

+ **IN THE HIGH COURT OF DELHI AT NEW DELHI**
CRIMINAL APPEAL No. 1369/2012

% **Reserved on: 1st May, 2013**
Date of Decision: 14th August, 2013

NITIN NAGPAL Appellant
Through Mr. Rajesh Khanna and
Versus Mr. Nishant Kumar, Advocates.

STATE (NCT OF DELHI) ...Respondent
Through Mr. Sanjay Lao, APP for the State.
Mr. Amardeep Singh, Advocate for
Victim's family.

CRIMINAL APPEAL No. 31/2013

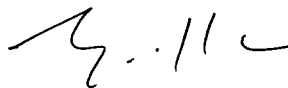
RAMBIR JHAKHAR Appellant
Through Mr. K. Singhal and
Versus Mr. Siddharth Mittal, Advocates.

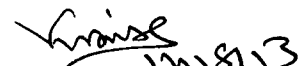
STATE NCT OF DELHI ...Respondent
Through Mr. Sanjay Lao, APP for the State.
Mr. Amardeep Singh, Advocate for
victim's family.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE VED PRAKASH VAISH

SANJIV KHANNA, J.:

For detailed order, see Criminal Appeal No. 1323/2012 titled
Sidharth Bansal versus State the Government of NCT, pronounced today.


(SANJIV KHANNA)
JUDGE


(VED PRAKASH VAISH)
JUDGE

AUGUST 14, 2013
VKR

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IN THE HIGH COURT OF DELHI AT NEW DELHI
CRIMINAL APPEAL No. 1323/2012

Reserved on: 1st May, 2013
Date of Decision: 4th August, 2013

SIDHARATH BANSAL

....Appellant

Through Mr. D.C. Mathur, Sr. Advocate with
Mr. Suryakant Singla and
Mr. Ayush Gupta, Advocates.

Versus

STATE THE GOVERNMENT OF NCT

...Respondent

Through Mr. Sanjay Lao, APP for the State.
Mr. Amardeep Singh, Advocate for victim's
family.

CRIMINAL APPEAL No. 1369/2012

NITIN NAGPAL

....Appellant

Through Mr. Rajesh Khanna and
Mr. Nishant Kumar, Advocates.

Versus

STATE (NCT OF DELHI)

...Respondent

Through Mr. Sanjay Lao, APP for the State.
Mr. Amardeep Singh, Advocate for
Victim's family.

CRIMINAL APPEAL No. 31/2013

RAMBIR HAKHAR

....Appellant

Through Mr. K. Singhal and
Mr. Siddharth Mittal, Advocates.

Versus

STATE NCT OF DELHI

...Respondent

Through Mr. Sanjay Lao, APP for the State.
Mr. Amardeep Singh, Advocate for
victim's family:

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE VED PRAKASH VAISH

SANJIV KHANNA, J.:

These three appeals by Sidharath Bansal, Nitin Nagpal & Rambir Jhakhar arise out of a common judgment dated 4th October, 2012 and order of sentence dated 18th October, 2012. Nitin Nagpal and Rambir Jakhar have been convicted under Sections 393/120-B/302/307/186/353/332 and 34 of the Indian Penal Code (IPC, for short) and Section 27 of the Arms Act, 1959. Sentences awarded to them are:

Name of the accused	Sections invoked	Punishment awarded
Nitin Nagpal and Rambir Jhakhar	393/120-B/302/307/186/353/332 /34 IPC and Section 27 of the Arms Act.	7 years Rigorous Imprisonment u/s 393 read with Section 120-B IPC and fine of Rs.25,000/-, in default Simple Imprisonment of three months.
		Rigorous Imprisonment for life and fine of Rs.50,000/- u/s 302/34 IPC and in default of payment of fine, Simple Imprisonment for six months.
		Rigorous Impzrisonment for life and fine of Rs.50,000/- u/s 307/34 IPC and in default of payment of fine, Simple Imprisonment for six months.

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		Rigorous Imprisonment for 10 years and fine of Rs.10,000/- under Section 27 of the Arms Act and in default of payment of fine, Simple Imprisonment for two months. Rigorous Imprisonment for three months under Section 186/34 IPC. Rigorous Imprisonment for 1 year under Section 353/34 IPC and Rigorous Imprisonment for 2 years under Section 332/34 IPC.
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2. Sidharath Bansal has been convicted under Section 120B read with Section 392 IPC and has been sentenced to Rigorous Imprisonment for 7 years and fine of Rs.50,000/- and in default of payment of fine undergo Simple Imprisonment of 6 months.

3. At the very outset, we deem it proper and appropriate to record that on behalf of the appellants Nitin Nagpal and Rambir Jhakhar prolix and rather long oral arguments and written submissions going into 69 typed pages have been filed but as observed below the prosecution case against them is water tight and open and shut. The contentions raised on their behalf are referring to minor deviations and are pointers on human frailties like failure to remember or recollect facts after lapse of time. We will deal with the said contentions, but

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appropriately so as to avoid an overly long judgment. Entries made or lapses in recording of the daily diary entries and insignificant and exiguous differences in the ocular statements with reference to the time etc. are reflective of the fact that either the entries were not made contemporaneously by the officers or the police officers could not recollect the exact time by the minutes while recounting and deposing in the court. On primary and material facts as noticed below there are no material contradiction in the ocular statements by witnesses or between the oral depositions and the records. (see paragraph 19 below)

Statement of Police witnesses present at the Crime Scene

4. The two appellants Rambir Jhakar and Nitin Nagpal were detained and caught in the lane outside house No. E-175, Phase-I, Ashok Vihar, Delhi on 23rd June, 2005 at about 1 P.M. Inspector Kharak Singh (PW1) was the first informant and has deposed that on 23rd June, 2005 at about 12.35 P.M. that he was on patrolling duty in Central Market, Ashok Vihar and had received information about dacoity and firing at E-174, Ashok Vihar. He rushed to the scene in his private Palio car. As he entered the street, he heard ASI Harish Chander (PW28) shouting that the boys running towards him were the culprits. He parked his car in an angular position to stop the appellants and apprehend them. He identified the two boys as the appellants Nitin Nagpal and Rambir Jhakar.

5. Nitin Nagpal fired two bullets at ASI Harish Chander (PW28). He was hit on his face and he fell down. At that instant, Inspector Kharak Singh (PW1)

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flashed a message to the control room and PW1 positioned himself behind the car to stop them. He started pelting the appellants with stones. The appellants Nitin Nagpal and Rambir Jhakhar tried to board the car to run away but by then Inspector P.L. Khera (PW38), who was also SHO, Police Station Ashok Vihar accompanied by staff reached there and surrounded them. Nitin Nagpal fired indiscriminately due to which Inspector Kharag Singh (PW1) received bullet injuries to his right thigh, Constable Ravinder (PW20) received bullet injury on his stomach and Constable Dharampal (PW16) also received bullet injury in his chest. Constable Dharampal (PW16) had fired on the appellants. As per the direction of PW1, driver Constable Paramjit Singh (PW4) had hit the accused with his vehicle. At the same time, public had gathered and had started throwing brick bats, stones and dandas at the accused, following which the appellants were apprehended. The injured police men and the appellants Nitin Nagpal and Rambir Jhakhar were removed to Sunder Lal Jain Hospital. PW1 was informed that the appellants had committed robbery in the house of Giriraj Kishore and had shot him. Giriraj Kishore was declared brought dead in the hospital. Jeans worn by him was marked as Exhibit P-1, pistol of Dharampal, Exhibit P-2 and revolver which was seized from appellant Nitin Nagpal Exhibit P-3.

6. Constable Paramjit Singh(PW4) has deposed on the same lines as Inspector Kharak Singh (PW1), that he had driven in Palio car to the scene. PCR van was already stationed in the street and they had seen the two

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appellants Nitin Nagpal and Rambir Jhakar coming towards them when the PCR in charge shouted that they were the culprits. Subsequently they parked the car in an angular manner so as to apprehend the appellants running towards them. Nitin Nagpal had pointed the revolver towards them and had attempted to sit in the car. He had threatened them, not to come forward. Rambir Jhakar had a knife in his hand. Nitin Nagpal tried to start the car. Meanwhile SHO, P.L. Khera (PW38) parked his Gypsy next to the car. Inspector Kharag Singh (PW1) pelted stones at the appellants and on seeing the police, Nitin Nagpal and Rambir Jhakar, deboarded the car and Nitin Nagpal started firing indiscriminately. Bullet injuries were suffered by Constable Ravinder (PW20), Constable Dharampal (PW16) and Inspector Kharag Singh (PW1). The two appellants tried to escape and discarded the revolver and knife, they were carrying at the corner of the park. Police and the public chased and apprehended them. Injured were taken to the hospital. The revolver, 11 live and 9 fired cartridges lying at the place of occurrence were seized and seizure memos were proved as Exhibit PW-4/C.

7. Head Constable Dharam Pal (PW16) has identically deposed that on 23rd June, 2005, he was posted as Constable at P.S. Ashok Vihar. They had received a call at 12.35 PM about shooting and dacoity in house No. E-174 Ashok Vihar. He along with Constable Ravinder (PW20) reached the said house and saw private car of Addl. SHO, Insp. Kharak Singh (PW1) parked there. Gypsy of the SHO was also parked there. PW1 shouted that two persons standing near

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the car were the culprits. One of them was armed with a revolver and the second one was having a knife in his hand. The appellant having the revolver fired a bullet at PW1 which hit him in his leg. PW20 tried to hit the said person with a danda but did not succeed. Meanwhile, the appellant with the revolver fired at PW20, which hit him, on his waist and he fell down. PW16 fired from his service revolver but missed. The appellants started running towards the park but they chased them. The appellant having the revolver fired at PW16 and he was hit in his abdomen. PW16 again tried to fire at the appellants but the bullet got stuck in the barrel. The appellants were surrounded by labour working in the park. Meanwhile Addl. SHO Khark Singh, ASI Subhsh (PW26) with the help of labour overpowered the appellants. PW16 thereafter became unconscious. He identified the appellant Nitin Nagpal as the person armed with the revolver and who had fired bullets and appellant Rambir Jhakhar as the person carrying the knife in his hand. He regained consciousness at Sunder Lal Hospital after two days. The two appellants were also admitted in the same hospital. He identified his service revolver as Ex. P-2 and the revolver used by Nitin Nagpal as Ex. P-3 and the knife used by Ranbir Jhakhar as Ex P-9. He identified his blood stained uniform and the under garments which were collectively marked as Ex. P-21.

8. HC Ravinder (PW20) was posted as constable at P.S. Ashok Vihar and had reached the spot along with Cont. Dharam Pal (PW16) and Const. Mithlesh

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(PW22). He had seen a Palio car parked there and had seen the two appellants Nitin Nagpal with a revolver and Rambir Jhakhar with a knife in his hand. Insp. Kharak Singh (PW1) had shouted at them to apprehend the appellants. Insp. Kharak Singh had fired as Nitin Nagpal had started firing. He attacked the appellants with a lathi, when a bullet fired by Nitin Nagpal hit him in his right chest i.e. under his under arm pit and he fell down. Const. Dharam Pal (PW16) chased them but the appellant fired at him. Insp. Kharak Singh (PW1) and Const. Dharmpal (PW16) were removed to Sunder Lal Jain Hospital in a police Gypsy and were admitted there. The two appellants were also admitted in the said hospital. He remained in the hospital for 20 days. Right side of his kidney was removed by the doctors due to the injuries. His uniform and the under garments were taken by the doctors. He identified the revolver and the knife used by Nitin Nagpal and Rambir Jhakhar respectively as Ex.P-3 and Ex.P-9. He also identified his uniform shirt and pant as Ex. P-21 and Ex.P-22 and his under garments as Ex. P-23 and Ex.P-24.

