

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

+ **Criminal Appeal No. 35/2014**

% **Reserved on:** 9th March, 2015
Date of Decision: 29th May, 2015

ANIL KUMAR ...Appellant
Through Mr. K. Singhal, Advocate.

Versus

STATE ...Respondent
Through Mr. Varun Goswami, APP along with
Inspector Krishan Kumar, P.S. Palam Airport.

Criminal Appeal No. 27/2014

MANISH AND ANOTHER ...Appellants
Through Mr. Sunil Upadhyay, Advocate.

Versus

THE STATE (NCT OF DELHI) ...Respondent
Through Mr. Varun Goswami, APP along with
Inspector Krishan Kumar, P.S. Palam Airport.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J.

This common judgment would dispose of the aforesaid appeals filed by Manish, Monu and Anil Kumar challenging their conviction under Sections 302, 364, 392, 394 and 201 read with Section 34 of the Indian Penal Code, 1860 (IPC, for short) vide impugned judgment dated 30th May, 2013 in the charge sheet arising out of FIR No.50/2008, Police Station Palam Airport. Appellant-Anil Kumar has also been convicted under Section 397 IPC read with Section 25 of the Arms Act. By order

on sentence dated 24th June, 2013, the appellants have been sentenced to the following punishments:-

<u>Under Section</u>	<u>Punishment</u>	<u>Fine</u>	<u>In default of fine</u>
302/34 IPC	Imprisonment for life	20,000/-	SI for 1 year
364/34 IPC	RI for 10 years	10,000/-	SI for 6 months
392/34 IPC	RI for 10 years	10,000/-	SI for 6 months
394/34 IPC	RI for 10 years	10,000/-	SI for 6 months
201/34 IPC	RI for 7 years	5,000/-	SI for 3 months
<i>The appellant Anil Kumar has been additionally sentenced as follows:</i>			
397 IPC	RI for 7 years	--	--
25 Arms Act	RI for 5 years	2,000/-	SI for 2 months

All the sentences are directed to run concurrently and Section 428 of the Code of Criminal Procedure, 1973 (Cr.P.C., for short) shall apply.

2. The challenge to conviction is primarily predicated on factual grounds and, therefore, it would be appropriate to refer and examine the contentions in the light of the evidence adduced by the prosecution. The prosecution case in brief is that one K.T. Sameer (also referred to as K.T.M. Sameer in trial court proceedings) an Indian national and permanent resident of Mahe was at the relevant time employed and working in Riyadh, Saudi Arabia. The said K.T. Sameer had come to India on a business visit and had flown to Delhi from Ahmedabad on 10th October, 2008. Thereafter, he went missing and could not be traced. The prosecution case is that K.T. Sameer was killed by the three appellants, who had robbed him of his belongings and withdrawn money using his ATM card.

3. The prosecution relies upon circumstantial evidence, in the absence of any eye witness stated to have seen the crime, which was committed in the intervening night of 10th and 11th October, 2008.

(A) **K.T. Sameer had travelled to Delhi on 10th October, 2008 and thereafter went missing.**

4. N.K. Afzal (PW1), brother of the deceased K.T. Sameer has deposed that the latter was residing and working in Riyadh, Saudi Arabia. K.T. Sameer had come to India and had flown to Delhi from Ahmedabad via Spice-Jet Airlines. K.T. Sameer was supposed to return to Riyadh on 12th October, 2008. During his visit to India, K.T. Sameer had been using his nephew's (PW19's) local mobile phone No.9846202449. Attempts were made to contact K.T. Sameer, he could not be reached. The phone was switched off. His office people had informed that money had been withdrawn four times from his account from ATMs located around Palam, Delhi by using the debit card allotted/issued to K.T. Sameer. K.T. Sameer was to meet one Sushil Kumar (PW54) of Camel Knitting and Textile Mills at Ludhiana, but he did not meet him. In the said circumstances, PW1 came to Delhi and filed a missing report dated 14th October, 2008 at 6.30 PM with Police Station Palam Airport vide DD entry marked Ex.PW1/A. In his cross-examination, PW1 deposed that although he had received copy of statement of account of K.T. Sameer on 15th-16th October, 2008, but he had been earlier telephonically informed that money had been withdrawn via ATMs from the account of K.T. Sameer.

5. DD No.43 (Ex.PW1/A) gives description of K.T. Sameer and as noticed above was recorded on 14th October, 2008 at about 6.30 P.M. The said report is also proved by HC Harpal Singh (PW2), who was

working as a duty officer Palam Airport on 14th October, 2008. Subsequently, on 15th October, 2008, FIR No.50/2008 (Ex.PW3/A) was registered by the duty officer HC Balwan Singh (PW3) at about 9.10 P.M. The said complaint by PW1 is detailed and records that as per PW1, K.T. Sameer had travelled from Ahmedabad to Delhi by Spice-Jet Airways Flight No.SG218. After landing in Delhi, he had made a call to his office at Riyadh on No.00966-501084566 from the local mobile No.9846202449. The latter phone number belonged to Ajmal Abdullah, resident of Cochin, Kerala and nephew of K.T. Sameer. An amount of Saudi Riyal (SAR) 1599.29 was withdrawn from Axis Bank, in addition, to three other withdrawals of Saudi Riyal (SAR) 399.29, 417.82 and 102.77 from the State Bank of India, Palam Colony, Dwarka through a debit card of Al Rajhi Bank, Riyadh. The said debit card was in the name of the sponsor of K.T. Sameer in Riyadh and had been given to the latter for business purposes.

6. Ajmal Abdullah (PW19) has deposed that mobile No.9846202449 was issued in his name and he had given the said SIM to his uncle, K.T. Sameer, during his earlier visit to India in July, 2008. K.T. Sameer had kept the SIM card with him to be used on his visits to India.

7. Kaithal Shahir Ahmed (PW7), younger brother of the deceased affirmed that the deceased had come to Delhi on 10th October, 2008 and had made a call to Saudi Arabia, following which contact with him was lost. On 15th October, 2008, a case was registered and he had also reached Delhi on 16th October, 2008. He had regularly been in touch with the police thereafter.

8. Sajid K.V. (PW12) has also deposed that the deceased K.T. Sameer was living in Riyadh, Saudi Arabia, and on 6th or 7th October, 2008 had

come to India. PW12 had spoken to K.T. Sameer on 10th October, 2008 on his mobile phone. K.T. Sameer informed that he was in Ahmedabad and would leave for Delhi on the same day and would return to Bombay (Mumbai) on 11th October, 2008. As testified, PW12 had gone to the airport on 11th October, 2008, to receive K.T. Sameer but he could not be found. PW12 tried to contact him on the telephone, but his number was unreachable. PW12, thereupon, had spoken to the wife of K.T. Sameer at Riyadh who had asked him to go to Delhi and ascertain his whereabouts. On 13th October, 2008, he came to Delhi and with N.K. Afzal (PW1) had gone to Police Station Palam Airport to file the missing complaint. From 13th October, 2008 till 20th October, 2008, they had continuously visited the Palam Airport as they were anxious to know about K.T. Sameer. We would be subsequently again referring to the testimony of PW12, on other aspects.

