

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

+ **CRIMINAL APPEAL NO. 149/2013**

% **Reserved on: 24th September, 2015**
Date of Decision: 18th December, 2015

VIJAY ALIAS RAJESHAppellant
Through Mr. Dimple Vivek & Mr. Deepak Sharma, Advocates.

Versus

THE STATE (NCT OF DELHI) ...Respondent
Through Mr. Varun Goswami, APP.

CRIMINAL APPEAL NO. 162/2013

OM PRAKASHAppellant
Through Mr. Mohit Mathur, Sr. Advocate with Mr. Manoj Pant
& Mr. Sharukh Hussain, Advocates.

Versus

STATE (NCT OF DELHI) ...Respondent
Through Mr. Varun Goswami, APP.

CRIMINAL APPEAL NO. 160/2013

RAKESHAppellant
Through Mr. Mohit Mathur, Sr. Advocate with Mr. Manoj Pant
& Mr. Sharukh Hussain, Advocates.

Versus

STATE (NCT OF DELHI) ...Respondent
Through Mr. Varun Goswami, APP.

CORAM:

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

SANJIV KHANNA, J.

1. Afore-stated Criminal Appeal No.160/2013, filed by Rakesh, Criminal Appeal No. 149/2013, filed by Vijay @ Rajesh and Criminal Appeal No.162/2013 filed by Om Prakash, question judgment dated 12th December, 2012, convicting Rakesh under Section 302/34 and Section 397 of the Indian Penal Code, 1860 (IPC, for short) and Section 27(1) of the Arms Act, 1959 (Arms Act, for short) , Vijay @ Rajesh under Sections 302/34 and 392 IPC and Om Prakash under Section 411 IPC.
2. The convictions arise from the charge-sheet filed in FIR No.62/2002, police station Anand Parbat, relating to murder of Mohan Lal Bansal and heist involving looting of Rs25 lacs on 28th February, 2002.
3. By order on sentence dated 15th December, 2012, Rakesh and Vijay @ Rajesh have been convicted for imprisonment for life, fine of Rs.10,000/- each and in default of payment of fine, simple imprisonment of two years for the offence under Section 302 read with Section 34 IPC. Vijay @ Rajesh has been convicted for rigorous imprisonment for five years, fine of Rs.5,000/- and in default simple imprisonment for six months for the offence under Section 392 IPC and Rakesh has been convicted under Section 397 IPC for rigorous imprisonment for seven years and under Section 27(1) of the Arms Act for rigorous imprisonment of seven years, fine of Rs.5,000/- and in default simple imprisonment of one year. Om Prakash has been sentenced under Section 411 IPC with rigorous imprisonment for six months, fine of Rs.10,000/- and in default to undergo simple imprisonment for two months. The sentences are to run concurrently and Section 428 of the Code of Criminal Procedure, 1973 (CrPC for short) it stands observed would apply.

4. There is a second set of Criminal Appeal Nos.161/2013, 1450/2012 and 122/2013 filed by Rakesh, Pranav and Bharat, respectively, which impugn another judgment of the same date, 12th December, 2012, arising out of the charge sheet filed in FIR No.121/2002, police station Uttam Nagar. This judgment convicts Rakesh and Pranav under Sections 307, 186 and 353 IPC and Section 25 of the Arms Act and Bharat under Section 216A IPC. The second set of appeals relate to the stated occurrence and the police encounter, which took place on the second floor of House No. 704, Janta Flats, Hastal, Uttam Nagar where the police team had gone to locate and apprehend perpetrators involved in the heist/ murder subject matter of the FIR No. 62/2002, Police Station Anand Parbat. As per the prosecution case, one Sanjeev Verma had died in the said encounter. Appellant Rakesh, it is the case of the prosecution, was arrested in the said encounter.
5. The said Sanjeev Verma was statedly involved in the heist and murder but he was not charge sheeted as he had died in the encounter. Another person named Mukesh @ Gujjar had faced prosecution and was charge sheeted, but he subsequently absconded and has been declared a proclaimed offender.
6. In terms of Orders dated 14th February, 2014 and 5th August, 2014 passed in the present appeals, Criminal Appeal No.161/2013 filed by Rakesh, Criminal Appeal No.1450/2012 filed by Pranav and Criminal Appeal No.122/2013 filed by Bharat, arising out of the charge sheet filed FIR No. 121/2002 police station Uttam Nagar were listed along with present set of appeals. Accordingly, we have heard arguments in the two sets of appeal and are pronouncing our decision on the two sets of appeals by way of two separate judgments.
7. As noticed and recorded above, Criminal Appeal No. 149/2013 filed by Vijay @ Rajesh, Criminal Appeal No.160/2012 filed by Rakesh and Criminal

Appeal No.162/2013 filed by Om Parkash impugn their conviction vide judgment dated 12th December, 2012 in charge sheet filed in FIR No. 62/2002, Police Station Anand Parbat. The aforesaid charge sheet relates to murder of Mohan Lal Bansal as a result of the gun-shot wound and robbery of Rs.25 lacs on 28th February, 2002.