9. Const. Mithilesh (PW22) has stated that he took police staff in Tata 407 vehicle to the spot after receiving a phone call at 12.30 PM about dacoity and firing. He had seen SHO Prakash Khera (PW38) who was present there. The police staff were having bullet injuries at the scene. SHO Prakash Khera was also present there. He and Const. Raj Kumar were directed to remain present at the spot while SHO removed the injured persons to the hospital. Later he was

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directed to go to Sunder Lal Jain Hospital to take the dead body of the deceased Giriraj Kishore in his vehicle to the mortuary of BJRM hospital. After post mortem of the deceased, the hospital authority had handed over three sealed parcels to him. He and constable Raj Kumar had remained at the spot guarding the place of occurrence. At this stage, we would note that PW22 has not deposed or stated that he had seen the appellants Nitin Nagpal and Rambir Jhakhar firing or being accosted and later on apprehended. The so called discrepancy in his statement has been dealt with and examined later on.

10. ASI Subhash (PW26) has deposed that he was posted at P.S. Ashok Vihar and at about 12.35 PM, a call was received at DM Net that dacoity and firing had taken place at house No. E-174 Ashok Vihar Phase I. They went to the location and in the street in front of House No. E-166, a Palio car was already standing with Insp. Kharak Singh, Addl. SHO (PW1). They parked their vehicle near the Palio car. They saw the appellants Nitin Nagpal and Rambir Jhakhar deboard the Palio car. SHO P.L. Khera (PW38) also got down from his Gypsy while the driver and wireless operator were inside and were in the process of getting down. On seeing SHO P.L. Khera (PW38), Insp. Kharak Singh (PW1) shouted that these appellants had fired and hit ASI of the PCR. One of the appellants i.e. Nitin Nagpal fired from his revolver. Insp. Kharak Singh (PW1) tried to hit Nitin Nagpal with a stone but did not succeed. Insp. Kharak Singh (PW1) was hit by a bullet on his right leg. PW1 fell down. Ct.

Ravinder (PW20) tried to attack the appellants with a lathi upon which Nitin Nagpal fired at him hitting him on his waist. He fell down. Const. Dharampal (PW16) fired from his service pistol at Nitin Nagpal but the bullet did not hit him. The appellants started running towards DDA park but the police including PW26 ran after them. Const. Dharampal (PW16) was then fired at by Nitin Nagpal and was hit in his abdomen. He fell down. Appellant Nitin Nagpal fired on police party but missed. Crowd had gathered there started pelting the appellants with stones. Appellants Nitin Nagpal and Rambir Jhakar discarded their revolver and bullets; and knife respectively. They were apprehended and in fact were beaten up by the public. The injured persons including the appellants were taken to the hospital. Two constables i.e. Ct. Mithilesh and Ct. Raj Kumar were directed to remain at the spot of occurrence to guard the scene of crime. He and SHO went to Sunder Lal Jain Hospital. Giriraj Kishore was declared brought dead by the doctors. The injured except Insp. Kharak Singh were not fit to make statement. MLCs of the injured persons were collected by the SHO. Statement of Insp. Kharak Singh was recorded by the SHO and endorsement was made. He had taken rukka to the police station and produced the same before the duty officer who has recorded FIR No. 419/2005. Thereafter he took the rukka and a copy of the FIR to the place of occurrence where, SHO P.L. Khara was present. The rukka and copy of the FIR was handed over to the SHO. Crime team had also reached the spot. Photographs were taken. From house No. E-174, various articles were taken in possession including frame of

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spectacles, tape, 3 black buttons, a rope, two steel glasses, a newspaper having blood spots, and were sized vide seizure memo (Ex. PW17/A). Blood was visible in the drawing room and lifted for forensic examination vide memo Ex. PW17/B. A box was lying left in the park and was seized (Ex. PW17/C). Fired and empty bullets were also found in front of House No. E-166 and were seized. Sketches of cartridges and pistol of Ct. Dharampal were prepared. Palio car of Insp. Kharak Singh was taken into possession. Knife and revolver used by appellants Rambir Jhakar and Nitin Nagpal were seized. Inquest report was prepared as Giriraj Kishore had been declared as brought dead. His body was sent to Mortuary at BJRM hospital. After post mortem, body of Giriraj Kishore was handed over to his close relatives. The blood stained clothes of the deceased and bullets which was recovered from the dead body during post mortem were handed over to Constable Mithilesh. Appellant Nitin Nagpal's blood stained clothes were taken into possession vide memo Ex. PW26/A. Personal belongings of appellant Nitin Nagpal were seized by doctors vide memo Ex. PW26/B. Appellant Rambir Jhakar was also examined by the doctors and the mobile phone used by him was taken into possession (Ex. PW26/C). On 24th June, 2005, he again joined the investigation along with SHO and visited E-174 Ashok Vihar, Phase I. They recorded statements of family members of the deceased Giriraj Kishore. They tried to trace the persons who had thrown stones on the appellants but they could not be located. They returned to the hospital and were informed that the two appellants Nitin Nagpal

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and Rambir Jhakar were fit to make statement. Insp. P.L. Khara recorded their statements and arrested them vide arrest memos Ex. PW26/D and PW26/E respectively. Their disclosure statements Ex. PW26/H and PW26/J of Rambir Jhakar and Nitin Nagpal were recorded. Thereafter, they went to House No. I-43, Ashok Vihar, Ph.-I, New Delhi and appellant Sidharath Bansal was present there. Siddharth Bansal's case is being examined separately. Appellants Nitin Nagpal and Rambir Jhakar were taken to Punjabi Bagh in police Gypsy along with Sidharath Bansal. Nitin Nagpal pointed towards taxi stand and stated that they had hired the taxi from there. The driver of the taxi namely Deepak identified Nitin Nagpal. Nitin Nagpal took them to Vishal Mega Mart, Mathura Road and had stated that they purchased the gift pack from there. Sh. Anoop Pandit, the owner of the said shop identified Nitin Nagpal. (Admissibility of the said statement is limited to section 8 of the Evidence Act.) PW26 identified pistol of constable Dharampal as Ex. P-2 as well as revolver and live and fired cartridges and bullet case of Nitin Nagpal as Ex. P-3, P-6(1-9), P-7 (1-11) and P-8 respectively. The gift pack containing mugs was identified by PW26 as the same which was lifted and seized from the park in front of House No. E-174, Ashok Vihar, Phase-I. He identified the articles seized from the house No. E-174 i.e. spectacles, buttons, tape etc.

11. SI Harish Chand (PW28) has deposed that on 23rd June, 2005, he was posted as Incharge PCR Van, Commander-7 in PS Ashok Vihar. After

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receiving the call at 12.30 PM, he along with staff members had reached E-174, Ashok Vihar, within two minutes. The front gate of the house was closed. So they went towards the back side of the house and saw two persons coming out of the house and one of them was having revolver and the other was having knife in his hand. He shouted and chased them and took out his service revolver and fired. By that time, SHO Kharak Singh (PW1) had also reached there. He shouted and told Insp. Kharak Singh (PW1) that the appellant having revolver had fired at him. The bullet fired by the appellant Nitin Nagpal had hit his chest below the right shoulder and above the abdomen. A bullet had also hit his nose. He lost consciousness. One bullet was still lodged at the back of his heart. He was suffering from infection in his chest/ribs and was not in a position to walk properly. He identified Nitin Nagpal and stated that he was having a revolver in his hand. He also identified appellant Rambir Jhakar as a person who had a knife in his hand.

12. SI Haroon Ahmad (PW29) has stated that after receipt of DD NO. 8A at 12.30 PM, he along with Const. Karan Singh had reached the spot, where they saw the two appellants had been apprehended. Public was beating them. Injured were removed to the hospital. He came to know that the owner of E-174 had been declared dead. Other police personnel who had sustained injuries because of rampant firing by the appellants were declared unfit to make statement. SHO recorded statement of Insp. Kharak Singh and prepared rukka and handed over

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the same to ASI Subhsh for registration of FIR 419/2005. At the crime scene, large number of persons were gathered and they had to manage the crowd. The SHO got the crime spot inspected and body of Giriraj Kishore was sent for post mortem. Belongings of appellant Nitin Nagpal and Ranbir Jhakar were seized and taken into possession except for the mobile phone. On 24th June, 2005, the two appellants Nitin Nagpal and Rambir Jhakar were declared fit for making statement and made the disclosure statements Ex. PW26/J and PW26/H respectively. On the leads given by them, Sidharath Bansal, was arrested and made a disclosure statement vide Ex. PW26/M. As noted above, we are dealing with the case of Sidharath Bansal separately. He deposed that Nitin Nagpal had taken them to the taxi stand and then Vishal Megamart and office of a call centre etc. In his cross-examination, he voluntarily deposed that taxi driver Deepak had identified Nitin Nagpal as the person who had hired the taxi.

13. ACP Prakash Khera (PW38) has testified that on 24th June, 2005, he was posted as SHO, P.S. Ashok Vihar and after receiving call about the robbery and firing at E-174, Ashok Vihar Phase-I, he along with ASI Subhash, Driver HC Ramesh, Const. Dharampal and Const. Ravinder rushed to the spot. They saw that Addl. SHO Kharak Singh was already present there along with Const. Paramjeet Singh and the two appellants Nitin Nagpal and Rambir Jhakar, present in the court, were getting down from Palio Car of Insp. Kharak Singh. Nitin Nagpal was having a revolver in his hand and appellant Rambir Jhakar

was having a knife (dagger). Insp. Kharak Singh told them that the appellants had fired at ASI Harish Chand. On this Nitin Nagpal aimed the revolver at him. Meanwhile, Insp. Kharak Singh had thrown a stone at Nitin Nagpal. Insp. Kharak Singh was fired at and the bullet hit his leg. He fell down. Const. Ravinder who has having a lathi tried to hit Nitin Nagpal, but was fired at, injuring him. Const. Dharam Pal fired from his police pistol but Nitin Nagpal was on the other side of the car. Public had gathered there and threw stones on the appellants and tried to grab Nitin Nagpal. Nitin Nagpal again fired and Const. Dharampal was injured. Const. Dharampal's service pistol got jammed and he could not fire. While police and public were trying to apprehend the appellants, Nitin Nagpal again tried to fire from his revolver but it did not fire and the appellants were apprehended. The appellants were beaten by the public but the police intervened to save them. Meanwhile, other police officers reached the spot. Injured were removed to the hospital. On reaching the hospital, Giriraj Kishore was declared brought dead. PW 38 had left Const. Mithilesh and Const. Raj Kumar at the spot, and recorded the statement of Insp. Kharak Singh and had sent rukka for registration of FIR through ASI Subhashi. He then came back to the spot, crime team was there. Site plan of the place of dacoity i.e. House No. E-174, Ashok Vihar was prepared (Ex. PW12DB). Site plan where exchange of fire had taken place Ex. PW38/B was also prepared. From the spot, one box with six mugs and a flask were seized. Other articles associated with the crime was also seized. One government pistol with 3 live

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cartridges and one empty cartridge were seized from the road in front of house No. E-166. A knife and revolver were also seized. The revolver had 5 empty cartridges in its chamber. Four empty cartridges and one leather pouch containing 11 live cartridges were seized. Palio car belonging to Insp. Kharak Singh was taken into possession. Blood sample was lifted from the drawing room. Inquest papers were prepared and dead body of Giriraj Kishore was sent for post mortem. Clothes of the injured police constables and the appellants were taken into possession. The two appellants were subsequently arrested on 24th June, 2005 and they made the disclosure statements Ex. PW26/J and PW26/H. On the basis of interrogation, they arrested appellant Sidharath Bansal. Appellants Nitin Nagpal and Rambir Jhakhar were taken on police remand and they took them to the taxi stand, Punjabi Bagh where driver Deepak identified them. They also took them to Vishal Megamart from where they had purchased the gift pack.