9. Sushil Kumar (PW54) has deposed that he was engaged in business of export of readymade hosiery garments at Ludhiana and had come to Delhi on 11th October, 2008 to meet K.T. Sameer. He had tried to contact K.T. Sameer on telephone, but did not succeed. The phone was switched off. He did not meet K.T. Sameer and returned to Ludhiana in the evening.

10. On examining and reading the aforesaid testimonies, we do not find any reason to disbelieve or disregard the said statements, on the aspect that the deceased K.T. Sameer had travelled to Delhi from Ahmedabad via Spice-Jet Airlines vide flight No.SG218. The said fact has been proved beyond doubt or debate. In addition, we have the testimony of Sumant Rautela (PW30), Station Manager, Spice-Jet Airlines, IGI Airport, who had handed over system generated passenger

manifesto (Ex.PW30/B) to the Investigating Officer Insp. Sunil Kumar (PW53). In the cross-examination, PW30 deposed that the said flight manifesto was prepared after the passengers had checked-in, boarding passes had been issued and the flight was closed. Sumant Rautela (PW30) has stated that at the request of the IO, he had handed over a copy of the passenger manifesto of flight No.218 under a covering letter, Ex.PW30/A. The said passenger manifesto running into three pages was computer generated and was marked Ex.PW30/B. It is conspicuously noticeable that the said flight manifesto (Ex.PW30/B) mentions 'K.T.M. Shameer' at Serial No.60. No objection was taken for admission of the said documents on record. In his cross-examination, PW30 has stated that airline was using NAVITAIRE system, which he knew was tampered proof. He denied the suggestion that the passenger manifesto was tampered with.

11. We are also inclined to accept the prosecution version on the question of withdrawal of money. There was information since 14th October, 2008 that money was being withdrawn using the ATM card as deposed to and is apparent from the statement of N.K. Afzal (PW1) and Kaithal Shahir Ahmed (PW7). Subsequently the statement of accounts was received in writing and furnished to the police, possibly on 16th or 17th October, 2008.

(B) Recovery of an unidentified dead body on 12th October, 2008 in Gurgaon, Haryana

12. Hukam Singh (PW20) had noticed a dead body of a young male lying in the fields near the wall of Kuber farm on 11th October, 2008 at about 7 A.M. His statement (Ex.PW20/A) was recorded. Gyan Mohammad (PW21) has deposed that on 14th October, 2008 at the request

of the officers of Haryana Police, he had buried the dead body of a Muslim male as per Muslim rites at the graveyard (*Kabristaan*) near Patodi Chowk. SI Prakash Chand (PW22) deposed that on 11th October, 2008, he was posted at Police Station Bilaspur, District Gurgaon and at about 8.30 A.M. he had received a *rukka* from Constable Mewa Singh sent by SHO Sunil Kumar, and on this basis FIR No.160/2008 (Ex.PW22/A), Police Station Bilaspur was registered. With regard to recovery of dead body of an unknown male Muslim, we also have testimonies of HC Manoj Kumar (PW23) Draftsman, Office of Commissioner of Police, Gurgaon, and ASI Braham Prakash (PW32), who had visited the fields of PW20 where the dead body was found. The Investigating Officer, in his presence, had seized blood-stained soil and one ring from right hand of the deceased with the word '*wahida*' engraved on it. He had proved the seizure memo and the pulanda prepared at that time. The ring was marked Ex.P10 and the blood-stained soil was marked Ex.P11. Ct. Satish Kumar (PW35) has deposed that the said articles were handed over to Police Station Palam on 15th December, 2008.

13. Dr. Sunil Kumar (PW39) was the SHO of Police Station Bilaspur, Gurgaon. He had proved the recovery of dead body, registration of FIR No.160/2008 (Ex.PW22/A) Police Station Bilaspur, seizure of ring and blood-stained soil, inquest papers and the site plan (Ex.PW39/D). We have also referred to his court deposition in some detail in paragraph 15 and other paragraphs below.

14. Statement of Pawan Kumar (PW36), photographer of Pawan Studio, Bilaspur is important. He had taken photographs of the dead body which were marked Ex.PW36/1 to PW36/13.

15. It is on the basis of the photographs that Kaithal Shahir Ahmed (PW7) had identified and stated that the dead body was that of K.T. Sameer. PW7 also identified the clothes of his deceased brother. As per PW7, the said identification was done on 20th October, 2008, after the appellants were detained and interrogated. The said assertion is disputed by the appellants, who claimed that the police already knew that the dead body found in FIR No.160/2008, Police Station Bilaspur, Gurgaon was of K.T. Sameer. This aspect will be dealt with subsequently. At this stage, we only record and observe that it has been proved that a dead body of an unknown male Muslim was found by Hukam Singh (PW20) on 11th October, 2008 at about 7 A.M. This body was identified on the basis of photographs (Ex.PW36/1 to PW36/13) as that of K.T. Sameer. The aforesaid factum is relevant and shows that the death of K.T. Sameer had taken place after K.T. Sameer had landed in Delhi at about 7.30 P.M. on 10th October, 2008 and before 7 A.M. on 11th October, 2008. It is also apparent that when the dead body was recovered, the name and the identity of the deceased could not be ascertained. When and how the said dead body was identified will be examined in detail infra.

(C) Homicidal Death and other Evidence

16. The factum that the deceased had died a homicidal death was proved by Dr. Sunil (PW39), who has stated that he along with ASI Braham Prakash and others had gone to village Banola and he recorded statement of Hukam Singh (PW20) and had also called the crime team. He had got the post-mortem of the deceased conducted vide application (Ex.PW9/A) and the body was cremated vide application (Ex.PW11/A). After the post-mortem, the doctor had handed over two sealed parcels, which were seized vide memo, Ex.PW33/A. PW39 has deposed that the

photographs of the deceased were published in the newspaper for the purpose of identification. However, the body was not identified and on 14th October, 2008, the deceased was cremated as per Mohammaden rites. Dr. B.B. Aggarwal (PW9) has proved the post-mortem report (Ex.PW9/B). He along with Dr. Ravi Bala Sharma (PW11) had conducted the post-mortem on the dead body of an unknown male aged 30 years on 11th October, 2008. The deceased was about five feet and eight inches, and had a red-coloured handkerchief tied around his neck. Though no ligature was seen on the neck, but the same appeared to be congested. A red rope was found tied around the right wrist. Teeth mark was visible on the lower lip with S/C haemorrhage over the right eye at 9 o'clock position. The X-ray revealed a bullet on the left side of the chest posterior. The vest and the shirt were blood-soaked and mud-stained. The vest also showed firearm-injury marks in front and upper part. The firearm entry wound had surrounding blackening and blue discolouration. On dissection of the wounds, fracture in sternum, and various injuries in the heart were found. A bullet was recovered from the body and sealed in a container, which is proved and marked Ex.P6. It was opined that the death was due to extensive injury to a vital part, i.e. the heart. The injuries were ante-mortem in nature and sufficient to cause death in ordinary course of nature. PW9 proved the X-ray plates as Exs.PW9/C and PW9/D. In the cross-examination, PW9 has stated that he had been performing post-mortems for the last 25 years and had conducted about 1000 post-mortems. He denied that he had signed the report in a mechanical manner. On the question of clothes worn by the deceased, Dr. B.B. Aggarwal (PW9) has deposed that the deceased was wearing a striped shirt, one vest, blue-coloured jeans and an underwear. The clothes worn by the deceased were identified by PW9 in the court collectively as

Ex.P5. From the said testimonies, it is apparent that the deceased had died an unnatural homicidal death as a result of firearm injuries.