8. The deceased Mohan Lal Bansal had suffered homicidal death as a result of a firearm injury is proved and established beyond doubt from the oral testimony and documents proved by Dr. Basant Dalmia (PW-38), who had recorded MLC marked Exhibit PA, at Jeewan Mala Hospital, New Rohtak Road at about 12.40 P.M. The patient Mohan Lal Bansal was declared brought dead. Mohan Lal Bansal was brought by the CATS ambulance with alleged history of gun-shot injury on the right side of the neck suffered at about 12.20 P.M. at Anand Parbat. The said document was not disputed by the appellants. The post-mortem on Mohan Lal Bansal was conducted by Dr. M.M. Narwana (PW-10), who had proved his report Exhibit PW-10/A, which opines and records presence of following internal and external injuries:-

“External Injury

One distinct hole seen on right side of neck located 8 cm below right mandibular angle and 9 cm from anterior midline. Size 1 cm x 1 cm. Margins are inverted, abraded. Tatooing seen on the anterior aspect of the wound.

In the course of injury, it pierced the neck structures (muscles, oesophagus and trachea). Entered the anterior aspect of left side of chest, recochettet to left shoulder and from there again recochettet to left arm end lodged in the muscles of left upper arm.

Internal injuries

Head and Neck:-Bleeding from nose present. Neck structures punctured.

Chest:- Muscles of the chest (left side) bruised. There were fracture of left fifth rib. Oesophagues lacerated. Trachea lacerated blood present.

Lungs:-Congested. Dark blood seen on cut section.

Heart: Large blood vessels normal.

Abdomen:-

Stomach empty. All other viscera normal.

Time since death approximately one/four day.”

The cause of death as opined by Dr. M.M. Narwana (PW-10) and as mentioned in the said report Exhibit PW-10/A was the firearm injury. Dr. M.M. Narwana (PW-10) has deposed on two other important aspects. He has stated that the bullet was fired from a distance of about 3 or even less than 2 feet. Secondly, he had extracted a bullet lead or discharged bullet from the body of the deceased-Mohan Lal Bansal, which was identified by him in the court as Exhibit PW-10/1.

9. On the question and fact that the deceased Mohan Lal Bansal was carrying Rs.25 lacs, we have depositions of Mukesh Kumar Sharma (PW-4), Ashok Goel (PW-5) and C.M. Duggal (PW-7), Senior Manager, Federal Bank, Karol Bagh. The last witness has deposed that Rs.25 lacs was withdrawn as per statement of account Exhibit PW-7/A from current account of Chaudhary Finance Company on 28th February, 2002. Chaudhary Finance Company was a proprietorship concern of late Mohan Lal Bansal. C.M. Duggal (PW-7) in his cross-examination has testified that Ashok Goel (PW-5) was also maintaining an account with the said bank, a fact confirmed by Ashok Goel (PW-5). Ashok Goel (PW-5) has testified that he and deceased Mohan Lal Bansal, son of his maternal uncle, were carrying on inductile business of purchasing drafts, etc. on commission basis. They were doing business jointly and their bankers were the Federal Bank Limited, Karol Bagh. They would daily withdraw money from the said bank. Their office was at 930/61, Lekhu Nagar, Tri Nagar, Delhi. Mohan Lal Bansal had two vehicles

including Santro car bearing No.4268 and Mukesh Kumar (PW-4) was his driver. On 28th February, 2002, Ashok Goel (PW-5) had spoken to the deceased at about 9 A.M. and thereafter had withdrawn Rs.25 lacs in cash from the account of Chaudhary Trading Company and Ashoka Trading Company from the Federal Bank, Karol Bagh. The amount withdrawn was kept in two carry bags of white colour. Ashok Goel (PW-5) after receiving a call from Mohan Lal Bansal that they were present outside the bank premises, alongwith his workers Bhagat and Ram Prasad, had taken and kept the carry bags in the car of Mohan Lal Bansal, parked by some distance, as the drain in front of the bank premises was dug. PW-5 had seen, Mohan Lal Bansal and Mukesh Kumar drive away in the said vehicle to their office at Tri Nagar. Ashok Goel (PW-5) remained at the bank to finish his work. After some time, Ashok Goel (PW-5) received a call on his cell phone from Mukesh Kumar Sharma (PW-4) and learnt that Mohan Lal Bansal had received bullet injuries and money had been looted near the Shiv Temple, Military Road, Delhi. PW-5 reached the said spot and found Mohan Lal Bansal lying on the road and an ambulance was parked. Surinder, younger brother of Mohan Lal Bansal also arrived. Mohan Lal Bansal was taken to the Jeevan Mala Hospital, but was declared as brought dead. The aforesaid “statement in chief” was recorded on 18th October, 2002. Ashok Goel (PW-5) subsequently on 15th March, 2003 identified the car, Exhibit P-1, as the one used by Mohan Lal Bansal.