Statement of Eye witnesses to the Murder of Giriraj Kishore

14. Now, we come to the evidence of the family members of the deceased Giriraj Kishore. Taruni Goel (PW9), Smt. Shashi Goel (PW10) and Ashu Goel (PW12) claimed that they were present in the house and had seen the occurrence i.e. the murder of Giriraj Kishore. Prosecution also relies upon statement of Deepak Goel (PW17) who claims that he had reached the house No. E-174 immediately after the occurrence and Sanjay Mittal (PW15) who had

taken Giriraj Kishore to the hospital. Taruni Goel (PW9) and Ashu Goel (PW12) are daughter-in-laws of the deceased and Shashi Goel (PW10) is the widow of the deceased. PW10 has deposed that at about 12.00 noon, on 23rd June, 2005, when she was sitting with her husband and children in the drawing room, the door bell rang. Her husband went and opened the door and saw that two boys were standing. Her husband returned to the drawing room with the boys. She identified the two appellants in the court. Appellants claimed that they had brought a gift pack for their son Deepak Goel. Giriraj Kishore sat down on the sofa and the appellants also sat down on the sofa. Giriraj Kishore tried to call up Deepak Goel. At that time appellants threatened the deceased not to make the call, otherwise they would kill him. The appellants had a revolver and a knife. Bullets were fired and knife blow was given. The appellants demanded valuable articles from them and the deceased had grappled with the appellants. The deceased fell down. Her daughter in law Ashu Goel came there and children were present. The appellants tied her hands and hands of the children and taped their mouth. The appellants took her daughter in law and children upstairs and she was directed to remain seated. After some time, door bell rang and the appellants ran outside from the back door of the house. At rear of the house, there was an encounter between police and the appellants. The appellants were apprehended. Giriraj Kishore was moved to the hospital by Sanjay Mittal and others but was declared brought dead. They had thrown the gift pack which was dropped by the appellants, in front of the park. The gift

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pack was green in colour but she could not identify the gift pack. Appellant Rambir Jhakar had a knife and appellant Nitin Nagpal was carrying a gun. PW10 was extensively cross-examined but we note that there is nothing to dent her testimony. The fact that she had stated in her statement under Section 161 Cr.P.C. (Ex. PW10/DA) that the appellants had come to their residence at 12:20 pm is not destructive. She had voluntarily stated that she was not wearing a watch and had further deposed that her statement was recorded on 24th June, 2005. We do not think any case adverse inference can be drawn from her statement in the cross-examination that "police might have recorded my statement on 16.9.05". We note that during the cross-examination she was specifically questioned whether senior police officers had visited their house on 24th June, 2005. She has stated that she did not remember whether her statement was recorded on 24th June, 2005. This shows that PW10 a widow, may not have recollected when the police had recorded her statement. Her husband was murdered in front of her eyes and to that effect her statement is unflinching and trustworthy. She has in categorical terms identified the killers as Nitin Nagpal and Rambir Jhakar and had deposed that her deceased husband had received blows of 4-5 bullets and one knife blow. Appellants remained in the drawing room for about 10 minutes but she had not seen knife in the hand of Rambir Jhakar when he entered the room. The knife was wrapped in the newspaper in his hand. She and her husband were sitting on single seat sofa on other side. She had not intervened when the accused had grappled with her

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husband. Door bell rang after 10 minutes. We only record here that the time mentioned by her is a mere an estimation and PW10 has deposed on basis of her recollection. This does not cast any doubt on her main testimony.

15. Ashu Goel (PW12) has confirmed the testimony of PW9. She has deposed that at 12.00 Noon on 23rd June, 2005, she was in the kitchen on the ground floor when someone rang the door bell. Her father in law (deceased) who was sitting in the drawing room went to open the door. Two young strong built persons entered the house. They claimed that they had come from Punjabi Bagh and Singla Ji had sent them. The deceased got up to make a call. Her mother-in-law and children were also present in the drawing room. She was standing. The appellants took out a knife and a revolver, when her father in law started making phone call. The deceased was asked to put down the receiver and hand over valuables in the house to them. Her father in law resisted and was hit by knife on the head and the person holding the revolver fired 5-6 bullets. She identified the two appellants and stated that the appellant Nitin Nagpal who was sitting on the wheel chair in the court, had fired bullets on her father-in-law and the other appellant Rambir Jhakar had knife in his hand. They tied her mother in law's feet and hands with a rope and applied tape on her mouth and on the children. The appellants went upstairs on the first floor and then to the second floor. On the first floor, appellants threatened to kill her and had aimed the revolver at her head and had asked her to hand over valuables

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lying in the house. They opened a almirah on the first floor and removed jewellery. Appellants took her to the second floor and threatened Taruni Goel. She was threatened that PW12 would be killed and was asked to hand over valuable articles. After some time, door bell rang on the ground floor and appellant i.e. Nitin Nagpal who was having revolver took her to the ground floor and asked her to state that her father in law was sleeping and the person at the door should come back after sometime. She followed the instructions and thereafter closed the door and bolt it from the inside. Nitin Nagpal who was present in the court on wheel chair was identified by her as the person who brought her to the ground floor and was having a revolver. The second appellant Rambir Jhakhhar had remained on the second floor where Taruni Goel and the children were present. She identified the second appellant Rambir Jhakhhar. Thereafter she and Nitin Nagpal again went to the second floor to the room of Taruni Goel. Meanwhile, the door bell rang for the second time. Two appellants took her to the ground floor and ran out from the back door of the house. She untied her mother in law and children and removed tape. She heard crowd making noise outside her house. Her relative Sanjay Mittal came and removed Giriraj Kishore to the hospital. She had also heard bullet firing outside and she along with Taruni Goel went outside her house and came to know that some police officers had received bullet injuries at the hands of the appellants. The appellants were lying injured and the police had encircled them. She again identified both the appellants present in court as one who had trespassed into

their house and killed Giriraj Kishore and committed robbery. She identified the knife and revolver which were shown to her and the same were marked as Ex.P-3 and Ex.P-9. She also identified the clothes of the deceased. In the cross-examination, she accepted that the deceased was not wearing any shirt at the time of occurrence. We note that no shirt of the deceased was seized and/or marked as exhibit. She has stated that five steel glasses were visible in a photograph on the stool and one glass was on the floor. This does not show, whether two or more persons had entered the house. Presence of steel glasses and their number cannot be indicative of the number of assailants who had entered the house. She has stated her statement was recorded on 24th June, 2005.

16. Taruni Goel (PW9) has deposed that on 23rd June, 2005, at about 12.15 PM, she was present in her room on the second floor of her house when she heard bullet firing and cries of her father in law from the ground floor. She peeped down and heard some cries of more persons. She bolted her room from inside and made a call to Deepak Goel and informed him that some persons had entered the house and firing had taken place. At that time Ashu Goel and her children came upstairs to the second floor and knocked on the door of her room again and again. She cried that the persons present would kill them. After some time she opened the door and saw two healthy persons. One was holding a revolver and the other was holding knife in his hand. They entered the room

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and asked her to hand over valuable articles to them. They searched almirah of her husband. After some time door bell rang and both the assailants took Ashu Goel and the children downstairs. She peeped down and found that the assailants had fled from the back door of their house. Police came to their house and her relatives removed her father in law to the hospital. She heard cries from outside their house that the assailants had been caught and beaten. She went outside the house and came to know that assailants had injured four police officers and had been apprehended and beaten by public. She and Ashu Goel went and saw the two assailants who were lying near the house of Mr. Mehta, in injured condition. She identified the assailants as the persons who had entered into their house. Nitin Nagpal had a revolver in his hand and Rambir Jhakhra had a knife. She identified the revolver and the knife as Ex. P-3 and P-9.

17. In her cross-examination, Taruni Goel (PW9) has stated that the stair case was inside the house and near the drawing room. There were two bedrooms on the second floor and kitchen was situated on the ground floor. During her cross-examination, PW9 confronted with her statement under section 161 Cr.P.C. Ex. PW9/ DA. In her statement Ex. PW9/DA she had not mentioned that she had heard cries of her father in law and peeped down and heard cries of some other persons. She had not specifically mentioned that Ashu Goel and her children knocked at the door again and again and that she saw tall and healthy

persons or one person was pointing towards Ashu and her children and that appellants entered into her room and searched the almirah of her husband or she had peeped down subsequently or that the assailants had fled from the back door or that she had heard cries and noise from outside the house, that assailants had been caught and beaten or there were two wooden almirahs in the bedroom and two steel almirahs in the store room or her husband's almirah was in store room or one almirah in the bedroom was searched by the person holding the knife and the other person holding the revolver searched the almirah of her husband lying in the store room or three almirahs which were searched were having keys therein or fourth almirah was locked. She reiterated that the appellants remained in the room for 10 minutes. Children of Ashu Goel were aged 7 and 10 years of age and her child was three and a half months old. When the room of her door was closed, she could not see movements in the remaining portion of the house. When the accused left the room, the door of her room had remained closed for 8-10 minutes. When she came down, she came to know that the appellants had run away and her relatives, neighbours and others had gathered there. She did not remember whether the police had prepared site plan of her room. Deepak Goel, her husband and some relatives were present in the room. Her husband had a shop at Kashmere Gate and he came to the house after 25-30 minutes. Investigation in the drawing room on the ground floor was on. Their house is constructed in an area of 125 sq. yds and was the fourth house from the end of the lane. The back lane of was about 10 ft. wide and

there was a road in front of the house and there was a park. She had seen the appellants lying on the ground near the park which was at the distance of half a kilometer from their house and they remained there for 2-3 minutes. The appellants were lying on the ground and they were beaten up by public. Her husband and Ashu Goel had gone with her but Deepak Goel had not accompanied them. She did not know whether Deepak Goel was present in the house. Deepak Goel had gone to the hospital but she did not know, whether he had taken Giriraj Kishore to the hospital. She confessed that she was in a perplexed condition at that time. She denied the suggestion that she had identified the appellants at the instance of police. On further examination on behalf of Nitin Nagpal, she gave her telephone number and that of Deepak Goel and stated that Deepak Goel was the first person who arrived at the house after her call. Her statement was recorded by the police on 24th June, 2005. On 23rd June, 2005, police remained in their house till 9.00 PM. She denied the suggestion that no incident on second floor took place on 23rd June, 2005. She identified photographs (Ex. PW3/17 and PW3/5) as photographs of her room at the second floor and one wooden almirah was visible in photograph Ex. PW3/17 but no steel almirah could be seen in the said photograph (Ex. PW3/17). Steel almirah in the room on the first floor which was in possession of Ashu Goel was visible in the photograph Ex. PE3/6. She deposed that almirah shown in Ex. P3/5 was searched and jewellery had come into the hands of the appellants. Before coming to her room, the appellants had already visited

room of Ashu Goel and she came to know later on that jewellery was taken from her room as well. She did not know where the appellants had left the jewellery before they escaped but later on she came to know that jewellery was left on the ground floor though she did not know the exact place. She did not know whether the jewellery was shown to the police or the appellants had made enquiry about missing jewellery and that she might not have informed the police about the missing jewellery. Her statement (Ex. PW9/DA) was recorded on 24th June, 2005 between 11.00 AM to 12.00 Noon but she did not know the name and designation of the police officer who recorded her statement.

