he came to the Court on his own and got his statement recorded under Section 164 CrPC in the year 2000 during the festival of Holi. He says that after he became a witness in this matter, the accused persons had threatened to kill him. Even Satinder's brother had threatened him. He further stated that in 2000, Satinder had brought CBI officials to his house and identified him as the man to whom he had given the *katta*. He (PW-1) then took the police to the house of the person to whom he had sold the gun, a person named Amit. The *Katta* was recovered from Amit's house. It was identified by the witness in court. He says that when the accused Satinder met him the second time, to tell him about the commission of the second dacoity, Harish was not with them, but a person named Ishu was with them. He claimed to have remained with Satinder's gang because of the threat extended by him. He said that on those occasions when they had stabbed people, accused Kale and Chandu had also been present. The *Katta* used to be with him on all the occasions. He stated that on the 20/25 occasions the accused persons had committed these crimes, but had never given him a share. PW-4 Kapil is the PW-1's brother. He reiterated his brother's account of the events with respect to the latter's involvement with the gang, the *modus operandi* of the gang, the extrajudicial confession made by Satinder to them about the attack on the house of a police man, about their uncle Shyam having seen them. He also said that after the attack, Kale and Satinder had hidden themselves in his house for two/ three days. He deposed that later, 4-5 CBI personnel had gone to his house, when he was alone and he was questioned about his

brother Pramod. They searched his house and found one iron rod (15 inches) and a vegetable cutting knife. He says that they used to use the iron rod for earthing. 33

Analysis & Reasoning

30. As may be seen from the previous discussion, the prosecution has relied on eyewitness testimony, identification in court, recoveries and extra judicial confessions allegedly made by the appellants, to PW-1 and PW-4.

31. Satender, Ravi Kumar, Ravinder and Dilshad are said to have been identified by PW-6, 7 and 8. Devender and Anil were seen by PW-6 and PW-7. It is noteworthy that all accused had not participated in the TIP. Though the three eyewitnesses, who claimed to have witnessed the incident (one of whom, PW-8, was seriously injured during it), deposed in their examination in chief, about the role(s) played by the accused, and even identified most of them in court, yet, in cross examination, they made damaging admissions.

32. PW 6 deposed that

"it is correct that I had not seen the person who had stabbed my father".

Later she said:

"I cannot tell which three of them were catching hold of my mother as with the passage of time I am unable to tell this. Similarly I cannot tell which of the three accused person came out and were escaping from the room of Brij Lata."

Further PW 6 wrongly identified Harish when in fact he was not an accused in the present case. The prosecution assertion that PW6 identified the accused properly or was able to identify each of the assailants who killed the deceased therefore, stands falsified.

33. PW 7 also could not identify the assailant who killed the deceased and failed to identify any of the accused and the roles played by them. The relevant portion of the statement of PW7 hereinbelow in cross examination is

"I cannot identify specifically and precisely those three assailants who had over powered my Mami Phoolvati, caught hold of her legs, gagged her mouth and also caught hold of her hands....nor I can say as to who were those who came out from the room of Kumari Brijlata and others."

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A careful reading of the deposition of PW-8 reveals that she too, was unable to identify the assailants who had killed her husband. She made contradictory statements regarding the accused's identity. In the first instance, she deposed that Surinder, Deepak and Ravi as the persons who caught hold of her and subsequently contrary to same she stated that Satinder as the person coming out from the room of Brijlata (PW9). Furthermore, PW-8 identified Deepak as the assailant who stabbed her, when in fact he (Deepak) was not even arrayed as an accused, in this case. In cross examination she said that:

"...due to lapse of time I could not identify 2/3 persons who had assaulted..."

PW-8, had only seen four assailants, and therefore the prosecution story that there were seven assailants is doubtful. Though PW-8 had deposed to having seen Dilshad running away with a *katta*, the fact that she says that she had seen only four assailants destroys the credibility of her story. Trial Court, in our opinion, overlooked the fact that according to PW-8's testimony, she had been stabbed and her husband had also been stabbed. This clearly showed that a *Katta* had not been used. Significantly, PW-15 who had conducted the postmortem had deposed that injuries 5,6 and 7 were sufficient in the ordinary course, to cause the death of a person; yet, on being shown the alleged weapon of offence in court, he had stated that the injuries could not have been caused by that weapon. As regards Brijlata (PW 9) the evidence shows that she could not identify any of the accused and specify the roles played by them. Therefore, from the statement of the eye witnesses PW6, 7, 8 and 9 it is clear that none of the eye witnesses could specify or establish the identify the accused and specifically of the assailant who killed the deceased or the role played by the accused.