10. Learned counsel for the appellants have drawn our attention to the cross-examination of Ashok Goel (PW-5) on 15th March, 2003 wherein the witness has accepted that Mohan Lal Bansal and Mukesh Kumar Sharma (PW-4) had come inside the bank premises to check the currency notes. It is highlighted that Mukesh Kumar Sharma (PW-4) had made similar somewhat divergent

statement, whether the deceased Mohan Lal Bansal and PW-4 had gone inside the bank or had remained sitting in the car, but the aforesaid minor discrepancy is immaterial and inconsequential. The core issue was whether Mohan Lal Bansal was carrying Rs.25 lacs with him in the car, which fact has been proved and established beyond doubt. Secondly, it has also been proved and established beyond doubt that Mukesh Kumar Sharma (PW-4) was in the car with the deceased Mohan Lal Bansal when he had suffered the fire arm injury and Rs.25 lacs were looted. This aspect is important as presence of Mukesh Kumar Sharma (PW-4) and his deposition as an eye witness was contested before us by referring to the testimonies of ASI Gajraj Singh (PW-1), Constable Hem Raj (PW-2), Constable Krishan Kumar (PW-18), SI Amichand (PW-21) and Inspector Virender Singh Meena (PW-23). They are ambivalent as to the presence of Mukesh Kumar Sharma (PW-4); or while admitting as to the presence of Mukesh Kumar Sharma (PW-4) state that no eye witness was found at the scene of crime. For example, constable Hem Raj (PW-2) in his court deposition has stated that Mukesh Kumar Sharma (PW-4) was present at the spot on the first occasion, yet at the same time had professed that no eye witness was seen. The said contention loses sight of the fact that Ashok Goel (PW-5) was the first informant and in his statement Exhibit PW-21/A, which became the substratum of the FIR Exhibit PW-1/B, names and mentions Mukesh Kumar Sharma (PW-4) as the person who was present and travelling in the car with Mohan Lal Bansal. The factum that PW-4 was with the deceased is inscribed and etched in the said document. We also do not find any substance in the contention that Mukesh Kumar Sharma (PW-4) should have been the first informant and the FIR should have been registered on his statement. This was possible, but would not affect the prosecution case, as even Mukesh Kumar Sharma (PW-4) did not know the

assailants from before. It does appear that initially and looking at the nature of the crime, the police did not rule out the possibility of involvement of an insider, who was aware of the daily regimen and the factum that the deceased Mohan Lal Bansal could be carrying substantial money in the car. Pertinently, Mukesh Kumar Sharma (PW-4) in his cross-examination, 20th April, 2004, has accepted that he was summoned the next day after the occurrence by the police and detained for two-three days. It is apparent to us that after the shoot-out Mukesh Kumar Sharma (PW-4) was severely shaken up, nervous and shattered. After all, he had seen his employer being shot dead in cold blood and Rs.25 lacs, which they were carrying in the car, were looted. The car itself with the money was driven away. The perpetrators were ruthless and brutal in their approach. Mukesh Kumar Sharma (PW-4) had a providential escape and was blessed with luck to be alive. Apparently, the police also suspected that PW 4 was involved for he had survived the attack.

11. It was submitted on behalf of the appellants that the call detail records of the phone used by Ashok Goel (PW-5) and Mukesh Kumar Sharma (PW-4) have not been placed on record. It was also highlighted that there was discrepancy as to the call made to the Police Control Room, and whether the call was made by Ashok Goel (PW-5) or Surinder Bansal. The call detail records are not on the record and there is some discrepancy, on the phone used by Mukesh Kumar Sharma (PW-4) to make the call to the control room etc. but this is not a substantial lapse or a major contradiction which would reflect on the prosecution case. Facts remains that both PW-4 and PW-5 have deposed about the phone call. Ashok Goel (PW-5) had certainly reached the spot, after information was communicated to him about the occurrence. The only person who could have communicated the said fact was Mukesh Kumar Sharma

(PW-4) and no one else. Ashok Goel (PW-5) in his cross-examination on 15th March, 2003 has specifically affirmed that Mukesh Kumar Sharma (PW-4) was present when he had reached the spot and the ambulance was standing. Further, Mukesh Kumar Sharma (PW-4) used to assist deceased Mohan Lal Bansal in his work and would drive the car. Earlier in his cross-examination on 15th March, 2003, Ashok Goel (PW-5) has stated:-

“.....We used to go to bank for withdrawal of money almost daily. I used to go by my own car and Mohan Lal Bansal used to go by his own car. We used to keep the currency notes in cloth bags, of white colour. There was design over those bags.....”