Contentions/Submissions and Discussions

18. We would now like to examine the contentions raised by the learned counsel appearing for Nitin Nagpal and Rambir Jharkhar on the testimony of the police officers and Taruni Goel (PW9), Shashi Goel (PW10), Ashu Goel (PW12), Sanjay Mittal (PW15) and Deepak Goel (PW17). We have also referred to other incriminating evidence against the two appellants Nitin Nagpal and Rambir Jharkhar.

- (1) Contention of the petitioner is that there was delay in recording the FIR and there was interpolation and change in the FIR for ulterior motives and sending the copy of the same to the concerned Metropolitan Magistrate, is without merit. The incidence in question took place between 12 noon till

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12.45/01.00 PM. This is clear from the MLC of the police officers as well as that of the appellants wherein the time of admission is recorded as 01.00 PM (see Ex. PW8/A to PW8/G). PW1 being injured was also taken to the hospital and upon his statement rukka was recorded and dispatched at 5.00 PM resulting in registration of the FIR at 5.15 PM. The first Investigating Officer (PW38) ACP Prakash Khera had gone with the injured police officers to the hospital and then returned to the spot. This necessarily consumed time. We do not think that there was delay as such in recording of the FIR. Moreover, the appellants Nitin Nagpal and Rambir Jakhar were arrested at the spot on the place of occurrence itself. They were taken to the hospital at 1.00 PM and their MLCs (Ex. PW8/G and PW8/B) speak for themselves on the said aspect. These MLCs corroborate the statements of the eye-witnesses who were not one in number but the three ladies of the house namely Taruni Goel (PW9), Shashi Goel (PW10) and Ashu Goel (PW12) and the injured police officers namely SI Harish Chand (PW28), HC Dharampal (PW16), HC Ravinder (PW20) and Insp. Kharak Singh (PW1). The Supreme Court has held that delay in recording of the FIR denies and affects advantage of spontaneity and raises suspicion of introduction of coloured vision, exaggerated action or concocted story in *Jai Prakash Singh v. The State of Bihar and Anr. Etc (2012) 4 SCC 379*, but the applicability of the said decision is clearly of the mark in the present case. In the present case, it

cannot be said that there was delay in lodging of the FIR or there was deliberation and afterthought. Decisions of the Supreme Court, therefore, in *Thulia Kali vs. State of Tamil Nadu* AIR 1973 SC 501; *Ishwar Singh & Ors. Vs. State of U.P.* AIR 1976 SC 2423; *Rajeevan & Anr. Vs. State of Kerala* 2003 CrL.L. J. 1572 (SC); *Arjun Marik & Ors. Vs. State of Bihar* JT 1994(2) SC 627 and *Raj Kumar & Anr. Vs. State (Delhi)* 1990(2) Recent Criminal Reports 554 have no relevance in this particular case and thus are not being separately considered. The question of delay, when in fact there was delay and where the delay was possibly to cover up the facts or create doubts, depends upon factual matrix of the case. No strait jacket formula can be applied.

- (2) Similarly, the contention that there was delay in dispatch and serving copy of the FIR on the Metropolitan Magistrate is devoid of merit. *State of A.P. v. S. Rayappa & Ors.* (2006) Cri.L.J. 1616 and *Mahmood & Anr. v. State of U.P.* (2008) Cri.L.J. 696 highlights this point. HC Narender Singh (PW14) has deposed that after recording of the FIR copies of the same were sent to the concerned Metropolitan Magistrate and to higher police officers through special messenger for information and action. In the cross-examination, he has stated that Const. Ranjit Singh took the special report for Metropolitan Magistrate and senior officers but when confronted accepted that as per DD No. 62B dated 23rd June, 2005, Const.

Ranjit had left at 11.45 PM and had returned as per DD No. 70B at 3.20

AM. Keeping in view the fact that the FIR was registered at 5.15 PM, we do not think that there is any abnormal delay in sending the copy of the same or that the FIR was recorded belatedly.

(3) It was argued that the FIR now produced before the court was different from the FIR originally recorded and in support thereof reference was made to Ex. PW38/C i.e. application for autopsy which records that dead body was received in mortuary at 4.00 PM on 23rd June, 2005. The said application was accompanied by brief statement of facts (Ex. PW38/D) which records and mentions the name of appellants Nitin Nagpal and Rambir Jhakhra and the fact that they were caught at the spot. It is mentioned that Nitin Nagpal had revolver .32 MK I – SAF Kanpur 2001, D-1101 in his hand and five empty cartridges were found in the drum and 10 live cartridges were found in a pouch. From the statement of Deepak Goel (PW17), son of the deceased Giriraj Kishore, it is clear that their family wanted cremation to take place on 23rd June, 2005 itself. The body was shifted to the mortuary after the MLC (Ex. PW8/A) was recorded at 12.45 PM. The MLC mentions that Giriraj Kishore was brought dead to the hospital. Dr. L.C. Gupta (PW27) who had conducted the post mortem has deposed that the same was conducted between 6.00 PM to 8.00 PM on 23rd June, 2005. The FIR in question was registered at 5.15 PM. Thus, there was time gap of 45 minutes between registration of the FIR and beginning of the post mortem. Contention that the

Investigating Officer (PW38) had received copy of the FIR only at 6.15 PM, as deposed, does not dent the prosecution's case or the post mortem report (Ex: PW27/A). The post mortem report specifically mentions the time as between 6.00 to 8.00 PM and is more accurate and precise. Statement of the Investigating Officer is based upon recollection and is approximate. Ex. PW38/D i.e. statement of brief facts given to the Doctor does not show that the rukka was dispatched from the police station at 6.15 PM.

(4) The contention that there was delay in recording of the statements of PW9, PW10, PW12 and PW17 is without merit. Their statements as per the Investigating Officer and the dates mentioned on their statements recorded under Section 161 Cr.P.C., is 24th June, 2005. The said witnesses had lost their father in law/husband who was brutally murdered in his own house. Dead body of Giriraj Kishore was subjected to post mortem and then cremation. The witnesses have admitted that they were perplexed, horrified and shaken by the occurrence. Ashu Goel (PW12) had young children between 7 and 12 years. The said children had also seen the occurrence and seen Giriraj Kishore being killed. Subsequently outside of the house firing had taken place and four police officers were seriously injured. Taruni Goel (PW9) had a small daughter aged about 3 and a half years. In these circumstances, it is understandable and natural that the witnesses would have taken some time to compose themselves

and narrate facts to the police. We do not think there is any abnormal or unrealistic delay and the said witnesses had any ground to falsely implicate the appellants Nitin Nagpal and Rambir Jhakar. Deepak Goel's (PW17) statement under Section 161 Cr.P.C. as per the prosecution was recorded on 23rd June, 2005. In these circumstances, decision of the Supreme Court in *G.B. Patel vs. State of Maharashtra* AIR 1979 SC 135 has no application. Delay in examination of witnesses cannot in all cases be fatal as facets like reason and when the delay was explained, length of the delay etc. have to be taken into consideration. It has to be ascertained whether the delay is indicative that the witnesses has been planted and was not natural. The conduct and whether the witness was frightened and his behavior are relevant circumstances. Similar point was reiterated in *Abuthagir & Ors. v. State Rep. By Inspector of Police, Madurai*(2009) Cri. L.J. 3987. We do not think that there is "delay" in recording of statements of material witnesses and that their statements under Section 161 Cr.P.C. were recorded on 24th June, 2005, does not cast any doubt or suspicion on the credibility of the prosecution version. In *Yanob Sheikh alia Gagu vs. State of West Bengal* (2013) 6 SCC 428, it has been pointed out that it is the quality and not the quantity of prosecution evidence that determines whether an accused is guilty or otherwise. The court is primarily concerned whether the evidence brought on record is reliable, trustworthy and of definite

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evidentiary value. In case any witness has not deposed, it has to be shown that prejudice was caused because of non-examination of the said witness. (See also *Lahu Kamlakar Patil and Anr. Vs. State of Maharashtra* (2013) 6 SCC 417).

(5) It has been highlighted that Taruni Goel (PW9) and Ashu Goel (PW12) have spoken in detail about the appellants Nitin Nagpal and Rambir Jhakar entering their rooms, searching almirahs and robbing them of their jewellery. The learned counsel for the appellants is correct that Taruni Goel (PW9), Shashi Goel (PW10), Ashu Goel (PW12) and Deepak Goel (PW17) in their statements under Section 161 Cr.P.C. have not mentioned about the robbery, searching of their almirahs etc. This discrepancy and difference in court testimony and the statement of these witnesses under Section 161 Cr.P.C., does not compel us to reject the testimonies and disbelieve that Nitin Nagpal and Rambir Jhakar had never gained entry after ringing the bell and the subsequent firing and injuries and death of Giriraj Kishore. From the statement of witnesses of ACP Prakash Khera (PW38), it is clear that the entire police team had taken the injured to the hospital and only two police officers namely Const. Mithlesh and Raj Kumar were left at the spot. Encounter between the police and the appellants Nitin Nagpal and Rambir Jhakar had taken place outside on the street, near the park. The crime team, as per the testimony of SI Rajesh Kumar (PW7), had reached the spot at 2.30 PM

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and had remained there till 5.00 PM. Family members and relatives of the said witnesses had, therefore, enough time to gather the jewellery and secure it. Reluctance on the part of the family members and witnesses to part with the jewellery and their reluctance to treat jewellery as case property is understandable, though cannot be appreciated. We will ignore the said part of their statement. Nevertheless, this cannot be a ground to hold that Taruni Goel (PW9), Shashi Goel (PW10) and Ashu Goel (PW12) were not present in the house and had not seen the occurrence on 23rd June, 2005 at about 12.00 noon onwards. Their presence in the house is natural and normal. This also takes care of the argument and contention of the appellants Nitin Nagpal and Rambir Jhakar that photographs taken by the crime team i.e. Ct. Chunni Lal (PW3) do not reflect or show almirahs were ransacked or searched.

(6) The contention that there were 5-6 glasses on the table as visible in the photographs and the statement of Dr. L.C. Gupta (PW27) that there were three weapons of offence show and prove that there were more than two assailants who had entered the house has to be rejected. The meritless contention ignores the fact that other persons would have had water. Statement of Dr. L.C. Gupta (PW27) regarding possibility of three weapons, is being read beyond what the witness wanted to communicate. One of the injuries on Giriraj Kishore was caused by a blunt object/weapon, as per the post mortem report(Ex. PW27/A). Giriraj

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Kishore had fallen down and might have injured himself in the said process. He certainly had bullet wounds and had suffered a wound which was caused by a sharp edged weapon. Eye-witnesses Shashi Goel (PW10) and Ashu Goel (PW12) have deposed that Giriraj Kishore was fired upon by revolver by Nitin Nagpal and was hit on his head by knife by Rambir Jhakhar. This is corroborated by the medical evidence i.e. the post mortem report (Ex. PW27/A). It cannot be said that the medical evidence cannot be reconciled with the ocular statements of the eye-witnesses. They are reconcilable. The post mortem report does not contradict the ocular statements but corroborates and affirms the ocular statements of PW10 and PW12. It affirms statement of other witnesses that Rambir Jhakhar had a knife and Nitin Nagpal had a revolver with him. Even otherwise, ocular statements in the present case has to be given precedence and acceptance over the medical evidence.