(D)(i) Involvement of the appellants

17. This brings us to the central and the core issue; whether the appellants were the perpetrators and were responsible for having committed murder of K.T. Sameer by way of gunshot and other injuries. We would like to refer to the testimony of Insp. Sunil Kumar (PW53), who had taken over the investigation of the case on 15th October, 2008 in some detail. This would help us in appreciating the entire prosecution case and how this blind murder case was solved.

18. PW53 has stated that on 15th October, 2008, he had sent a request to ACP for collecting call records of mobile No.9846202449, which was stated to be a number used by K.T. Sameer. The next day, he had sent a request to the Missing Person Squad of Delhi Police and CBI. They had tried to trace the victim. Hue-and-cry notices were issued and published in the newspapers. On 17th October, 2008, teams were sent to Gurgaon, Faridabad and other police stations to search for K.T. Sameer, but returned without any success or clues. On receiving the call records, he noticed that three mobile Nos.9818152052, 9213534186 and 9268397468 had been called from the mobile No.9846202449 in the intervening night of 10th and 11th October, 2008. PW53 learnt that mobile No.9213534186 had been subscribed by one Jagbir Singh (PW5) of village Mohammadpur. SI Prashant was sent to house No.441-442, Rajouri Garden as mobile No.9268397468 was found to have been allotted to one Suresh Kumar (PW26), resident of the said address. Notices under Section 160 Cr.P.C. were served upon them and they were asked to join investigation on 18th October, 2008. Jagbir Singh (PW5) and Suresh

Kumar (PW26) came to the police station on 18th October, 2008 along with their daughters Rozy (PW4) and Vandana (PW13) respectively. PW53 recorded their statements. It was also learnt that mobile No.9818152052 was allotted to one Naveen Kumar (PW44), resident of 20/60 Mehram Nagar. PW53 went to the house of Naveen Kumar (PW44) along with HC Kamlesh (PW45). Naveen Kumar (PW44) informed PW53 that the said mobile SIM was being used by his brother Manish Kumar who had gone to Shimla.

19. Before we refer to and elucidate upon other portions of the testimony of PW53, we would like to refer to the court depositions of Rozy (PW4), Jagbir (PW5), Vandana (PW13) and Suresh Kumar (PW26). Jagbir (PW5) has stated that he was employed at Army Headquarter Camp, Delhi Cantt. and was father of Rozy (PW4). He had purchased one mobile phone and the same was being used by his family members. On being cross-examined by the Public Prosecutor, PW5 deposed that the said phone was purchased on 2nd or 3rd October, 2008 and a function had been organised last year prior to Diwali. The mobile phone connection was issued by the Tata Cellular Company. On a specific question, PW5 did not deny or admit the suggestion that the mobile number was 9213534186 was allotted to him by the said Company. However, he accepted that Rozy (PW4) was using the same.

20. Rozy (PW4) aged about 17 years has testified that there was a function in their house on account of birth of her cousin's son and many guests were present. Family members of the appellant-Anil were also present. However, she failed to recollect whether Anil had come to attend the function. She accepted that police had made inquiries. On being cross-examined by the Public Prosecutor, she denied having made

any statement to the police that on 18th October, 2008 she had gone to Palam Airport along with her brother Vijay Kumar. She denied the suggestion that her father had bought a mobile phone instrument with SIM No.9213534186 for her but voluntarily added that the connection was for home use and the number might be the same as suggested. She claimed that she could not remember whether she had told the police that there was a function on 8th October, 2008 and volunteered that she did not remember the date. She denied the suggestion of having told the police that Anil Kumar was a taxi driver at Palam Airport from Mehram Nagar and had come to attend the said function. A portion of her further cross-examination is reproduced for clarity:-

“Q. I put it to you that you had told the police that Anil had taken your mobile phone number 9213534186 during function?

Ans. No, I do not know.

Q. I put it to you that you had told the police that on 10.10.2008 at about 10.45 P.M. you received a phone call from Anil from mobile number 9846202449?

Ans. I had not attended any such call.

It is wrong to suggest that I had told the police that I had told Anil that his mobile number was 9868415221 and that whose phone number was 9846202449 from which he was making that call. It is wrong to suggest that I had told to the police that Anil had informed me that this mobile phone belonged to his friend.”

21. Vandana (PW13) had stated that 9th August, 2008 being her birthday, her father (PW26) had gifted her a mobile phone, but she did not remember the number. In the month of August, 2008, they had a function in the house and her brother-in-law, Ravinder along with his father had come to their house. On being cross-examined by the Public Prosecutor, PW13 accepted that it could be possible that the number was 9268397468 and it was correct that there was a function in their house on 10th October, 2008. She also accepted that Anil, who was present in the

Court, had come to their house in the said function and they had exchanged mobile numbers. She, however, claimed that she did not know whether the said mobile number was 9868415221. She denied the suggestion that appellant-Anil had called her on her mobile number at about 12.30 A.M. from mobile phone No.9846202449, i.e., the mobile number being used by K.T. Sameer. She denied the suggestion that Anil had spoken to her till 15th October, 2008 from mobile No.9868415221. She denied the suggestion that she was deliberately concealing that she had received a call from appellant-Anil on 10th October, 2008 at 2.30 A.M. from the mobile phone being used by K.T. Sameer, i.e. 9846202449.

22. Suresh Kumar (PW26), father of Vandana (PW13) has stated that he had gifted a Tata mobile phone to her daughter on her birthday. Subsequently, Vandana (PW13) had told him that she had received a call on the said phone from the appellant Anil. The said appellant is brother-in-law of PW26's elder daughter Priti, who is married to Ravinder.

23. We should record our anguish and strong displeasure as it is apparent that Rozy (PW4), Jagbir (PW5) and Vandana (PW13) have intentionally tried to conceal facts. When we read their deposition, hesitation and trepidation is apparent and on reading in between the lines, the true and correct version emerges. The witnesses did not candidly accept the apparent and luminescent facts that mobile No.9213534186 was being used by Rozy (PW4) and telephone No.9268397468 was being used by Vandana (PW13). Both of them knew the appellant-Anil.