12. The aforesaid facts would indicate that the heist was meticulously planned and executed. The perpetrators involved were dare devils, who knew his daily routine, car details and were aware that the act of robbery had to be completed within the shortest time. Slightest resistance and reluctance was met with the fire from the weapon, which the perpetrators were carrying with them.
13. This brings us to the all important testimony of Mukesh Kumar Sharma (PW-4), who was present in the car with the deceased Mohan Lal Bansal, at the time of occurrence. It was strenuously urged that testimony of Mukesh Kumar Sharma (PW-4) that the deceased was driving the car should be disbelieved for Mukesh Kumar Sharma (PW-4) statedly employed as a driver, should having being driving the car. The said contention is to be noted and rejected for it is not uncommon and given the fact that Mohan Lal Bansal was carrying money, he (i.e. Mohan Lal Bansal) was driving the car. Mukesh Kumar Sharma (PW-4) has categorically stated that the car was being driven by Mohan Lal Bansal. PW-4 has also affirmed that Mohan Lal Bansal, a

resident of Tri Nagar was carrying on business on commission for purchase of drafts etc. On 28th February, 2002, they had driven to the Federal Bank, Karol Bagh and parked the car in a lane as the drain in front of the bank was dug up. Mohan Lal Bansal had made a call to Ashok Goel (PW-5), who was inside the bank, to inform him to come with the money. Ashok Goel (PW-5) and Bhagat had brought the money in two carry bags, which were kept on the back seat. Ashok Goel (PW-5) had returned to the bank with Bhagat stating that they had to finish some job and had asked Mohan Lal Bansal to take the money to the office. At about 11.30 A.M., when PW4 and Mohan Lal Bansal had reached near the temple at Military Road, Delhi, a motorcycle with two persons came from the left side and stopped in front of their vehicle. The riders made the motorcycle fall down and their car stuck the motorcycle and stopped. Two persons from the motorcycle came towards the car. A third person came from the back side and fired a shot through the window pane on the right side, striking Mohan Lal Bansal on his neck. The said person had abused Mohan Lal Bansal and had asked him to open the window. Perplexed, Mukesh Kumar Sharma (PW-4), opened the door of the car and ran to the other side of the road and had made a call to the Police Control Room and to Ashok Goel (PW-5) and Surinder Bansal, brother of Mohan Lal Bansal. The three persons had opened the driver's side door and Mohan Lal Bansal was dragged out of the car and made to lie on the ground. The three then boarded the car and drove away with the money, leaving the motorcycle at the spot. Mohan Lal Bansal was taken to the Hospital, where he succumbed to his injuries. Mukesh Kumar Sharma (PW-4) identified the car, Exhibit P-1. The aforesaid factual narration stands lucidly and coherently recapitulated in the examination-in-chief narrated by Mukesh Kumar Sharma (PW-4) recorded on 15th March, 2003.

14. On 24th March, 2003, Mukesh Kumar Sharma (PW-4) identified the motorcycle, Exhibit P-2, and had thereafter on the same day deposed, on the identification of the culprits as under:-

“....Accused Vijay and Rakesh along with their third associate came on motorcycle Ex. P2 on the spot on 28.2.02. Accused Rakesh stood by the side of the window of the aforesaid car and fired on Mohan Lal Bansal. When Rakesh Bansal (sic. Mohan Lal Bansal) received gun shot injuries, then accused Rakesh and Vijay alongwith their third associate had broken the glass pane of the driver’s side window and had taken out Mohan Lal Bansal out of the car. Thereafter the accused persons drove car Ex. P1 and ran away from the spot. I am not in a position to say as to who drove away car Ex.P1. I can identify the third associate of (sic, or) the third person, if shown to me. The accused persons had taken away the money kept in a car.”

15. In his cross-examination on 24th March, 2003 on behalf of Vijay @ Rajesh, Mukesh Kumar Sharma(PW-4) affirmed that his statement was recorded by the SHO at about 12 noon at the spot. In February, 2002, PW-4 was having a mobile phone No. 9811005851, which was subscribed in the name of Mohan Lal Bansal. This number was being used by the family members of his employer even on the said day. Mukesh Kumar Sharma (PW-4) however could not produce the purchase bill of the said mobile phone and had testified that Mohan Lal Bansal would keep the aforesaid mobile phone with him. PW-4 affirmed as correct that it was normal for Mohan Lal Bansal to go to the Federal Bank for collecting money and the route taken was known to Mukesh Kumar Sharma (PW-4). Cross-examination of Mukesh Kumar Sharma(PW-4) on behalf of appellant-Vijay @ Rajesh was deferred on 24th March, 2003 as a request made by his counsel for he had to “ascertain” facts stated in the charge sheet.