- (7) There is no inconsistency between the medical offence and the ocular evidence and it cannot be said that medical evidence is such that it completely negates the ocular testimonies and creates doubt about the statements of the eye-witnesses as to whether they were present and had seen the occurrence and the perpetrators. Decisions in *Ram Narain & Ors. Vs. State of Punjab* AIR 1975 SC 1727, *Purshottam & Anr. Vs. State of M.P.* AIR 1980 SC 1873, *Mohar Singh & Ors. Vs. State of*

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Punjab AIR 1981 SC 1578 and *Kapildeo Mandal & Ors. Vs. State of Bihar* 2008 CrL.L.J. 730 (SC) are, therefore, not applicable.

(8) It is incorrect to state that the post mortem report (PW27A) does not tally with the number of injuries given by the eye-witnesses. The post mortem report states that injury numbers A, B and C and B-01 and the injury on the left side of the neck were caused by fire arm projectile weapon. Injury No. G was caused by sharp edged weapon and injury No. D, E and F which were an abrasion wound, three lacerated wound on the right eye-brow, sub scalp to skin deep and one lacerated wound on the right side forehead were caused by blunt edged object/weapon. Referring to the size of injury No. A, B and C it was submitted that it indicates that more than one fire arm were used. The said contention is merely an assumption. There were entry wound, A, B and C, of oval or oval to circular shape or size of 0.5 cm X 0.6 cm or 0.4 cm x 0.5 cm. B-1 was an exit wound protruding outside and a track communicating with wound B. This shows three bullets had entered the body of the deceased.

(9) PW27 has not stated and it was not stated to him that projectile wounds were caused by two separate weapons. One charged bullet was recovered from the underwear just lodged and entangled in the subcutaneous tissues below the left side inguinal region and a track connected with the wound No. A. The bullet was preserved and handed over to the Investigating Officer. The forensic examination of the said bullet which was given

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identification mark Ex. 3A-1 was undertaken. On microscopic examination, Ex. 3A-1 was found having characteristic rifling marks present on the test fired bullet Ex. 2A11 to 2A13 (see Ex. PW35/A). The revolver Ex. P3 was seized from the spot. A photocopy of the arms licence of Nitin Nagpal was also recovered and the same has marked Ex. PW38/B. Nitin Nagpal was the registered holder of the arms licence as per the records in the District Magistrate Rohtak, as deposed by the Arms Licence Clerk Devender Singh (PW30). A photocopy of register Ex. PW38/A records/mentions that the Arms licence was issued to the appellant Nitin Nagpal. As recorded above, a number of fired cartridges and live cartridges in the pouch were also recovered from the spot. These cartridges could be fired from the revolver in question.

- (10) Testimony of Taruni Goel (PW9) was challenged on the ground that she was upstairs on the second floor and could not have seen the actual occurrence i.e. the firing or the knife blows. This is correct. Taruni Goel (PW9) had, however, deposed that she had heard firing and commotion i.e. cries and then Ashu Goel (PW12) along with Nitin Nagpal and Rambir Jhakhhar had come to her room. As she had locked the room, the appellants warned her that PW12 and her children would be harmed, therefore, she opened the door and had the occasion to see the appellants. There is no reason for us to disbelieve the said assertion.

The motive and purpose was to commit robbery and steal valuables. The

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fact that Ashu Goel (PW12) did not depose about the second door bell etc. is immaterial as it is a matter of perception and recollection. Emotions, turmoil, anxiety and trepidation caused and suffered is not difficult to imagine. The fact of the matter is that police reached the spot during the occurrence itself. PW9 had stated that she had made a phone call to her brother in law who informed others is corroborated. Police were almost instantaneously informed about the occurrence. Statement of Sanjay Mittal (PW15) that he reached the spot and had taken Giriraj Kishore to the hospital is established by MLC Ex. PW8/A. Possibly persons in the street had also heard sound of bullet firing and had rung the door bell. They had got suspicious, when the door was not opened.

- (11) Contention relating to recovery of the gift pack from the park etc. is also without merit. It is clear from the deposition of Taruni Goel (PW9), Shashi Goel (PW10), Ashu Goel (PW12), Sanjay Mittal (PW15) and Deepak Goel (PW17) that relatives and friends had gathered. This necessarily to some extent disturbs the scene and place of crime. ACP Praksh Khera (PW38) had to leave the spot along with four seriously injured police officers who were taken to the hospital. Crime scene outside the house was also to be guarded. The occurrence as described by the witnesses was chilling, extremely violent and gruesome. Solace was necessary and emotions had to be pacified. PW-10 has deposed that they had thrown the gift pack in front of the park. Even if we disbelieve the

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recovery of the gift pack noticing the fact that Anoop Pandit (PW2) who was working as Manager in 2005 in Vishal Mega Marg, Mathura Road, had refused to identify the gift pack and the appellants, it does not materially affect the prosecution version or the depositions of the eye-witnesses.

(12) The contention of Shashi Goel (PW10) was not present in drawing room in view of her statement (Ex. PW10DA) recorded under Section 161 Cr.P.C. is devoid of force. She had stated that she was present in the drawing room along with her husband. In her deposition she has stated that she was present in the drawing room with the husband when the occurrence had taken place. Her husband, the deceased, had opened the door has been clearly deposed to by PW10. It would not have taken much time for her reach the drawing room from the bedroom. Similarly the contention that PW12 had made improvement by changing time from 12.20 as recorded in her statement under Section 161 (Ex. PW12/DA) to 12.00 noon is inconsequential. The time difference is small and such difference is normal as time mentioned/ recollected is approximate and not exact.

(13) Deepak (PW34) is a taxi driver who had driven the appellant Nitish Nagpal in a taxi from Saini Taxi Stand, Punjabi Bagh, Central Market to pick the other appellant Rambir Jhakar from Agrasen Hospital and then dropped them at Ashok Vihar. He has deposed that after dropping the

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two appellants he had heard noise from the kothi where the appellants had gone (thief thief). On hearing the said noise, he went back to Saini Taxi Stand, Punjabi Bagh. He identified the two appellants.

(14) The contention of the appellants that they have been falsely implicated in the present case is completely meritless. Appellants Nitin Nagpal and Rambir Jhakhar's presence at spot is proved beyond doubt. Revolver (Ex. P3) which was used for firing at Giriraj Kishore and then on the policemen belonged to appellant Nitin Nagpal. His presence at the spot is proved from the testimony of the eye-witnesses, Deepak Goel (PW34) as well as MLCs of the appellants Ex. PW8/B and PW8/G.

(15) The contention that MLC of Giriraj Kishore (Ex. PW8/A) was prepared subsequently is incorrect. Giriraj Kishore was first to be brought to the hospital and was taken there by Sanjay Mittal (PW15). The said MLC is timed 12.45 PM, whereas the MLCs of the police officers who were injured and were admitted and the appellants Nitin Nagpal and Ranvir Jhakhar are timed 1.00 PM. The serial numbers mentioned on the MLC disprove and negate the said allegation as they are inseriatim.

(16) It was submitted that Test Identification Parade was required to be held and court identification by Taruni Goel (PW9), Shashi Goel (PW10) and Ashu Goel (PW12) should be disbelieved, is a feeble attempt to challenge the identification. Judgments relied upon by counsel for the

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appellants, *Kanan vs. State of Kerala* AIR 1979 SC 1127; *Mohan Lal Ganga Ram Ghelani vs. State of Maharashtra* AIR 1982 SC 839; *State (Delhi Administration) vs. V.C. Shukla* AIR 1980 SC 1382 and others, clearly are not applicable as in the present case. The two appellants Nitin Nagpal and Rambir Jhakhar were detained at the spot itself by the police. Thereafter they were taken to the hospital. There cannot be any doubt or debate on their identity as is sought to be made out. TIP is resorted to and is a part of investigation. It ensures that the alleged unknown culprits, detained during investigation are the real culprits who were seen by the eye witnesses at the crime scene. In the present case, murder of Giriraj Kishore and then the firing in the street outside the house, in which four police officers got injured was in seriatim and continuation. The two appellants ran out and were chased. The appellants were challenged by the police who had reached the spot, while the two appellants were still inside house No. E-174 and thereafter were caught at the spot. This dispels any dispute about the identity of the perpetrators who had committed the murder of Giriraj Kishore. Moreover PW9 and PW12 have deposed that they had gone outside and had seen the two appellants after they were detained. There is no reason and cause why their testimonies should not be accepted. These two witnesses are independent and unbiased and being family members of the deceased had only one

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interest i.e. to ensure that perpetrators, whoever they be, are punished. We reject the contention that the said witnesses should not be relied upon.

(17) Similarly, we also reject the contention that statement of Deepak (PW34) should not be accepted as he did not produce any written document that he was working as a driver at the taxi stand. There is no such requirement. The contention ignores practical reality. Deepak (PW34) had deposed that he was with the two appellants for considerable time and had travelled with them throughout till he dropped them at Ashok Vihar. The factum that Deepak (PW34) was taken to the Police Station and made to sit there from morning till night as deposed by him, proves that he is a truthful witness who did not conceal any fact. It is apparent that the police wanted to rule out possibility of his involvement. However, this does not mean his testimony should be ignored. We do not think, judgment in the case of *Ajay Singh & Ors. Vs. State of U.P.* 1990(1) Crimes 517 lays down any proposition to the contrary. We further note that PW34 was never booked as a co-accused and therefore, observations in *State of Maharashtra vs. Sukhdeo Singh & Anr.* AIR 1992 SC 2100, are not relevant.

(18) Submission that the Investigating Officer (PW38) had deposed that he did not know how many weapons were used in the crime is read, expanded and dealt out of context. He had voluntarily subsequently deposed that the deceased Giriraj Kishore had suffered bullet injuries as

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per wounds mentioned in the post-mortem. PW38's further deposition that he did not remember whether he had read the post-mortem report shows that the said witness had got confused. His failure to remember the said aspect, does not impel us to disregard his entire deposition. The suggestion given about three weapons theory to PW-38 on the basis of post-mortem report is not correct. Post-mortem report (Exhibit PW27/A) is clear on two aspects; (i) there were bullet wounds and (ii) there was an injury caused by a sharp-edged weapon. The other injuries were caused by blunt object/weapon. The post-mortem report never opined that the third set of injuries at point D, E and F could have been only caused by a blunt weapon and not by a blunt object. PW-38 has stated that as per the eye witnesses there was a scuffle and the deceased had fallen down.