24. Now having noticed the said facts, we would return to the testimony of Inspector Sunil Kumar (PW53). He has deposed that on 20th October, 2008 they had received secret information that Manish Kumar

and Monu were involved in the present case and would be coming to bus stop near Sanjay T-point, Mehram Nagar. A raiding team was constituted and they apprehended Manish and Monu, who upon interrogation made disclosure statements marked Exs.PW7/A and PW7/B, respectively. At that time, the secret informer and Kaithal Shahir Ahmed (PW7) were with the police team. Thereafter, Constable Raja Ram (PW8) and Kaithal Shahir Ahmed (PW7) went to Police Station Bilaspur, Gurgaon as it had been revealed by the two appellants that they had thrown the dead body of K.T. Sameer in the jurisdiction of the said police station. Manish Kumar and Monu were arrested vide memo Exs.PW8/DA and PW8/DB, respectively. Mobile phone No.9818152052 was recovered from possession of Manish Kumar and seized vide seizure memo Ex.PW45/T. Mobile phone No.9968562955 was seized from Monu and seized vide memo Ex.PW45/S. PW53 has testified that at about 6 P.M. Ct. Raja Ram (PW8) along with Kaithal Shahir Ahmed (PW7) came to the police station and handed over a copy of FIR No.160/2008 (Ex.PW22/A), Police Station Bilaspur, Haryana regarding murder of K.T. Sameer, following which they added Section 302/201 IPC to the present FIR (Ex.PW3/A). PW53 along with HC Kamlesh (PW45) and other officers and Kaithal Shahir Ahmed (PW7) went to the house of Manish Kumar 20/60, Mehram Nagar and recovered Rs.35,000/- kept in a handkerchief. The recovery consisted of 70 currency notes of Rs.500/- each. The currency notes were taken into possession vide seizure memo Ex.PW7/C. They also went to the house of Monu at T-11/60, East Mehram Nagar, Delhi and recovered Rs.45,000/- in 90 currency notes of Rs.500/- each, and one mobile phone 'i-mate JASJAR' (Ex.P4), which was seized vide seizure memo Ex.PW7/D, signed by PW53 at points 'C' and 'C1'. Manish Kumar disclosed that one taxi DL1T-6001, which was used for the

offence was parked in front of Balmiki temple, Mehram Nagar. This taxi was recovered from the said spot by PW53 and seized vide seizure memo Ex.PW45/C, signed by PW53 at point 'B'.

25. On the same day, at about 9 P.M., the third appellant Anil Kumar was arrested from Mahipalpur bus stand at the instance of secret informer. He was interrogated and he made disclosure statement (Ex.PW45/F). On 21st October, 2008 at 6 A.M. PW53 along with SI Zabbar Singh (PW28), HC Kamlesh (PW45) went to the house of Anil Kumar at S-313/95, Mehram Nagar and recovered a country made pistol (Ex.P7) and a *khanjar* (Ex.P8) from the roof of bathroom situated outside the house. The country made pistol (Ex.P7) was wrapped in a maroon colour cloth. Sketch of the pistol (Ex.PW28/A) was prepared and signed by PW53 at point 'C'. Ex.P7 was seized and sealed with the seal of ZS and taken into possession vide memo Ex.PW28/C. The *khanjar* (Ex.P8) was seized vide memo Ex.PW28/D. Sketch of the *khanjar* was made and proved as Ex.PW28/B. Earlier, Rs.60,000/- in denomination of 116 notes of Rs.500/- each and 20 notes of Rs.100/- each were recovered at the behest of appellant Anil Kumar from a '*taand*' (attic) of the house and were seized by seizure memo Ex.PW28/E. Appellant Anil Kumar had got recovered one mobile phone 'Nokia Xpress Music' (Ex.P5), which was seized vide memo Ex.PW12/A.

(D)(ii) Legal Position; Section 8 of the Indian Evidence Act, 1872

26. Appropriate in this regard would be reference to a decision of this Court in CrI.A.349/2009 & 352/2009 titled ***Gopi Chand alias Pappu versus State***, decided on 2nd August, 2013, reported in [2013 VI AD (Delhi) 633] wherein it has been held as under:-

“29. ... On the question as to what extent Sections 27 and 8 of the Evidence Act can be invoked, there is no requirement to elaborately deal with the contention as Ram Chail has expired. Section 27 of the Evidence Act is not applicable viz. the appellants. However, the investigation made by the police officer Dayal Chand (PW23) and how they came to know that the unidentified body was of Jasbir, the cleaner, is an admissible and relevant circumstance under Section 8 of the Evidence Act. There is a corroborating circumstance both on the question of identity of the dead body i.e. it was the body of Jasbir, the cleaner of the truck, as well as involvement of the appellants. We would like to reproduce the following observations of the Supreme Court in **Prakash Chand v. State (Delhi Admn.)** (1979) 3 SCC 90:

‘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]. 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 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 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].’

30. It was 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 Cr.P.C. 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.' ”

27. In *A.N. Venkatesh versus State of Karnataka*, (2005) 7 SCC 714, at p.721, it has been held:-

“9. By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in *Prakash Chand v. State (Delhi Admn.)* [(1979) 3 SCC 90]. Even if we hold that the disclosure statement made by the accused-appellants (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act.”

(D)(iii) Taxi No.DL1T-6001, connection and link with the crime;

DNA analysis and involvement of the appellant Manish

28. PW53 had deposed that on 22nd October, 2008, a CFSL Team headed by Dr. Rajinder Prasad (PW6) and others had inspected the taxi DL1T-6001 (Ex.PX2) and had taken a piece of rear seat cover (Ex.P1)

and two pieces of floor carpets (Ex.P2) as they had noticed blood stains on them. These were seized vide seizure memo Ex.PW6/A and deposited in the *malkhana*.

29. Dr. Rajender Singh (PW6), Principal Scientific Officer, Head of Physics Division, CFSL, CBI, New Delhi has affirmed the inspection of the vehicle on 22nd October, 2008. The vehicle was thoroughly photographed and two pieces of blood stained floor carpet (Ex.P2) and a piece of rear seat cover (Ex.P1) were handed over to the Investigating Officer for analysis in the laboratory. PW6 identified the piece of the car seat cover as Ex.P1 and floor carpet as Ex.P2 in the court. As per the CFSL report (Ex.PW48/A), human blood of group “A” was found on the seat cover (Ex.P1) and the carpet (Ex.P2). The said CFSL report was proved by Suresh Kumar Singla (PW48).

30. Similar statement was made by Gautam Roy (PW27), Senior Scientific Officer, CFSL, CBI, CGO Complex, Lodhi Road, who had taken the photographs marked Ex.PW27/A-1 to A-11.

31. Ajay Prakash (PW18), Department of Forensic Medicine, AIIMS, had taken blood sample of one Zameel Mohd., son of the deceased K.T. Sameer for DNA profiling. Both ‘dry blood stain’ and ‘wet whole blood’ samples were prepared and sealed with the seal of ‘Forensic Medicine AIIMS’. The consent form (Mark A) of Zameel Mohd. was signed by PW18 at point X.