16. Mukesh Kumar Sharma (PW-4) was then cross-examined on 1st September, 2003 by counsel for Om Prakash and Rakesh. On 1st September, 2003, PW-4 in his cross-examination on behalf of Om Prakash and Rakesh , testified:-

“.....On our return journey, my employer Mohan Lal Bansal was driving the car and I was sitting by his side. I cannot give the number of the motorcycle which was used by the offenders. However, it was of Yamaha make. Accused Vijay and one other person were there on the said motorcycle. The other accused is not present before the court today. I had seen the said motorcycle overtook our car from left side and came in front of our vehicle. When we stopped our car, accused Rakesh came there from right side and fired on Mohan Lal Bansal. He was on foot at that time. I cannot say what mode of transport was used by him in reaching there. At that time I was sitting in the car. When accused Rakesh Kumar fired on Mohan Lal Bansal, I saw towards him. The shot was fired when driver side glass pane of the window was closed. Accused Rakesh was thumping the glass panes in order to get it opened. I opened the left side gate of the car and came out. I had stated all these facts before the police. I had not stated before the police that as soon as the car was stopped, I alighted and ran away. I had also not stated that I could not see the incident of firing at Mohan Lal Bansal. I had given the description of the offenders in my statement to the police. I had not given the age of the offenders to police. I had not given the age of the offenders to police. I had given their height, physique, colour and facial features to the police.After about 5-7 minutes of the incident, I came out of the car. It is incorrect that accused Rakesh was shown to me by the police on 3 and 4th March, 2002. It is incorrect that accused Rakesh was shown to me by the police at PS Anand Parbat. At the time of incident, there was traffic on the road. On account of that incident, backside traffic stopped. The driver of the motorcycle who is not present before the court was wearing a helmet while the pillion rider that is the accused Vijay Kumar was not wearing any helmet.....”

17. The proceeding on 1st September, 2003 specifically records that the counsel for appellant-Vijay @ Rajesh, did not cross-examine PW-4. It stands recorded “Nil. Opportunity given”. Mukesh Kumar Shrama (PW-4) re-appeared for

cross-examination on 15th April, 2004, on the said date also, counsel for the appellant-Vijay @ Rajesh did not conduct any further cross-examination and the order sheet records “Nil. opportunity given”.

18. A reading of the aforesaid portions of the testimony of Mukesh Kumar Sharma (PW-4) reflect that he had identified Rakesh as the person, who had come from behind and fired the shot. Vijay @ Rajesh was sitting on the pillion seat of the motorcycle and had come near the car. Vijay@ Rajesh was not wearing any helmet, whereas the driver of the motorcycle was wearing a helmet. Notably, one helmet was recovered from the spot along with the motorcycle. A discharged bullet or fired cartridge as deposed by PW4 was recovered from the scene of crime.
19. Mukesh Kumar Sharma (PW-4) was thus subjected to cross-examination on 24th March, 2003, and then again on 1st September, 2003. Counsel for the appellant-Vijay @ Rajesh subsequently moved an application dated 20th April, 2004 for re-summoning Mukesh Kumar Sharma (PW-4) for further cross-examination, which was allowed on the same date vide order dated 20th April, 2004. Mukesh Kumar Sharma (PW-4) was crossed examined on 20th April, 2004 and on 24th April, 2004. It is apparent to us that during this intervening period between September,2003 and 20th April,2004, Mukesh Kumar Sharma (PW-4) was pressurised and intimidated to subservience, for PW-4 in his cross-examination on 20th April, 2004 shrivelled and disowned the most enmesh and pivotal portion of his earlier testimony, identifying the appellant Vijar @ Rajesh as one the perpetrators. Mukesh Kumar Sharma (PW-4) limped on 20th April, 2004 and finally wilted and resiled on 24th March, 2004 when he absolved and failed to identify even Rakesh. We have no hesitation in holding that it was inappropriate and imprudent to allow the

application for recall of Mukesh Kumar Sharma (PW-4) once sufficient time and fair opportunity was earlier granted to the appellants.