- (19) The contention that there is difference between the injuries recorded in the post-mortem report (Exhibit PW-27/A) and the MLC of the deceased Exhibit 8/A, which was recorded at Sunderlal Jain Hospital, is devoid of any force. The MLC records six bullet wounds. PW-27 in his deposition has mentioned that injury Nos. A, B, C and D and injury on the left side of the neck were caused by firearm projectile weapon. The post-mortem report is far more detailed as the body was subjected to opening and dissection. Similarly, the contention that the bullet found in the underwear was planted as it is not mentioned in the MLC (Exhibit 8/A) as farcical and far-fetched. Giriraj Kishore was brought dead to the

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hospital and the MLC (Exhibit PW-8/A) records the said factum and position. The MLC does not record that the doctors had not removed the underwear and noticed the bullet, which had got stuck. The body was sent to the mortuary at 4 P.M. on the same day. The underwear worn by the deceased was still on the body. Submission that the recovered bullet was not deformed and therefore must have been fired on a foam or a soft surface is again misconceived. Giriraj Kishore was taken to the hospital at 12.45 P.M. when his MLC was prepared and then his body was shifted to the mortuary at 4 P.M. His post-mortem was conducted between 6 to 8 P.M. The revolver was left at the spot, i.e., street in front of house No. E-174 and was seized by the crime team, which had remained at the spot between 2.30 to 5 P.M. Looking at the fast pace at which the events had occurred, we do not think that there is any possibility of planting a bullet in the underwear of the deceased after firing the same on a foam. We also record that Investigating Officer (PW38) had remained in the hospital with the injured police officers for considerable time.

- (20) The appellants have relied upon testimony of Dr. R.K. Sharma (DW-1), who had stated that there was a possibility that the bullet was planted. The said witness had deposed only on the basis of the post-mortem report or possibly after reading the evidence of PW-27. He was produced as a defence witness and in fact the only defence witness. The contention of the appellants that the entangled bullet found in the

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underwear had no corresponding injury, supports the said position. The submission of the appellants that PW-27 had collated wound No. A with the said bullet is not borne out from the records. Even if the submission is correct, it could be best lapse or error on the part of PW-27 but will not affect the prosecution version or even the post-mortem report that the deceased had died because of bullet wounds. Contention that X ray plates mentioned in the post-mortem report is not placed on record and, therefore, the entire post-mortem should be disbelieved, is again far-fetched and meritless. We do not think his testimony furthers or promotes the case of the appellants. We also reject the contention that the prosecution had changed the type of wounds suffered by the deceased.

- (21) Referring to statement of PW-22 Mithlesh, it was submitted that bullet was not recovered at the time of post-mortem. PW-22 had specifically stated that the led recovered from the body was given to him. PW-22 had stated that he was handed over three sealed parcels, which were produced before the Investigating Officer. Investigating Officer in his testimony has stated that Constable Mithlesh had handed over led recovered from the body. Led can mean and include the bullet also. PW-38 had further deposed that he had recorded statement of Mithlesh. It was mentioned therein that two bullets recovered from the body were given. We reject, therefore, the contention of the appellant that Exhibit 3A/1 was not recovered from the body of the deceased.

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(22) On the question of knife, we have deposition of the eye witnesses PW-10 and PW-12 and the statement of the police officers regarding recovery. The knife may not have been sent to the FSL for examination, as no blood stains could be found thereon. This is no ground to disbelieve that knife was not used as deposed by the eye witnesses. The deposition is affirmed in view of the injuries noticed and recorded in the post-mortem report (Exhibit PW-27/A) prepared by Dr. L.C. Gupta (PW-27). There are several reasons why blood could not be identified or seen on the knife including the fact that Rambir Jhakar may have wiped the knife or cleaned it.

(23) Reference was made to the post mortem report, Ex.PW27/A wherein it was recorded that rigor mortis was present all over the body and the stomach was empty, but the rectum was full of stool. Left side lower first and second molar teeth was filled with meal. Thus, it appears that the deceased had not brushed his teeth and had not passed stool in the morning. We do not understand how the said observations of Dr. L.C. Gupta (PW-27) can create doubt about the time of the occurrence. PW-27 in clear and categorical terms has deposed about the cause of death and the time of death as six hours before the post mortem. He has stated that rigor mortis starts developing within 2-3 hours in general and takes up to 12 hours to appear fully. It was summer time. He categorically asserted not once and severally that time of death was six hours prior to

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the time of the post mortem. We do not think that in view of the statement of PW-27 as well as the ocular witnesses i.e. the police officers and PW-9, PW-10, and PW-12, there can be any doubt or debate about the time of occurrence, death etc.

(24) The fact that the two children aged between 5 to 10 years were neither cited nor produced as witnesses is understandable as adult members of the family, who were present, have deposed. Except for stating that the two children were not cited or produced, it is not indicated or stated how and in what manner it had affected the statement of PW-9, PW-10 and PW-12. Reluctance to cite the children as witnesses is understandable as they had seen and suffered trauma and seen violence. To recapitulate the occurrence in the court, to subject them to cross-examination and put them face to face with the perpetrators apparently was not acceptable and had prevailed. There were several witnesses to the occurrence who have deposed. In view of the facts of the present case, the fact that children did not depose cannot be treated as a negative factor to discard the statement of the eye-witnesses. Reliance placed upon *Rampadarath Gami & Another Vs. State of NCT of Delhi*, 2012 (3) C.C. Cases (HC) 61 and *Rai Sandeep @ Deepu Vs. State of NCT of Delhi*, AIR 2012 SC 3157 is misconceived. It is not the plurality or number of witnesses which matters, but the evidence of witnesses

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produced before the Court and whether their deposition are credible, truthful and aspiring confidence. (see sub para 4 above)

(25) It is correct that the call details of the mobile phone belonging to Taruni Goel and Deepak Goel have not been produced. To say that this goes to the root of the matter is incorrect and farfetched. There is oral deposition by Taruni Goel to the said effect and Deepak Goel also deposed how he came to know about the occurrence and reached the spot. These are lapses on the part of the investigation but unless there is any indication that prejudice has been caused or evidence has been withheld to probably falsely implicate the persons, who have been booked/charge-sheeted, such contentions are to be rejected. We also reject the said contention in the present case. Call records would have corroborated their statement but we do not think that corroboration was required.

(26) Reference was made to the PCR Form, Ex.PW-21/C as per which the PCR van had reached the spot at 12.34 hours and at 12.35 hours, information was given that bullets were being fired and IC PCR van had received bullet injury. It was also recorded that at 12.45 injured IC van had been taken to Sunder Lal Jain Hospital and he was lying unconscious on a stretcher. Ex.PW21/C is a bit confusing. Information as per the said form was recorded at 12.27, but there was also a message which was transmitted at 12.25 and it records time of arrival of PCR van as 12.26 as well as 12.34. Apparently, two PCR vans i.e. T-13 and T-33 had reached

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the spot. It is also recorded that at 12.53, SHO along with force, ACP and DCP were at the spot. At 12.49 another entry with regard to T-13 was recorded that they were at Sunder Lal Jain Hospital. We do not think that the said form shows that the story of firing and the bullet injuries caused to the police officers was concocted.

(27) In the written submissions it is contended that HC Dharam Pal, the gunman was having SAF gun and there was also a driver, but they never deposed. It is alleged that IC PCR van had a service revolver and had fired from his revolver, but this fact has been suppressed. We do not find any merit in the said contentions. These are mere presumptions and there is no evidence and material to substantiate the said contentions. *Ipsi dixit* contentions have to be rejected.

(28) Another contention or submission raised was that the injuries received by IC of PCR van at 12.35 was not disputed, but the dispute was whether information was received in the police station after 12.35 p.m. and whether PW-1 along with PW-4 could have reached the spot and seen the IC PCR van being fired at. As already noticed above, Ex.PW-21/C also mentions entries at 12.25 and 12.27 p.m. Apparently, the two appellants who were in E-174, Ashok Vihar, realizing that persons in the neighborhood and police had got activated, tried to flee and run away. When they were confronted by the police, appellant-Nitin Nagpal fired.

Information was flashed and PW-1 and other police officers immediately

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reached the spot. The statement that the two appellants had made an exit from the back lane and nobody could have ascertained or known, who were the culprits again belies and is contrary to the evidence on record. In such situations of panic, behavior and actions of the person, are a good indicator of who is the culprit. In any case, in the present case the appellant-Nitin Nagpal had fired from his revolver. He was identified by PW-9, PW-10 and PW-12 and identified by the police officers.

- (29) The contention that the encounter between the police officers and the two appellants is make belief and sham and, therefore, should be rejected, is without merit. In the written submissions, it is projected that the said encounter theory has been set up to procure rewards and awards. This is not reflected from the ocular and documentary evidence. Four police officers had suffered grievous injuries as is apparent from the MLCs Exhibit PW-6/A, 8/C, 8/D, 8/E and 8/F. Exhibit PW-6/A MLC of Haresh dated 2nd July, 2005 was issued by the Medical Officer, All India Institute of Medical Sciences. It refers to alleged history of gun shot wounds on the chest on 26th March, 2005 and the fact that Harish Chander PW-28 had developed breathing problem and was put on the ventilator and incubated. His chest was drained. The MLCs speak of injuries by way of gunshot wounds and there is no reason or ground to disbelieve the said MLCs. There is no evidence what so ever to show or indicate fake encounters. Statements of the police officers and the public

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witness i.e. family members of Giriraj Kishore, are to the contrary. The present case cannot be put in the category of fake encounters as submitted.

- (30) Contention that the police did not collect danda, stone, bricks etc. from the spot, which were used by the public and cite and produce public witnesses, who had beaten the two appellants has no merit. The statement of PW-1 that he had asked the driver Paramjit to run the car over the appellants reflects the precarious and parlous situation which the police officers were confronted with and the effect of firing by the appellant Nitin Nagpal and resultant injuries. SI Harish Chander who had appeared as PW-28, has deposed that he had taken out his service revolver and had fired. He was subsequently hit on his chest below his right shoulder and above the abdomen and thereupon he became unconscious. Whether the Investigating Officer PW-38 remembered whether he had seized the used bullet etc. and whether he had collected the arms and ammunitions register dated 26th May, 2008 reflects on the investigation lapse. We cannot forget when occurrence of this nature is taking place, very often compliance of technical formalities becomes secondary and unimportant. Emphasis is on swift action to reach the place of occurrence and ensure that the culprits do not cause further damage/injuries and are caught. Discrepancies or inadequacies can, therefore, arise in the records, which are required to be maintained and

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written contemporaneously. Errors or mistakes, therefore, the records can be explained. We should not ignore such errors but at the same time we cannot on this basis alone, reject oral testimonies of not one but several witnesses, who are fully credible, truthful and corroborating and in unison.

- (31) Reference was made to statement of Ct. Mithlesh Kumar (PW 22) that he had reached the place of occurrence after the injured had been taken to the hospital. It is stated by HC Ravinder (PW20) and HC Dharam (PW16) Constable Dharampal (PW-16) were with him. Constable Ravinder (PW20) and Dharampal (PW16) should be disbelieved. Both PW16 and PW20 had received serious injuries and were shot at. Their presence and participation is also deposed to and affirmed by PW-1 Inspector Kharak Singh, PW-38 ACP Khera and PW-4 Head Constable Paramjit Singh. Medical evidence also supports the said position. Read in this context, statement of Constable Mithlesh Kumar, driver of Tata 407 that when he reached the spot when the injured had already been removed to the hospital cannot mean that Constable Ravinder (PW20) and Constable Dharampal (PW16) had not seen the occurrence. It is probable that Constable Mithlesh (PW22) being the driver of the truck had stayed back and had not moved ahead. The fact place of recovery of the cartridge of the bullet fired by Dharampal (PW16) is not mentioned in the site plan PW-38/B, does not mean that

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the statement of PW16 has to be disregarded or is untrustworthy. This can happen and the cartridge may not have been located. SI Harish Chander (PW28) has stated that some bullets were recovered from his body but one bullet was lodged towards the back side of the heart. PW 28 has stated that he was admitted twice to the hospital, once at Sunder Lal Jain Hospital and then again in AIIMS Hospital. Leds which were recovered from the body were not seized and never became the case property. However, it will be incorrect to accept the argument that he was hurt by a police bullet. PW-28 SI Harish Chander was the first one to reach the spot. He had reached the place of occurrence within two minutes after receiving call at about 12.30 P.M. or earlier. On finding that the front gate was locked, PW 28 went towards back side and had seen the appellants Nitin Nagpal and Rambir Jharkhar running with a revolver and knife. He shouted and chased them, but he was fired at. Additional SHO Inspector Kharak Singh had reached the spot at that time.