32. Dr. B.K. Mohapatra (PW43), Senior Scientific Officer (Biology), CFSL, CBI, New Delhi Officer, has proved the DNA Profiling Report marked Ex.PW43/A. He has stated that he had undertaken the said examination as per working procedure manual and had carried DNA isolation from several exhibits via organic extraction method using DNA

analyser. For the said purpose, he had examined the seat cover, shirt, vest, pants, underwear, piece of cloth, metallic piece and found that the DNA profile was consistent with the finding that they belonged to the biological father of Mohd. Zameel, who was the source of Ex.X-1 (liquid blood sample) and Ex.X-2 (blood stained gauze). The report also records that blood was found on the piece of car seat cover (Ex.P1) and the pieces of carpet (Ex.P2) found on the car. This proves that the blood stains found on the piece of car seat cover and pieces of floor carpet was that of the deceased K.T. Sameer and not of any third person. This predicates a strong link between the car and the offence in question.

33. The aforesaid car bearing registration number DL1T-6001 was being operated as a taxi and was registered in the name of Satya Prakash, who has deposed as PW34. Satya Prakash (PW34) is the brother of the appellant Manish Kumar. Notice under Section 133 of the Motor Vehicle Act was issued to PW34, who had furnished a reply dated 10th October, 2008 vide Ex.PW34/A in his handwriting and signature. However, in the Court deposition, PW34 resiled and did not accept what was stated in his reply dated 10th October, 2008, claiming that the reply was dictated by the police. PW34 in Ex.PW34/A had stated that the taxi was with his brother Manish Kumar from about 7 P.M. on 10th October, 2008 and the said taxi came back on 11th October, 2010 at 8 A.M. PW34, however, accepted that the telephone No.9810041951 belonged to him. On being confronted with his statement (Ex.PW34/A) under Section 161 Cr.P.C., wherein it was recorded that he had handed over taxi to the appellant Manish, he replied that he could not tell whether he had made any such statement.

34. In view of the factual background and evidences in the present case, we would accept the written version given by Satya Prakash (PW34) in Ex.PW34/A, which is in his own handwriting and signed. The

said reply was given on 10th October, 2008, and in case the said witness was coerced and forced to make the statement, he would have protested or informed the higher authorities, after all, his brother, i.e. the appellant Manish was being implicated on the basis of his reply dated 10th October, 2008 (Ex.PW34/A).

(D)(iv) Specific contentions of the appellants

35. We would now like to refer to other argument of the appellants. They rely upon the testimony of the first Investigating Officer SI Krishan Kumar (PW40). The said Sub Inspector on 14th October, 2008, was posted at police station IGI Airport and was marked DD No.43 regarding missing of K.T. Sameer. The missing complaint was made by N.K. Afzal (PW1). PW40 had checked the pre-paid taxi booth to find out whether any passenger by the name of K.T. Sameer had booked a taxi from the airport. He came to know that taxi bearing registration No. DL1T-3940 was booked by one Samir for Paharganj/Karol Bagh side. PW40 then contacted the driver of the said taxi who pointed out the place where he had dropped the said Samir in Karol Bagh. PW40 had checked and verified from the hotels but could not ascertain and confirm whether Samir had checked in any of the hotels. He had flashed wireless messages and checked hospitals etc. as per the routine followed in cases of missing persons. On 15th October, 2008, he had given a letter to the ACP's office for call record details of the mobile phone of K.T. Sameer, i.e. the number provided by N.K. Afzal (PW1). He also gave letters to SBI, Palam and SBOP, Palam for ATM withdrawal details. Thereafter, the FIR (Ex.PW3/A) was registered and investigation was marked to Inspector Sunil Kumar (PW53).

36. Learned counsel for the appellants had vociferously relied upon the letter (Ex.PW19/A) written by Ajmal Abdullah (PW19). The said letter

gives details of the residence of PW19 and the fact that he had purchased the SIM card with mobile No.9846202449 and the said SIM card was given to his uncle K.T. Sameer Kaithal, who had been murdered after being kidnapped from IGI Airport, Delhi. The said letter is dated 13th October, 2008. The indication and suggestion is that Ajmal Abdullah (PW19) as well as relatives of K.T. Sameer were aware that he had been murdered by 13th October, 2008. Thus, the entire foundation and edifice of the prosecution case is dubious and doubtful. Noticeably, Ajmal Abdullah (PW19) was not specifically cross-examined on the date as mentioned in Ex.PW19/A. To us, the mentioned date is an apparent mistake. This is obvious, for the FIR was only registered on 15th October, 2008. The deposition of the first Investigating Officer SI Krishan Kumar (PW40) is lucid and clear. Noticeably, initially the FIR was registered under Section 364 IPC. Section 302 IPC was only added on 20th October, 2008. The heart of the argument based upon the discrepancy in the date mentioned in Ex.PW19/A, therefore, does not seem to beat to the rhythm of the apparent and clearly undisputed facts as proved. The argument has to be thus rejected. Inspector Sunil Kumar (PW53) has sequentially and clearly explained the manner, in which the case was investigated and solved from the time when he took over investigation on 15th October, 2008.

37. Submission that the appellants' proposition should be accepted as it is affirmed by Sajid K.V. (PW12) who has stated that they were daily going to police station Palam Airport between 13th October, 2008 to 20th October, 2008, is again flawed and unacceptable. The said statement by PW12 does not negate and is not contrary to our finding. Statement of PW12 indicates that they were not aware what had happened, except that

K.T. Sameer was missing and a substantial amount of money had been withdrawn using his ATM card.

38. Similarly, the contention on behalf of the appellant Anil that the records of hiring of taxi from airport, toll receipts, CCTV footage of cameras have not been produced and, therefore, the prosecution story is rejected as untenable and devoid of merit.

(D)(v) Withdrawal of money, ATM Transactions and call records

39. Reference can now be made to the testimonies of the bank officials, who had provided information and details with regard to withdrawal of money from ATMs through the Debit Card No.4909801160227752, which was in possession of the deceased K.T. Sameer.

40. Sharon Sethi (PW14), Branch Manager, Standard Chartered Bank, Vasant Vihar Branch, has deposed that pursuant to a request letter received on 23rd October, 2008 for providing transaction details of ATM Card No.4909801160227752, the requisite information was provided on 30th October, 2008, vide letter Ex.PW14/A along with two video CDs collectively marked Ex.PW14/C containing video recording of the ATM for the relevant period, and the ATM Roll depicting transactions (Ex.PW14/B). Anjula Narula (PW16), Deputy Manager, State Bank of India, Dundahera Branch, Gurgaon, Haryana proved the computerized withdrawal statement of ATM dated 11th October, 2008 as Ex.PW16/B. Binita R.C. Basu (PW17), Assistant Vice President, Axis Bank proved the letter marked Ex.PW17/A giving details of the transaction of the aforesaid card. Shweta Wadhwa, Customer Service Manager, Clearing Department, HSBC Bank, Connaught Place has appeared as PW29 and has stated in response to the application dated 23rd October, 2008, that

they had provided withdrawal details of the aforesaid ATM Card for the period 11th October, 2008 to 13th October, 2008 vide letter Ex.PW29/A. The said details running into three pages were marked Ex.PW29/B. No objection was taken to admission of the said details on record.