20. Opportunity and right of cross-examination is salutary and must be accorded, but this kosher and veritable right cannot be abused to recall eye-witnesses at will or on oblique and ambiguous pretexts to allow practise of trickery, chivvy and force subjugation. In his cross-examination on 20th April, 2004, Mukesh Kumar Sharma (PW-4) accepted that he was present on the scene of crime, but delved to state:-

“.....I could see the persons riding the motorcycle a little bit when it had fallen in front of our vehicle. When motorcycle had fallen at that time, I could not see faces of these persons with certainty, as they were wearing helmets. Within 2-4 seconds, one of the associates of those persons came by the side of our vehicle. He was some third person who was not on the motorcycle referred above. He knocked the window twice for getting door opened and when Mohan Lal Bansal had not opened the door, he fired the shot. At that time when he was knocking the window, I had seen weapon of offence in his hands. Mohan Lal Bansal had tried to bent downside since no such opportunity was given to him. Within 2-3 seconds that person had fired the shot on Mohan Lal Bansal. Till a shot was fired, I had not tried to run away from the vehicle. Till shot was fired, I had seen only one person who fired the shot. I ran out of the vehicle immediately after firing of the shot.....”

21. At the same time, Mukesh Kumar Sharma (PW-4) affirmed that three persons had dragged Mohan Lal Bansal out of the vehicle and made him lie on the ground. PW-4 was confronted then with his statement Exhibit PW-4/DA wherein it is mentioned that the person who had fired the shot had dragged Mohan Lal Bansal out of the vehicle. PW-4 affirmed that he had made the call to the Police Control Room and the two brothers of Mohan Lal Bansal.

22. In the cross-examination on 24th April, 2004, Mukesh Kumar Sharma (PW-4) completely scoured under pressure for, in the cross-examination he has deposed:-

“.....I had seen only one person who fired the shot and could not see the other two persons. I had not named Vijay to the police in my statement Ex. PW-4/DA. I had not given the name of the accused persons to the police in my statement as to who came at the spot on the motor-cycle. I had stated before the police that accused Rakesh and Vijay alongwith their third associate had broken the glass pane of the driver side window and had taken out Mohan Lal Bansal out of the car. Again said in my statement before the police I had not named the offenders. I had not stated before the police that the offender who fired a shot at Mohan Lal Bansal had taken him out of the car. (confronted with portion ‘X’ to ‘X’ of statement Ex. PW-4/DA where the facts are so recorded). I cannot say by specifying the exact dates that on 8th, 9th, 10th and 11th April, 2002 I had gone to the P.S. However, I had gone to P.S. after the incident. Accused Vijay was shown to me in the P.S. Police told me that accused Vijay was the person who was sitting on the motor-cycle. As I had seen only one person at the spot, hence I cannot identify Vijay. On the last date when I testified before the court I identified Vijay at the instance of the police. Surinder Bansal had also gone to P.S. along with me when Vijay was shown to me there. I am not aware whether wads of currency notes were summoned by the police through Surinder Bansal or not. It is incorrect that I was not present at the spot and the incident had not occurred in my presence. ----- I had not seen accused Vijay at the spot. I had seen him in the P.S.”

23. Mukesh Kumar Sharma (PW-4) was re-examined by the Additional Public Prosecutor, but insisted with his statement regarding identity of the appellant Vijay @ Rajesh made on 24th April, 2004 was correct and the earlier affirmation on 24th March, 2003 was under influence of the police. In our opinion, trial court had rightly disbelieved the second version given by Mukesh Kumar Sharma (PW-4) in his cross-examination on 20th April, 2004 and 24th April, 2004, disowning his earlier identification of the two appellants

Vijay @ Rajesh and Rakesh. In his examination-in-chief as well as in his earlier cross-examination, Mukesh Kumar Sharma (PW-4) had categorically and in clear and unequivocally terms had identified the two appellants stating that Rakesh, had come from the back side and had fired and Vijay @ Rajesh was the pillion rider on the motorcycle, who had come next to the car . PW-4 had averred that Vijay @ Rajesh was not wearing any helmet and the witness had discerningly seen and looked at him. The portions quoted above would show that on 20th April, 2004, Mukesh Kumar Sharma (PW-4) could somewhat identify Rakesh, but was hesitant to identify the other appellant-Vijay @ Rajesh. However, on 24th April, 2004, Mukesh Kumar Sharma (PW-4) was even reluctant and did not want to identify both Vijay @ Rajesh and Rakesh. The change in stance and stance is pejoratively perceptive. The courts have repeatedly highlighted that the need for witness protection and mandate in law for day to day examination of the witnesses, who have to depose as eye-witness in heinous crimes. The witness can be and should be subjected to thorough and extensive cross-examination, but should not be subjected or allowed to be browbeaten, or threatened or won-over by resorting to dubious methods. (see *Vinod Kumar v/s State of Punjab*, 2015 (1) SCALE 542, paragraphs 1 to 6 and 40 to 41 and *AG v/s Shiv Kumar Yadav and Ors.*, 2015 (9) SCALE 649, on the question of recall of witnesses.)