34. Another aspect which the court has to take into consideration is that the two witnesses, who claimed to have seen the assailants, were sleeping; they were woken up by the screams of PW-8; PW-6 and PW-7 deposed seeing who were the attackers, because the room was lit. Now, the materials on record show that the premises were very small; the probability its being lit, as is deposed by the latter two witnesses, is very remote. The incident occurred in the early hours of the morning. The witnesses' deposition that two bulbs were lit, seems improbable, because it would not have been possible for anyone to sleep with a light or at least a powerful one, switched on, since it would have lit up the entire room (the entire premises in this case measured about 500 square feet). Even if there was a light, it would have been

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extremely weak. If such were the position, again, the CBI case of the possibility of identifying any assailant would have been slim. In any case, the assailants would not have switched on the light, or left it on, after entering the premises.

35. The court, in this case, is alive to the fact that the incident occurred quite some time, in September 1998, before the accused were arrested, and made to face trial, after 2000. All the accused refused TIP; two of them were identified by PW-8. As to the value of such identification, the Supreme Court, in *Suresh Chandra Bahri v. State of Bihar* (1995 Supp (1) SCC 80), said that it is well settled that substantive evidence of the witness is his evidence in the Court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial. In the decision reported as *Malkhansingh and Others v. State of M.P.* [(2003) 5 SCC 746] the Supreme Court stated that:

"It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade is a matter for the courts of fact to determine."

In *State of Uttar Pradesh v. Boota Singh and others* (1979 (1) SCC 31), the Supreme Court observed that the evidence of identification becomes stronger if the witness had an opportunity of seeing the accused not for a few minutes but for some length of time, in broad daylight, when he would be able to note the features of the accused more carefully than on seeing the accused in a dark night for a few minutes. In *Ramanbhai Naranbhai Patel and others v. State of Gujarat* (2000 (1) SCC 358) after considering the earlier decisions the Court observed:-

"It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and circumstances wherein the police is said to have given the names of the accused to the witnesses. Under these circumstances, identification of such a named accused only in the Court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in turn, relied upon as

earlier decision of this Court in the case of *State (Delhi Admn.) v. V. C. Shukla* (AIR 1980 SC 1382) wherein also Fazal Ali, J. speaking for a three-Judge Bench made similar observations in this regard. In that case the evidence of the witness in the Court and his identifying the accused only in the Court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eye-witnesses. It, therefore, cannot be held, as tried to be submitted by learned Counsel for the appellants, that in the absence of a test identification parade, the evidence of an eye-witness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case."

In the present case, the length of time which occurred, before the accused were arrested, and sent for TIP, and the nature of their identification in court, renders that circumstance to be a weak link, and not strong enough to implicate them, for the offence they were charged with. Furthermore, the incident occurred in the early hours of the morning, and in what can be termed, at best at a dimly lit place, when the eyewitnesses were bleary eyed, and jolted out of sleep. They could at best have formed a blurred impression about the attack, and the sequence of events which unfolded in front of them. The circumstances were insufficient to enable them to form a lasting impression about the identity of the assailants.

36. Now, as far as the extra judicial confessions made allegedly to PW-1 and PW-4 is concerned, it is apparent that the main witness (PW-1), by the prosecution's showing, was a partner in crime, with some of the accused. Before a court bases its findings, particularly on the testimony of such a witness, it would be useful to see that evidence by self confessed accomplices stands on a weak footing. In *Shamsher Khan v Govt of NCT of Delhi* 2000 (8) SCC 568, it was held that:

"If the testimony of PW 2 is believable, there can be little doubt that the appellant had caused explosive bombs to be manufactured and stored them in his house. But PW 2, Shahabudin, on the showing of the prosecution itself, is an accomplice and therefore we would seek corroborative materials to give assurance to us that the testimony is true, despite the inherent drawback of that witness."