41. Kalpna Lal (PW15) had deposed that she, vide Ex.PW15/A, informed the police that the ATM card was destroyed by their bank on 14th October, 2008, after it was retained in the machine at Patparganj on 13th October, 2008 as a 'hot-listed card'.

42. Deepak, Alternate Nodal Officer, Vodafone Mobile Services Ltd., who had appeared as PW56, proved the call record details of mobile number 9846202449 for the period 1st April, 2008 to 15th October, 2008 which was marked Ex.PW56/A. He had also proved the cell ID address list marked as Ex.PW56/B. Certificate (Ex.PW56/C) under Section 65B of the Indian Evidence Act, 1872 is proved and is on record.

43. Anuj Bhatia, (PW10) Nodal Officer, Vodafone Mobile Services Ltd. has stated that at the request of the police, call details of phone No.9846202449 for the period 1st April, 2008 to 15th October, 2008 were supplied by Gulshan Arora, the then Nodal Officer through e-mail. Printouts of covering e-mail letter and call details were proved as Ex.PW10/A and B, respectively. PW10 deposed that the call made on 11th October, 2008 at 0031 hours (am) was from Gurgaon area, Sukhrali Chowk and IFFCO Nagar, Sector 17. Ex.PW10/A, the e-mail covering letter and the call records Ex.PW10/B can be relied upon by the prosecution only to corroborate the statement of the Investigating Officer Inspector Sunil Kumar (PW53). The said e-mail covering letter was addressed to ACP Rajiv.

44. The trial court in the impugned judgment in paragraphs 108 to 122 has referred to different telephone numbers, the call records and has established the link between the calls made and received. Mobile phone number 9968562955 was allotted to subscriber “Monu/Sher Singh” as per customer application form (Ex.PW49/C). Several calls, both incoming as well as outgoing, were made from this number to mobile phone number of Manish, i.e. 9818152052 on 10th October, 2008 between 2133 hours to 2325 hours. Similarly, calls were made from mobile number 9968562955 of the appellant Monu to mobile phone number 9268397468 on 10th October, 2008 at 2336 hours and 2341 hours. The mobile phone number 9268397468 was being used by Vandana (PW13). The exchange of these phone calls corroborates the prosecution version. As already noticed, money as well as mobile-phone-cum-pocket PC ‘i-mate JASJAR’ (Ex.P4) of the deceased was recovered at the behest of the appellant Monu.

45. The contention of the appellants that in the disclosure statements of Manish and Monu marked Ex.PW7/A and 7/B, respectively, there is a cutting and the mobile phone number of appellant Monu, 9968562955 has been written after striking 98110041951, indicates that the disclosure statements were not in fact made, is fallacious and without substance. Disclosure statements made to police are admissible only under Section 27 of the Indian Evidence Act, 1872 and to a limited extent when they give leads, Section 8 of the Indian Evidence Act, 1872 would be applicable. Satya Prakash (PW34) in his cross-examination by the Addl. Public Prosecutor has stated that his mobile number was 9810041951. The said Satya Prakash (PW34) is a brother of the appellant Manish and owner of the taxi bearing registration No.DL1T-6001.

46. Sunil Kumar (PW49), Nodal Officer, MTNL could not produce the call records of mobile telephone number 9968562955 as they were not available, but he had produced the customer application form (Ex.PW49/C) along with the driving license of the subscriber, i.e. the appellant Monu, son of Sher Singh. Ex.PW49/C mentions the name of the subscriber as “Monu/Sher Singh”. Referring to the call records of mobile phone number 9846202449 (Ex.PW10/B), it was highlighted that a call was made to Riyadh at about 12.25 A.M. on 11th October, 2008. This is correct but would only show that the said number was being used by the deceased K.T. Sameer. The said call to a number in Riyadh would not help or assist the appellants or their argument.

(D)(vi) Recovery of money and mobile phones

47. On the question of recovery of money from the three appellants- Manish, Monu and Anil Kumar, we would refer to the depositions of Sunil Kumar (PW53). Kamlesh (PW45) and SI Zabbar Singh (PW28) which affirm and corroborate recovery of Rs.35,000/- at the behest of Manish, Rs.45,000/- at the behest of Monu, and Rs.60,000/- at the behest of Anil Kumar. As noticed, the said recoveries were made after recording disclosure statements of Manish (Ex.PW7/A), Monu (Ex.PW7/B) and Anil Kumar (Ex.PW45/F). The aforesaid disclosure statements have been proved by Kaithal Shahir Ahmed (PW7) who has signed the Exs.PW7/A and PW7/B both at point “A”; Kamlesh Kumar (PW45) who had signed Exs.PW7/A, 7/B and 45/F at points “B”, “B” and “A” respectively. Sunil Kumar (PW53) had also signed Exs.PW7/A, PW7/B and PW45/F at points “C”, “C”, and “B”, respectively.

48. The appellant Monu had led Insp. Sunil Kumar (PW53) along with ASI Kailash Kumar (PW45) and Kaithal Shahir Ahmed (PW7) to his

house, i.e. House No.T-11/60, Mehram Nagar, on 20th October, 2008, from where he had got recovered a polythene bag under a bed, which contained a sum of Rs.45,000/- in cash (Ex.P3 colly.) and a mobile phone (Ex.P4) of make and model, “i-mate JASJAR”. The phone (Ex.P4) was identified by Kaithal Shahir Ahmed (PW7) as belonging to his deceased brother, K.T. Sameer. The phone (Ex.P4) was seized by Insp. Sunil Kumar (PW53) vide memo Ex.PW7/D, which was signed by PW7, PW45 and PW53 at points “A”, “B” and “C”, respectively. The recovery has been proved by PW53, PW45 and PW7 without any aberrations in their testimonies regarding the same. PW53 in his cross-examination accepted that no documentary proof was available with PW7 to prove ownership of Ex.P4 but added that PW7 had identified it as the said phone which was bought and used by the deceased in Saudi Arabia. No suggestion regarding the ownership of the mobile-cum-pocket PC was put to PW7 in his cross-examination. PW7 had also deposed that there was a video of K.T. Sameer and his family members in the said mobile-cum-pocket PC (Ex.P4). It is noteworthy that the said phone was a mobile phone-cum-pocket PC, which was not commonly available and used by general public in the year in question. The recovery of the said mobile and money at the instance of the appellant Monu creates a link between him and the offence in question.

49. Sajid K.V. (PW12) has testified that on 20th October, 2008, they, i.e. he and others, had seen the appellants Anil and Monu in police custody and were asked by the police to accompany them for recovery and identification of articles belonging to K.T. Sameer. Appellant Anil had, thereafter, taken the police team and PW12 to the house where they recovered one mobile phone ‘Nokia Xpress Music’ (Ex.P5), which was

identified by PW12 as belonging to K.T. Sameer. The phone was seized and sealed vide seizure memo, Ex.PW12/A.