24. In the present case, Mukesh Kumar Sharma (PW-4) was re-examined in the years 2010-2011 on 7th May, 2010, 9th June, 2010, 15th February, 2011 and 30th March, 2011, in terms of the order dated 3rd April, 2010, as additional charge under Section 27 of the Arms Act for having used pistol of .30 calibre to cause death of Mohan Lal Bansal was framed against the accused Rakesh. Sanction to prosecute Rakesh under Section 27 of the Arms Act had been obtained and was placed on record. It is noticeable that on 9th June, 2010

Mukesh Kumar Sharma (PW-4) had proclaimed that he was not in a condition to identify the weapon of offence used on the day of occurrence and voluntarily added that if shown to him, he could try and identify the weapon. PW-4 accepted that earlier the weapon of offence had not been shown to him. On 15th February, 2011, Mukesh Kumar Sharma (PW-4) was shown the weapon statedly used in the crime. He unhesitatingly deposed that the pistol used by Rakesh on the date of incident, was similar to the pistol shown to him in the court. The pistol was marked Exhibit PW-4/P-1. The answer given by Mukesh Kumar Sharma (PW-4) in the re-examination on 15th February, 2011, distinctly shows that PW-4 had seen Rakesh with a pistol like Ex.P-1 on the date of the occurrence, for when the pistol, Exhibit PW-4/P-1, was shown, PW-4 had stated that the pistol used by Rakesh on the date of the incident was similar. In his cross-examination on 30th March, 2011, Mukesh Kumar Sharma (PW-4) accepted as correct that several revolvers of the same brand could be available and it might not be possible for him to identify a particular revolver, from similar looking revolvers. PW-4 voluntarily added that the pistol used by Rakesh on the date of incident was similar to the pistol shown to him in the court on the last date. PW-4 has thus affirmed his first version that appellant-Rakesh was one of the perpetrator and was holding a revolver. The aforesaid candid assertions virtually nullify and exposes the cross-examination of Mukesh Kumar Sharma (PW-4) on 20th April, 2004 and 24th April, 2004 and affirms our view that Mukesh Kumar Sharma (PW-4)'s true and correct deposition is that he had identified Rakesh and Vijay @ Rajesh as the two perpetrators, who had committed the said crime. Identification of Rakesh gets corroboration and affirmation from the recovery of the weapon of offence, the FSL report marked Exhibit PW-35/A and recovery of the looted money from the appellants Rakesh and Vijay @ Rajesh.

25. We have already referred to recovery of a lead Exhibit PW-10/1 from the dead body of the deceased Mohan Lal Bansal as deposed by Dr. M.M. Narwana (PW-10), who had conducted the post-mortem operation. A discharged cartridge was found at the scene of crime, a fact which has been deposed to by ASI Gajraj Singh (PW-1), Constable Hem Raj (PW-2), SI Amichand (PW-21) and Virender Singh Meena (PW-23). The said cartridge was seized and sealed vide seizure memo Exhibit PW-1/B and a sketch thereof marked Exhibit PW-18/B was also prepared. The said witnesses have deposed having taken into possession one motorcycle of Yamaha make DL 7S E 3807 vide seizure memo Exhibit PW-1/D and one helmet Exhibit PW-1/E. These facts affirm the testimony of Mukesh Kumar Sharma (PW-4) that a motorcycle was used for committing the offence and that only one person, who was sitting on the motorcycle was wearing the helmet. The said person had obviously thrown the helmet and not taken the helmet with him.
26. As noticed above, one empty cartridge marked Exhibit PW-1/B was found and seized from the place of occurrence and one led bullet marked (PW-10/1) was extracted and taken out during the post-mortem by Dr. M.M. Narwana (PW-10). Sketch of the used cartridge recovered was prepared and marked Exhibit PW-18/B (see testimony of Constable Krishna Kumar (PW-18) and Virender Singh Meena (PW-23). As per Inspector Raj Kumar (PW-40), appellant Rakesh was arrested after an encounter on 3rd March, 2002 from 704, Janta Flats, Hastal and one English pistol of .30 calibre recovered from Rakesh was seized vide seizure memo Exhibit PW-27/C. Sketch of the pistol marked Exhibit PW-27/B was prepared. The pistol was identified and marked Ex-PW-40/X. SI Jitender Tiwari (PW-27) has stated that Rakesh was formally arrested in the present case on 6th March, 2002, after he has been arrested from flat No. 704, DDA Flats, Hastal in FIR No. 121/2002,

registered at Police Station Uttam Nagar. He affirms that the pistol recovered was sealed with the seal of RKM and seized vide memo Exhibit PW-27/C and the sketch Exhibit PW-27/B was prepared.