A similar approach had been spelt out in a previous decision of the Supreme Court, reported as *M.O. Shamsuddin v State of Kerala* 1995 (3) SCC 351, in the following words:

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" the courts in India have held that while it is not illegal to act upon the uncorroborated testimony of the accomplice the rule of prudence so universally followed has to amount to rule of law that it is unsafe to act on the evidence of an accomplice unless it is corroborated in material aspects so as to implicate the accused. The reasons for requiring corroboration of the testimony of an accomplice are that an accomplice is likely to swear falsely in order to shift the guilt from himself and that he is an immoral person being a particular in the crime who may not have any regard to any section of the oath and in the case of an approver, on his own admission, he is a criminal who gives evidence under a promise of pardon and supports the prosecution with the hope of getting his own freedom."

In this case, PW-1 claims to have been a party to the previous offences committed by the appellants, and therefore, a confidant of Satender, (one of the Appellants), who supposedly approached him. This Court, in the other case titled as *Harish Yadav and Ors. v. CBI*, 2007 I AD (Delhi) 703, in which the present accused were arrested, observed that the Court have to be satisfied that the extra judicial confessions are made before a credible witness, who can be safely believed. Commenting on the confession used in that case, said to have been made to the very same witnesses, the court noted that no time date and even the date of occurrence were given by the witness to extra judicial confession. The relevant portion of the said judgment below:

"13. On a careful examination of the evidence of PW-3 Pramod we are of the view that this witness cannot be said to be an independent and reliable at all. He himself was an associate of accused persons. His brother has claimed that he (PW-3) was also a member of a gang of dacoits headed by accused Satender. Both the brothers have claimed that the accused persons had threatened Pramod with his life. So, these witnesses can be said to be having a motive to falsely implicate the appellants. For this reason alone the evidence about extra judicial confession needs to be discarded. However, there are other reasons also for not placing any reliance on the evidence of PW-3. He has not given any date when the confession was made to him. An extra judicial confession in order to inspire confidence should be shown to have been made by an accused soon after the particular incident for which that accused is tried. PW-3 has also not specified as to what was stated to him by a particular accused. He has given a general statement that all the accused had confessed before him about the incident in question. All the accused could not state at the same time the same words. It is highly improbable. So, no reliance can be placed in these circumstances on the so called extra judicial confession relied upon by the CBI.....

14. In fact, same evidence of extra judicial confession before PW-3 has not been accepted by the trial Court in respect of two accused who have been acquitted. But no reasons have been stated in the judgment as to why that evidence was sufficient in respect of the present appellants and not for the acquitted accused. There is yet

another reason for discarding the evidence of extra judicial confession. As noticed already, PW-3 in his cross-examination admitted that he had not made any complaint to the police that the accused persons had made the confession before him. That conduct of this witness also makes his evidence unreliable. It appears that so long as everything was well between him and his co-gangsters he did not bother to report to the police about the activities of his gang and the moment his relations became strained with them, he chose to side with the police. Learned trial Judge has also observed in para no. 45 of the judgment that this witness had claimed that he was with the gang of Satender because of the threats extended by Satender. This kind of a witness can hardly be relied upon for convicting an accused."

We are of the opinion that the credibility of PW-1 and PW-4 is suspect for the same reasons, articulated in the above manner. Here too, no time, date or venue when the extra judicial confessions were made, has been deposed. Furthermore, the precise substance, if not the exact phraseology of the extra judicial confession, has not been deposed; to compound these infirmities, the CBI would have the court believe that these witnesses kept silent, and approached it, more than a year later. PW-1 had allegedly known of the activities of the gang (such as looting, dacoity), had even been given, *Katta* by one of the accused, and had witnessed the gang members stab a few persons; yet he did not report these to the police. Kale and Satender @ Bawa had, as per these witnesses' testimony lived in Anil's house for two days, and from this it could not be inferred that he had been associated with each other. Another significant aspect is that PW-1 and PW-4 identified the accused in an omnibus manner and had not specifically identified each of them. The last aspect which highlights the doubtful credibility of the two witnesses is that PW-4 had deposed in Court, that the accused told him that they had shot the police man whose house they had looted. However, no bullet injuries were found on the deceased. We are therefore, of the opinion that the Trial Court could not have relied on the testimony of PW-1 and PW-4 to conclude that the accused had made extra judicial confessions implicating themselves for the crime.