- (32) It is submitted that clothes of the appellant Nitin Nagpal have been planted. It is also alleged that Nitin Nagpal was run over by the Palio car and had sustained injuries on his chest and legs. On the second contention, no such suggestion was given to any of the witnesses. Even on planting of clothes, no such suggestion was given. The contention that the buttons of the assailants recovered from the house of Giriraj Kishore were not produced and, therefore, could not be tallied with the shirt

button, refers to evidence which could have been produced but in the present case was not produced. In the facts of the present case, where there is ample and clear cut evidence against the two appellants, the said contention is of no meaning and relevance.

19. Having considered and dealt with the submissions of the appellants and the evidence produced by the prosecution, we would like to highlight and crystallize the evidence against the appellants.

- (i) PW10 Sashi Goel, wife of the deceased, PW12 Ashu Goel, daughter-in-law of the deceased have deposed that they had seen the actual occurrence that the two appellants entered the house E 174 Ashok Vihar at about 12:20 PM on the pretext that they had brought a present. Their intention was to rob and commit dacoity. Giriraj Kishore was shot at repeatedly in their presence. Both of them have identified the two appellants.
- (ii) PW9 Taruni Goel was also present on the second floor and had the occasion to see the appellants when they came upstairs. She has identified the two appellants.
- (iii) PW9 and PW12 Taruni Goel and Ashu Goel had also seen the two appellants outside after they were captured by the police.

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- (iv) The two appellants had fled from the back door of the said house after door bell rang. PW1 Inspector Kharak Singh, PW16 Head Constable Dharampal, PW20 Head Constable Ravinder and PW28 SI Harish Chander got injured in the encounter, which took place just outside house E-174, Ashok Vihar. Appellants Nitin Nagpal and Rambir Jhakar were confronted by the police and an encounter took place. Firing outside on the street is proved from the recoveries of revolver, knife and bullets, used cartridges etc. from the crime scene, report of the crime team and statements of the eye witnesses. The encounter has been proved beyond doubt.
- (v) The injuries suffered by the said four witnesses are duly proved by their MLCs Exhibit PW-6/A, 8/C, 8/D, 8/E and 8/F. The statement of the said injured eye witnesses is corroborated and affirmed by witnesses PW-4 Constable Paramjit and PW-38 ACP Prakesh Khera.
- (vi) Presence of two appellants at the spot and the fact that Nitin Nagpal had a revolver with him is established from the recovery of revolver Ex. P-3. The arms licence of Nitin Nagpal, was proved PW-26 Subhash, PW-29 SI Haroon Ahmad and by PW-30 Devender Singh, Arms Licence Clerk, District Magistrate's Office, Rohtak.

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(vii) The said revolver was used to fire the bullets that killed Giriraj Kishor is proved by the FSL report Exhibit PW-38/H. Bullet found in the lower undergarments of the deceased was fired from the revolver of Nitin Nagpal.

(viii) MLCs of Nitin Nagpal and Rambir Jhakar Exhibit PW-8/G and 8/B respectively were recorded at 1 P.M. on 23rd June, 2005. They fully corroborate the prosecution version that both of them were detained at the spot and taken to the hospital in view of the injuries suffered, after they were beaten.

(ix) Rambir Jhakar in his statement under Section 313 Cr.P.C. has stated that Paramjit had struck him with the Palio car and he has stated that he became unconscious thereafter and regained consciousness in the hospital. Nitin Nagpal in his statement under Section 313 Cr.P.C. has accepted his presence at the spot and has stated that a police car was there and a tall man wearing jeans and T shirt was there in front of DDA park. He has stated that Inspector Kharak Singh fired at the PCR official and PCR official fell down and then Kharak Singh fired at them. He has accepted that Kharak Singh had fired at them but has claimed that Kharak Singh had taken his revolver and fired in the air. Thereafter, three-four shots were fired but he did not know who fired them. He felt pain in his

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neck and fell down and Palio car ran over him. He became unconscious and regained consciousness in the hospital. He was implicated falsely.

(x) PW-34 Deepak has stated that he had driven and taken the two appellants to Ashok Vihar in his taxi and had heard noise from inside the house.

(xi) The post-mortem report of Giriraj Kishore Exhibit PW-27/A supports and corroborates the injuries suffered were of gun shot wounds.

(xii) Giriraj Kishore had also suffered a wound caused by a sharp edged weapon. PW 10 and PW 12 have deposed that the appellant Rambir Jakhar had hit Giriraj Kishore with knife.

Case against Sidharath Bansal

20. Sidharath Bansal was not present at the scene of crime. He was arrested based on the interrogation of the appellants Nitin Nagpal and Rambir Jhakhar. He has been convicted for seven years under Section 120B read with Section 392 IPC and has been asked to pay Rs.50,000/- and in default of payment of fine, he has to undergo simple imprisonment for six months.

21. In the impugned judgment reference is made to the mobile call details to show and establish that Nitin Nagpal from his mobile telephone no. Crl. A. 1323/2013

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9818546771 was in contact with Sidharath Bansal on his mobile telephone no. 9811777511. Impugned judgment records that they were in constant touch during the months of May and June, 2005, just before the offence was committed (see paragraph 81 of the impugned judgment).

22. It was submitted before us that the trial court has relied upon statement of SI Ravinder Singh (PW41) who was the Investigating Officer in FIR No. 999/2004, P.S. Shalimar Bagh wherein the appellants Nitin Nagpal and Sidharath Bansal were allegedly involved. Our attention was drawn to question no.2 under Section 313 Cr.P.C. put to Nitin Nagpal and Sidharath Bansal. It was submitted regarding the telephone conversation interse the two, no question was raised or explanation was sought. It was submitted that there is no proof that telephone or sim number 9811777511 was in the name of Sidharath Bansal or was being used by him and similarly telephone number or sim 9818546771 belonged to Nitin Nagpal. As per the prosecution version another mobile phone number 9871964361 also belonged to Nitin Nagpal. It has been submitted that as per the documents placed on record, the said telephone number belonged to one Sachin.

23. The contention of the appellant Sidharath Bansal that there is no document to show that telephone number 9811777511 belonged to or was being used by Sidharath Bansal is incorrect and has to be rejected. Not only the subscriber form has not been produced, there is evidence in form of documents

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produced by Sanjay Sehrawat (PW13) of Cleave Global, E-Services Ltd. He has deposed that Sidharath Bansal and Nitin Nagpal had undergone training together at their company and Sidharath Bansal had worked from July, 2004 to November, 2004 for them. The original record of Sidharath Bansal was marked Ex. PW13/1 to PW13/18. In the said documents Sidharath Bansal has given his mobile number as 9811777511. Call details of mobile No. 9811777511 were proved by Anuj Bhatia (PW32), Nodal Officer, Vodafone, Essar Mobile Services Ltd. As per customer agreement form, the said number was issued in the name of Sidharath Bansal. The form was exhibited as Ex. PW32/A. It was submitted that there is correction in the said form and another number has been scored off. In our view, this does not make a difference, as in Ex. PW13/1 to 18, documents of Sidharath Bansal proved by PW13 the same number is mentioned. In his statement under Section 313 which was recorded before us on 3rd April, 2013, Sidharath Bansal had stated that due to time gap he could not recall his telephone number. The said statement is obviously incorrect.

24. Telephone number 9811294150 was officially allotted and as per record of Vodafone, Essar Mobile Services Ltd. to one Vinod Bansal. Sidharath Bansal is the son of Vinod Bansal. However, further details etc. are not available.

25. There is serious dispute and contest whether Nitin Nagpal was using mobile no. 9818546771. ACP Prakash Khera (PW38) has deposed that one Airtel sim (Ex. P/4) of Nitin Nagpal was handed over to him by the doctors as

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personal belongings of Nitin Nagpal. There has been a serious lapse on the part of the prosecution including the Investigating Officer as he did not get relevant details of the sim, i.e. the telephone number pertaining to the sim from the telecom services provider. R.K. Singh (PW25), Nodal Officer, Bharati Airtel Ltd. has proved the call record details of mobile number 9818546771 for the period 1st May, 2005 to 7th August, 2005 which were marked Ex. PW25/A. Similarly the call details from 6th June, 2005 to 23rd June, 2005 were marked Ex. PW25/B. He had also proved on record, call details of telephone number 9871964361 for the period 1st May, 2005 to 23rd June, 2005 which were marked Ex. PW25/C. He, however, has stated that these call details were supplied earlier and were available on judicial record. They had, however, are destroyed the call details as all call details beyond one year were destroyed. He, did not produce the subscriber form with regard to the sim card. He had stated that name of the company i.e. the service provider was printed on the chip/sim card so that the company could identify the mobile number allocated to the said sim card. The said statement was made on 12th November, 2009. The witness was called for further examination which was recorded on 2nd April, 2012. He deposed that telephone mobile no. 9871964361 was in the name of Sachin Kumar r/o Faridabad as per scanned customer identification form (Ex. PW25/D). He deposed that subscriber's details of mobile No. 9818546771 was not available in the system and did not give the details of the person who was the subscriber of the said number. Nor could he provide details of the particular

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sim card used in the mobile instrument for the year 2005 as the records had been erased. In the cross-examination by the Public Prosecutor, he denied the suggestion that mobile number 9818546771 was in the name of Nitin Nagpal r/o Faridabad and that they were willfully not producing the above data. It may be interesting to note that mobile instrument IMEI No. 3518584610980 was used with mobile sim number 9818546771 as per Ex. PW25/A & PW25/B and also with sim number 9871964361 vide call records Ex. PW25/C. Thus the same mobile instrument/phone used by a person using numbers 9818546771 and 987964361. Ex. PW25/C also shows that mobile call was made from mobile number 9811777511 of Sidharath Bansal to 9871964361 at 11.12 AM on 23rd June, 2005. Prosecution in this regard, subsequently produced SI Ravinder Singh (PW41). He was the investigating officer in FIR No. 999/2004 P.S. Shalimar Bagh, New Delhi. Sidharath Bansal and Nitin Nagpal were implicated in the said case and they were arrested and charge-sheeted. During investigation, it was revealed that mobile No. 9818546771 was in the name of Nitin Nagpal r/o Faridabad Haryana. In the cross-examination, however, PW41 has deposed that he could not produce any document or customer form to prove that the said number was in the name of Nitin Nagpal. However, he was not specifically cross-examined on his deposition in relation to the investigation that mobile No. 9818546771 was used or was in the name of Nitin Nagpal. In view of the deposition of R.K. Singh (PW25) stating that customer identification record for the said number had been destroyed or erased, the prosecution had no

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option but to produce ocular evidence. In these circumstances, we do not think that statement of SI Ravinder Singh (PW41) should be completely ignored. The assertion made by PW41 has to be examined with care and caution. Examination of call records (Ex. PW25/A to PW25/C) and call records (PW32/D) do show that number of calls were being exchanged between the subscribers. There were long conversations which show and establish closeness between the two callers.