(D)(vii) Recovery of the Pistol (Ex.P7) at the behest of Anil and the Ballistic Report

50. On the basis of the disclosure statement marked Ex.PW45/F made by the appellant Anil Kumar, a country made pistol (Ex.P7) was recovered from roof of the toilet of his house. In addition to the deposition of Sunil Kumar (PW53) elucidated above, this fact is deposed and proved by SI Zabbar Singh (PW28). Sketch of the pistol (Ex.PW28/A) was prepared and the pistol was taken into possession vide seizure memo Ex.PW28/C, signed by PW28 at point 'A'. The aforesaid pistol was identified by PW28 after opening seal of CFSL, CBI and the same was marked Ex.P7. PW28 was subjected to extensive cross-examination on the question of recoveries, but we do not think there is any justification or reason to disbelieve the recovery. ASI Kamlesh Kumar (PW45) has deposed that on 21st October, 2008, he along with the IO (PW53), PW28, and the appellant-Anil Kumar had gone to his house at S-395/15, Mehram Nagar and at the behest of the appellant one country made pistol (Ex.P7) was recovered covered in a cloth from the roof of the bathroom. He gave dimensions of the said pistol and proved the seizure memo Ex.PW28/C, signed by him at point 'C'. The sketch Ex.PW28/B, also signed by him at point 'B'. In his cross-examination by the Public Prosecutor, PW45 clarified that he was confused whether the house of Anil Kumar was 313/75 or 95. In his cross-examination, PW45 denied that the bathroom was for common use of the accused and neighbours, and stated that it was an independent bathroom. PW45 had visited the house of the appellant Anil Kumar in the morning and for the second time

in the evening. During the first visit only one room was searched. This room was again searched in the evening. In the morning, recoveries were affected from the room and in the evening recoveries were affected at a small distance. He denied the suggestion that the recoveries were planted.

51. Inspector Sunil Kumar (PW53) has deposed about the recovery of the country made pistol (Ex.P7) from the roof of the bathroom situated outside the house of the appellant Anil Kumar on 21st October, 2008 at 6 A.M. and the sketch thereof (Ex.PW28/A), signed by him at point 'C' and the seizure memo (Ex.PW28/C), signed by him at point 'C'. In his cross-examination, PW53 has deposed that there were two rooms in the house of the appellant-Anil Kumar on the ground floor. There was a kitchen outside the house and a temporary shed outside kitchen but he could not recollect the dimension of the room, the articles kept therein or the number of windows in the house. We reject the contention of the appellants that recoveries from the house of appellant-Anil Kumar are fudged or framed. In fact, PW53 was quite steadfast in his cross-examination. PW53 further clarified that he had recorded four disclosure statements of the appellant-Anil Kumar, the first after the arrest (Ex.PW45/F) on 20th October, 2008, and three more on 21st October, 2008; one in the morning at 10.30 A.M. and two at about 5 P.M. (Ex.PW53/A and Ex.PW53/B). Ex.PW45/F had led to the recovery of the pistol (Ex.P7), the *khanjar* (Ex.P8) and Rs.60,000/- (Ex.P9), while Ex.PW53/B led to the recovery of the mobile phone (Ex.P5).

52. The CFSL report (Ex.PW50/A) with regard to pistol was proved by A.R. Arora (PW50), Senior Scientific Officer, Grade-I. The aforesaid report records and A.R. Arora (PW50) in his court deposition has stated

that he had examined parcel No.6, which contained a fired bullet (Ex.P6) and the country made pistol (Ex.P7) and opined that the bullet had been fired from the said pistol. He identified the bullet as Exhibit PW50/P-1, the country made pistol as Exhibit PW50/P-2, and the fired cartridge used by him for the said test as Exhibit PW50/P-3. The bullet (Ex.P6) was recovered from the dead body of the deceased K.T. Sameer (See deposition of Dr. B.B. Aggarwal (PW9) in paragraph 15 supra).

53. Learned counsel for the appellant-Anil Kumar had emphasised and relied on the deposition of PW50 highlighting that the length of the country made pistol as stated by him was 26 cm with barrel length of 14.8 cm. He also referred to the sketch (Ex.PW50/DY). Reference was then made to the sketch of the country made pistol marked Ex.PW28/A, wherein the dimensions of the pistol have been recorded as 28.8 cm, length of the barrel has been mentioned as 19 cm and the length of the butt has been mentioned as 9.8 cm. Our attention was drawn to the discrepancy in design of the trigger in the two sketches.

54. In these circumstances, we had asked for the original pistol (Ex.P7) and the same was produced before us on 9th March, 2015 and after examining the pistol (Ex.P7), the following order was passed:-

“xxx

The duly sealed exhibit has been produced and was opened in the presence of the counsel. The pistol was measured and we record that the said exhibit, matches the dimensions mentioned and recorded in Ex.PW28/A. The exhibit is also identical to the sketch in Ex.PW50/DY.

A fired cartridge (Ex.PW50/P3) has also been examined. Figure 8 engraved on the fired cartridge can also be read or mis-read as 5. The fired cartridge (Ex.PW50/P3) was shown to the counsel for the appellants.

xxx”

55. It is, therefore, clear that there was no discrepancy whatsoever in the calibre or the size of the seized country made pistol (Ex.P7) and the bullet (Ex.P6) recovered from the deceased and as examined by the experts at the CFSL. The trigger of the pistol (Ex.P7) is peculiar, with a moving lock. It is for this reason that the two sketches appear to be different, but in fact the sketches are of the very same pistol, i.e. Ex.P7. The figure of '8' engraved on the fired cartridge (Ex.PW50/P-3) was mis-read as '5', an illusion possible when we look at the fired cartridge (Ex.PW50/P-3) from the side. This was shown and accepted by the counsel for the appellants.

56. Serological Examination Report (Ex.PW48/A) describes Exhibit 6 as "few threads of metallic piece". It is submitted that the aforesaid description of the bullet recovered from the body of K.T. Sameer negates the prosecution story, for a bullet would not have described in the said words. The said 'metallic pieces' were remnants of the bullet which had been recovered from the body of the deceased as is clear from the deposition of Dr. B.B. Aggarwal (PW9), who had identified the said bullet marked Ex.P6. The said bullet in parcel No.6 was examined by the ballistic expert, A.R. Arora (PW50), who had opined that the bullet was of 8 mm size. It is obvious that the ballistic expert was able to identify the metallic piece and, therefore, had described it as a fired bullet.

(E) Concern

57. However, there is one aspect of concern. There is sufficient evidence to accept the defence version that the three appellants were apprehended at Shimla and then brought to Delhi. The said fact was asserted by the three appellants in their statements under Section 313 Cr.P.C. They had led defence evidence in support. Constable Sunil

Kumar (DW1) has accepted that one car bearing No.DL3CK-2997 was detained by the traffic police at Tutti Kundi bypass and DD entries were made regarding the information and also on return to the police station at 5.15 P.M. by Head Constable Praveen Dutt. DW1 did not identify the appellants as the persons who were brought to the police station, but had accepted that their names were Manish, Monu and Anil. DW1, we agree, was not candid when he did not accept the suggestion that the three were wanted by Delhi Police in this case, but claimed that this fact might be in the knowledge of the SHO.