37. The opinion of PW-15 Dr. Anil Kohli, who had conducted the post mortem of the deceased, was that the cause of death was Septicemia and Peritonitis due ante-mortem injuries on the abdominal region caused by a sharp edged weapon. Injuries no. 5, 6, 7 were sufficient in the ordinary course of nature, to both independently and collectively causes death. This witness stated that the recovered weapons shown to him such as dagger (Ex.P1) could have cause injuries 4, 8, 9; Ex. P5 could have also caused injuries 8 and 9. Importantly, PW-15

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stated that injuries 5, 6, 7 could not have been caused by the recovered weapons shown to him in Court. This immediately puts a question mark on the credibility of the prosecution story about recovery of the murder weapon, at the instance of the accused.

38. The recoveries of four churris/knives allegedly at the instance of Satinder, in the year 1999 in the other case No. RC 2(S)/1999/SIUT/SICT is unreliable. In fact the evidence of recoveries of said *churries* was inadmissible because they were not shown to the eye witnesses and were not shown to Devender. It was also disbelieved by this court in the case of *Harish Yadav & Ors.* in which the recoveries were said to have been made. Moreover, as noted in the previous paragraph, PW 15's deposition does not support the prosecution so far as fatal injuries No.5,6&7 are concerned; PW 15 has stated that injury No.5,6,7,10,11,12,13 are spindle shape which can be caused by a double edged weapon. The *churris* shown to PW 15 were not double edged.

39. The IO in the present case, PW-87, deposed that all the accused were arrested during the investigation of case RC 2 (S) 99/SIUT/SICT and on direction of this Court in that case the investigation of the present case was handed over to CBI; case no. RC2 (S) 2000/SIUT2/SICI was registered on 11.1.2000. PW-87 could not tell the date when Satinder, Dilshad and Ravi Kumar were arrested in the other case and their disclosure statements were recorded. These accused persons were already in custody and were arrested in present case after obtaining the permission of the court. The witness did not remember the date when for the first time he came to know about the involvement of accused persons in the present case. PW 87 stated that he suspected the involvement of the accused in this case before registration of the FIR on 11.1.2000. We also notice that Satender's disclosure statement was recorded in the present case on 10.3.2000 after two months of registration of the case when they were already in custody of CBI and IO had suspicion about their involvement.

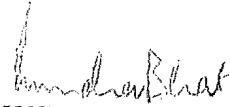
40. The Supreme Court, in *Samwat Khan v State of Rajasthan* AIR 1956 SC 54, held that:
"Beaumont, C.J. and Sen, J. in *Bhikha Gober v. Emperor*² rightly held that the mere fact that an accused produced shortly after the murder ornaments which were on the murdered person is not enough to justify the inference that the accused must have committed the murder. There must be some further material to connect the accused with the murder in order to hold him guilty of that offence. Our attention was drawn to a number of decisions which have been summed up in a Bench decision of the Allahabad High Court in *State v. Shankar Prasad*³ in some of which a presumption was drawn of guilt from the circumstance of possession of stolen articles soon after c

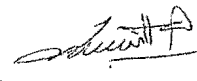
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murder. We have examined these cases and it appears to us that each one of these decisions was given on the evidence and circumstances established in that particular case, and no general proposition of law can be deduced from them. In our judgment, no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof."

In the present case, the recoveries allegedly made at the behest of one or the other Appellants, cannot, -in view of the medical evidence (that the *churries* or other weapons, relied on by the prosecution, were not the cause of injuries), be said to incriminate them, or constitute incriminating circumstances.

41. A ghastly crime was committed, in this case. What started as a burglary or dacoity, instead turned into a murder. There is every probability that the perpetrators were aware about the activities of the residents, of the place they had set about to commit the offence; they appear to have marked it. However, their plans went awry, resulting in the death of Devi Saran. The police alleged involvement of someone else, and prosecuted him; he was discharged by the court. The CBI was entrusted with investigation of the case, because it claimed to have secured leads about this case, during the investigation and prosecution of another case. PW-1 and PW-4 were, like in the present case, star witnesses in those proceedings: their credibility was seriously doubted by this court in *Harish Yadav's* case, and the present Appellants were acquitted. The witnesses, who were relied on in this case, by the Trial Court to convict the Appellants, have serious credibility issues. Taking into account the entire conspectus of facts, and in view of the previous discussion, we are of the opinion that the findings and conviction recorded by the Trial Court are unsustainable. The impugned judgment is accordingly, set aside. The Appeals are therefore, allowed.


S. RAVINDRA BHAT
(JUDGE)


G. P. MITTAL
(JUDGE)

OCTOBER 31, 2011