26. During the course of hearing before us, objection was raised that there were lapse on the part of the trial court as no question was put to Sidharath Bansal, that telephone no. 9818546771 was being used by Nitin Nagpal and he was in touch with him via mobile no. 9811777511. Similarly, Nitin Nagpal was not confronted with any material/evidence or suggestion that he was using telephone no. 9818546771 in his questioning under Section 313 Cr.P.C. The following relevant questions were put to Sidharath Bansal under Section 313 Cr.P.C.:

“Q.2 It is in evidence against you that you were knowing accused Nitin Nagpal as you both had taken training together as evident from Ex.PW-13/B1 to B12. What have you to say?

A. It is correct. We had taken training together in April, 2004, at Cleave Global Call Center Academy.

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Q.53 It is in evidence against you that call details of

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mobile No.931583654 and 9350804131 for the period 3rd May, 2005 to 23rd June, 2005 was collected and filed on record vide Ex.PW-24/A and B and also call details of mobile phone no.9818546771 for the period 1st May, 2005 to 7th August, 2005 was collected and filed on record vide Ex.PW-25/A and B and also call details of mobile no.9871964361 was collected and filed on record vide Ex.PW-25/C. What you have to say?

A. I do not know.

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Q.57 It is in evidence against you that call details fo mobile no.9811294150 (registered in the name of Vinod Bansal) and mobile no.9811777511 (registered in the name of Sidharath Bansal) along with relevant record is proved Ex.PW-32/A to F. What you have to say?

A. I do not know.”

27. Noticing the above facts, after referring to case law in terms of order dated 13th March, 2013 supplementary statement of Sidharath Bansal and Nitin Nagpal under section 313 Cr.P.C. were recorded in this Court on 3rd April, 2013.

28. Nitin Nagpal has stated that telephone no. 981846771 was not his number and he did not have any knowledge of Sidharath Bansal's telephone number. He has stated that he did not know telephone no. 9871964361. Sidharath Bansal has stated that he was not on talking terms with Nitin Nagpal. He, however, accepted that the question relating to FIR 999/2004 was correct. We have already quoted the earlier reply given by Sidharath Bansal, wherein he had

stated that he knew Nitin Nagpal and both of them had undergone training together in April, 2003 at Cleave Global, E-Services Ltd.

29. As noticed above, questions were to put to both Sidharath Bansal and Nitin Nagpal in their statements recorded under Section 313 Cr. P.C. by the trial court, though direct questions pertaining to exchange of telephone calls was not asked. The said lapse in our opinion has not caused any prejudice as it is apparent from question no. 2 and other questions put to Sidharath Bansal and questions which were put to Nitin Nagpal. It was put to them that were well acquainted. To make up for the said lapse and technical plea, statements of Nitin Nagpal and Sidharath Bansal u/s 313 Cr.P.C. on the said aspect were recorded in the High Court after detailed order dated 13th March, 2013 was passed. This takes care of the technical pleas raised by Sidharath Bansal and Nitin Nagpal. In *Ramnaresh v. State of Chhattisgarh* (2012) 4 SCC 257, reference was made to Section 313 Cr.P.C., right to fair trial, presumption of innocence, unless proved guilty and proof by prosecution beyond reasonable doubt. It was observed that when, we speak about prejudice to an accused, it has to be shown that the accused has suffered some disability or some detriment to any of these protections. Prejudice has to be demonstrated and it has to be shown that there was failure of justice. Camouflage cannot be allowed, in the garb of defence. Similar view has been taken in *Nagesh v. State of Karnataka* (2012) 6 SCC 477 wherein reference has been made to several other decisions. In *Satyavir*

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Singh Rathi, Assistant Commissioner of Police and Ors. Vs. State through Central Bureau of Investigation (2011) 6 SCC 1, it has been held that the accused must prove prejudice on account of omission to put questions under Section 313 Cr.P.C. The section is based on rules of natural justice that the accused may not be aware of the circumstances against him so that he can give appropriate explanation to meet and defend. When the accused is represented by a competent counsel and witnesses are subjected to grueling and detailed examination, the courts should be reluctant to interfere on the ground, even assuming that some incriminating circumstances had been left out. The objection should be taken at the earliest stage.

30. Even if we do not take these telephone calls under consideration, there is sufficient material to show that Sidharath Bansal and Nitin Nagpal knew each other. Both of them had trained in the same academy and we have quoted the reply of Sidharath Bansal to question no. 2 in his statement under Section 313 Cr.P.C. The police and family members of Giriraj Kishore were unaware that Nitin Nagpal knew Sidharath Bansal or Sidharath Bansal was involved in the crime. During police investigation and interrogation of Nitin Nagpal and Rambir Jhakar police officers came to know about involvement of Sidharath Bansal. Subsequently, Sidharath Bansal was arrested.

31. Sidharath Bansal is close and related to family of Giriraj Kishore. This uncontestable position which has been proved from the testimony of family

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members of Giriraj Kishore, PW9, PW10, PW12 and PW17. Statement or assertions made by Nitin Nagpal during police interrogation are inadmissible in view of Sections 24 to 27 of the Evidence Act. However, the leads given by Nitin Nagpal during the course of investigation are admissible under Section 8 of the Evidence Act. Referring to Section 8 of the Evidence Act, the Supreme Court in *Prakash Chand v. State (Delhi Admn.)* (1979) 3 SCC 90, has observed as under:

“8. It was contended by the learned Counsel for the appellant that the evidence relating to the conduct of the accused when challenged by the Inspector was inadmissible as it was hit by Section 162, Criminal Procedure Code. He relied on a decision of the Andhra Pradesh High Court in *D.V. Narasimham v. State* [AIR 1969 AP 271 : 1969 Cri LJ 1016 : 1969 MLJ (Cri) 687] . We do not agree with the submission of Shri Anthony. There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a CrI. A 349/2009 & conn.matters Page 25 of 35 Police Officer in the course of an investigation which is hit by Section 162 of the Criminal Procedure Code.

What is excluded by Section 162, Criminal Procedure Code is the statement made to a Police Officer in the course of investigation and not the evidence, relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a Police Officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would

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be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act (vide *Himachal Pradesh Administration v. Om Prakash* [(1972) 1 SCC 249 : 1972 SCC (Cri) 88 : AIR 1972 SC 975]).”

The Supreme Court has further elucidated in *State (NCT of Delhi) v.*

Navjot Sandhu, (2005) 11 SCC 600:

“190. The first circumstance is that Afzal knew who the deceased terrorists were. He identified the dead bodies of the deceased terrorists. PW 76 (Inspector H.S. Gill) deposed that Afzal was taken to the mortuary of Lady Hardinge Medical College Hospital and he identified the five terrorists and gave their names. Accordingly, PW 76 prepared an identification memo Ext. PW-76/1 which was signed by Afzal. In the post-mortem reports pertaining to each of the deceased terrorists, Afzal signed against the column “identified by”. On this aspect, the evidence of PW 76 remained unshattered. In the course of his examination under Section 313, Afzal merely stated that he was forced to identify by the police. There was not even a suggestion put to PW 76 touching on the genuineness of the documents relating to the identification memo. It may be recalled that all the accused, through their counsel, agreed for admission of the post-mortem reports without formal proof. Identification by a person in custody of another does not amount to making a statement falling within the embargo of Section 162 CrI. A 349/2009 & conn.matters Page 26 of 35 CrPC. It would be admissible under Section 8 of the Evidence Act as a piece of evidence relating to the conduct of the accused person in identifying the dead bodies of the terrorists.”

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32. Robbery/dacoity of the nature which Nitin Nagpal and Rambir Jhakhar had attempted and committed was not possible without conducting detailed background research and having full and complete details about the family members of house no. E-174 Ashok Vihar, their names, basic knowledge about the architectural design of the house, persons who would be present at the relevant time, valuables and assets which might be available etc. In the present case, a specific house was targeted in a carefully thought out and planned operation. The two appellants Nitin Nagpal and Rambir Jhakhar gained entry to the house claiming that they had brought a present for Deepak Goel who was residing at the house, from one Singlaji. Nitin Nagpal and Rambir Jhakhar could have known the name of son, Deepak Goel, only if somebody had informed them. They were aware of the time when only one male member of the family would be present and all others would be either ladies or children. They were aware that no servant would be present. They knew that the house had two entrances. A preplanned robbery/dacoity requires insider information and knowledge that valuables would be available in the house and there would be only marginal or no resistance. Nitin Nagpal and Rambir Jhakhar gained entry to the house as, they knew facts as to the names of family members or the relatives. This information and details in the present case could have come from one source, i.e. the appellant Sidharath Bansal. Therefore, the leads given during the investigation under Section 8 of the Evidence Act assume importance and relevance.

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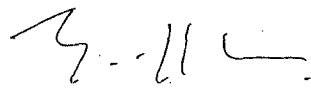
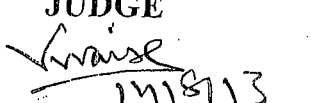
33. Prosecution, necessarily and in most conspiracy cases have to rely upon circumstantial evidence. Further in such cases, courts have to examine and draw inferences from the indirect evidence which is established and proved. The question which arises and has to be examined is, was there any kind of physical manifestation of the agreement between the conspirators? Expressed agreement or physical meeting between the conspirators need not be proved but facts proved must indicate that there was meeting of minds. The essential ingredients of offence under Section 120A/120B IPC is that there should be agreement between the parties who conspire and the agreement should be for doing an illegal act or indulge in illegal means to do an act which may not be by itself illegal. Dacoity or robbery is an illegal act. The question, therefore, is whether there was any agreement between Nitin Nagpal/Rambir Jharkhar and Sidharath Bansal for committing the said crime or illegal act. What is required to be seen is whether two persons i.e. Nitin Nagpal/Rambir Jharkhar and Sidharath Bansal had common design and had conspired to commit act of robbery/dacoity and whether they had agreed to commit the relevant act. Having examined the above evidence, even if we do not take into account the telephone record, we feel that there was an agreement for committing of the illegal act.

34. The aforesaid offence and the manner and mode in which it was committed by Nitin Nagpal/Rambir Jharkhar was impossible without active

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involvement of an insider who provided logistical details on several aspects before the planned operation was undertaken. There is no other insider who could have provided the said information and support except Sidharath Bansal. Sidharath Bansal in his statement under Section 313 Cr.P.C. has not stated that he had innocently informed and given some details of the family of Giriraj Kishore to Nitin Nagpal/Rambir Jhakhar.

35. In view of the aforesaid discussion, we uphold the conviction and sentences of Nitin Nagpal, Rambir Jhakhar and Sidharath Bansal. Directions with regard to fine are also upheld. Sentences would run concurrently. However, it is directed that 50% of the fine collected for the offence under Sections 302, 392, 393 IPC read with Section 120B IPC from the three appellants will be paid to wife of Giriraj Kishore and in her absence to his Class-I legal heirs. Appeals are disposed of.


(SANJIV KHANNA)
JUDGE

14/8/13
(VED PRAKASH VAISH)
JUDGE

AUGUST /4th, 2013
kkb/VKR/NA