58. Head Constable Nikka (DW2) has stated that on 18th October, 2008 he was posted as Investigating Officer, Police Station West Shimla. He had gone to Tutti Kundi bypass and three persons were brought to the police station, but claimed that he could not identify the said persons due to time gap of four years. He was cross-examined by the counsel for the appellants but again asserted that he cannot identify the three persons and did not know their names or whether they were called Anil, Monu and Manish. He denied that the three persons were wanted by Delhi Police and the three had stayed the entire night in the police station. We do not think that DW1 and DW2 have deposed truthfully in as much as they have tried to hide and conceal true facts, known to them.

59. Our finding gets support from the testimony of Head Constable Amit Rajta (DW5) of Himachal Pradesh Police, who proved the Daily Diary entries and the reply given under the RTI; and testimony of Inspector K.D. Sharma (DW6), who was posted as the SHO Police Station West Boileauganj, District Shimla. DW6 has deposed that police team from Delhi reached Shimla on 19th October, 2008. The vehicle bearing No.DL3CK-2997 and three detained persons, namely, Manish,

Monu and Anil were handed over to them. The detainees were interrogated and this entry was made in Daily Diary entry No. 37 dated 18th October, 2008. He also proved Daily Diary entry Nos. 34A, 37 and 6 as DW6/A, 6/B and 6/C. He identified the appellants in the Court.

60. Ms. Soumya Sambasivan (DW7) has proved the General Diary No.34A and 37A both dated 18th October, 2008 and General Diary No.6A dated 19th October, 2008, along with the certificate under Section 65B of the Indian Evidence Act, 1872.

61. Inspector Vinod Narang (DW3) has testified that he was posted at Police Station IGI Airport and SI J.S. Mishra was posted as Sub-Inspector at the Domestic Airport. On 18th October, 2008, they had left for Shimla from Delhi. They had reached Shimla on 19th October, 2008. They had gone to Shimla on directions of ACP M.I. Haider to interrogate three persons who had been apprehended in a missing case of an NRI. After reaching Shimla at about 5 A.M., they had made inquiries from the three persons apprehended by the Shimla Police. We accept the contention of the appellants that DW3 had tried to cover up and conceal true facts, when he had claimed that the three boys had referred to a Gujarati passenger. DW3 was also wrong and had falsely claimed that the persons were directed to appear before the IO. The appellants, it is apparent, were detained and brought to Delhi. DW3 has accepted that he had interacted and made inquiries from the three persons, i.e. the three appellants, whom he had identified as the accused present in the Court. In his cross-examination by the counsel for the accused, DW3 had accepted that on the way back to Delhi, their vehicle broke down and he professed inability to remember whether they had returned to Delhi on 19th October, 2008. He accepted that vide GD No.6A, Police Station West Shimla, the

three persons were handed over to him, but added that he had relieved them after making necessary inquiries.

62. Inspector J.S. Mishra (DW4) has accepted that three persons had been detained in Police Station Boileauganj, Shimla and were interrogated. However, he claimed that they did not disclose anything about the present case, therefore, they were relieved. The said statement has to be rejected as false and wrong. DW4 has accepted that the appellants, i.e., Anil, Monu and Manish were the same persons from whom inquiries were made. In his cross-examination by the counsel for the appellants, DW4 affirmed that DD No.46 dated 18th October, 2008 was made with regard to departure and DD No.47 dated 20th October, 2008 was made with regard to arrival. The same were marked as Mark D-4/1 and Mark D-4/2 as well as Ex.DW4/A and Ex.DW4/B. He accepted that he had interrogated the three for about 45 minutes to 1 hour at Shimla itself and they had left for Delhi at 7.30 A.M. and reached Delhi on the next day, late in the evening because their vehicle had broken down at Panchkula at about 10.30 A.M. They drove to Delhi at a slow speed during the intervening night of 19th and 20th October, 2008. They got the vehicle repaired at Panipat late in the night intervening 19th-20th at about 11 P.M. and had stayed in a *mazaar* in Panipat at late night at 11 P.M. on 19th October, 2008. The time mentioned in DD No.47, marked Ex.DW4/B, loses its relevance once we accept the factual position.

63. It is apparent from the testimonies that the three appellants were interrogated and thoroughly examined in Shimla on 19th October, 2008 and were brought back to Delhi. It is apparent from the statement of DW3 and DW4 that during the return journey, the car in which the

appellants were being brought to Delhi broke down. The police team had not taken transit remand from the court of Metropolitan Magistrate at Shimla. Possibly, they believed that they would reach Delhi the same evening. However, this would not affect the prosecution case so as to grant and entitle the appellants an order of acquittal. At best, the aforesaid conduct and lapse on the part of the investigation mandates a close and meticulous scrutiny. It warrants a cautious and judicious examination of the testimony of witnesses. For this purpose, we would take the date of arrest and detention of the appellants as 19th October, 2008, i.e. when the police team from Delhi reached Shimla and had interrogated the three appellants. It is noticeable that the further inquiries dealing identification of the dead body, recovery of the taxi DL1T-6001, recovery of the pistol and money, etc. were all on or after 20th October, 2008. It is for this reason that we have comprehensively and exhaustively examined the entire evidence and the material on record. On the said irregularity, a Division Bench of this court in CrI.A.615/2011 titled *Asif @ Shabbu versus State*, decided on 28th May, 2014, had observed:-

“26. Constitution mandates that a person upon arrest should be produced before a Magistrate/Court within 24 hours. The Supreme Court in the case of *D.K. Basu Vs. State of Bengal* (1997) 1 SCC 416 has issued directions as the aforesaid constitutional obligation and protection was not being adhered to.

27. However, it would not be correct and appropriate to acquit the two appellants for failure to adhere to the limit prescribed in Article 22 and follow the requirements of Sections 52 and 57 of the Cr.P.C. This violation would result in procedural irregularity and would not make the arrest and the prosecution's story in the present case null and void. Strict compliance of statutory provisions should be there but that by itself does not render the acts done by the police officer void *ab initio* and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. [See *H.N. Rishbud and Inder Singh Vs. The State of Delhi*, AIR 1955 SC 196, *Manubhai Ratilal Patel Tr. Ushaben Vs. State of Gujarat and Ors.*, AIR 2013 SC 313, *Sadhwi Pragyna Singh Thakur Vs. State of Maharashtra*, 2011 (10)

SCALE 77, *Ashok Tshering Bhutia Vs. State of Sikkim*, AIR 2011 SC 1363, *State of M.P. Vs Ramesh C. Sharma*, (2005)12 SCC 628, and *State of Punjab Vs. Balbir Singh*, AIR 1994 SC 1872 and *State Through Reference Vs. Ram Singh & Ors.* And *Pawan Kumar Gupta Vs State*, (Death Sentence Ref. No.6/2013 and Crl. App. No.1398/2013 Decided On: 13.03.2014)].”

Conclusion

64. In view of the aforesaid discussion, we do not find any merit in the present appeals. We uphold the conviction and maintain the sentences awarded to the appellants.

65. The appeals are dismissed. Trial Court Record will be sent back.

**SANJIV KHANNA
(JUDGE)**

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**May 29th, 2015
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