27. The said pistol marked Exhibit PW-40/X and the fired cartridge found at the spot marked Exhibit PW-1/B and the lead of the bullet recovered from the body of Mohan Lal Bansal marked Exhibit PW-10/1 were examined by the forensic expert Puneet Puri (PW-35), Senior Scientific Assistant, who had marked the fired cartridge as Exhibit EC-1, deformed bullet as Exhibit EB-1 and the pistol of .30 calibre as Exhibit F-2. Bullets were test fired from the pistol marked Exhibit F-2. Test fired cartridge cases TC-1 to TC-3 had identical individual characteristics of firing pin marks and breech face marks with the fired cartridge, Exhibit EC-1. Thus, Puneet Puri (PW-35) has deposed that the fired cartridge recovered from the spot was fired from the pistol Exhibit F-2, i.e. the pistol seized and recovered from Rakesh. PW-35 has further testified that deformed bullet Exhibit EB-1 was discharged/fired from the pistol of .30 calibre marked Exhibit F-2 recovered from Rajesh. This opinion was predicated on the individual characteristics of rifling marks present on the discharged bullet EB-1 and the test fired bullets marked TB-1. PW-35 had recorded the said positive and affirmative findings in his report Exhibit PW-35/A. Puneet Puri (PW-35) in his cross-examination has accepted that no photographs were taken and the examination was done under a microscope. Mere fact that no photographs were taken is not sufficient and good reason for us to disbelieve and disregard the categorical and definitive opinion of Puneet Puri (PW-35) in his report Exhibit PW-35/A and reject his court testimony.
28. The deposition of Puneet Puri (PW35) and his forensic report Ex.PW35/A are relevant and implicate appellant Rakesh, for this report conclusively

establishes that the pistol recovered from the appellant Rakesh was in fact used in the heist in question and had caused the fire arm wound on the deceased Mohan Lal Bansal.

29. Rakesh was formally arrested in the present case on 6th March, 2002, though he had been detained on 4th March, 2002 in FIR No. 121/2002, police station Uttam Nagar. There is evidence to show that after arrest in FIR No.121/2002, the appellant Rakesh was kept in muffled face. Paramjeet Singh (PW-8) had deposed that on 20th March, 2002 and 12th April, 2002, respectively he had conducted Test Identification Proceedings (TIP) of appellants-Rakesh and Vijay @ Rajesh. Appellant-Rakesh on 20th March, 2002 was produced before him in a muffled face and when asked about his willingness to joint TIP proceedings, he (Rakesh) had refused to participate in spite of warning that his refusal may warrant adverse inference. Similar statement was made by Vijay @ Rajesh, who was also produced in a muffled face. PW-8 had recorded their refusal in Exhibit PW-8/B (Rakesh) and Exhibit PW-8/F (Vijay @ Rajesh). The witness was not cross-examined. We shall now examine and deal with the arrest of Vijay@ Rajesh and recovery of looted money affected from or at the behest of the appellants Rakesh and Vijay @ Rajesh.
30. Rs.1,65,000/- was recovered from the appellant Rakesh pursuant to his disclosure statement Exhibit PW-22/A from his house C-95, Amar Colony, Nangloi, Delhi vide seizure memo Exhibit PW-6/B. SI Jitender Tiwari PW-27, Constable Jagdish (PW-17), Head Constable Pradeep Kumar (PW-6) are signatories/witnesses to the recovery for Rs.1,65,000/-. The money consisted of 16 wads of Rs.100/- denomination currency notes and 1 wad of Rs.50/- denomination. The wads had slip of Federal Bank and were thus linked and connected to the heist and crime in question.

31. On 6th March, 2002 on the basis of another disclosure statement by Rakesh marked Exhibit PW-22/A, Rs.10,000/- were recovered from the house of one Roshan, who has deposed as PW-33. This Rs.10,000/- were seized vide seizure memo Exhibit PW-21/G. The said recovery has been deposed and affirmed by SI Amichand (PW-21) and SI Rajesh Kumar (PW-41). Rs.10,000/- were in form of 1 wad of currency notes of Rs.100/- denomination. The said wad again had a slip of the Federal Bank. Deposition of Roshan Lal (PW-33) is interesting. He accepts that he knew appellant Rakesh as in the year 1998 PW-33 was working in a cement shop and the appellant Rakesh used to carry cement bags from their shops on his tempo and would park his vehicle in front of their shop. However, PW-33 professed that he had never handed over Rs.10,000/- to the police and even claimed the police had not visited his place with appellant Rakesh. PW-33 when confronted with the seizure memo Exhibit PW-21/A accepted his signatures thereon at point B. PW-33 thereafter declared that he had not signed the memo after reading the same. The proclivity of the PW-33 to help Rakesh is apparent. The police could not have reached and taken signatures of Roshan Lal (PW-33), a resident of village Nangal Dargoo, District Narnaul, Haryana and a friend of appellant Rakesh, without information and knowledge from a source and in the present case the source could be only Rakesh. We would accept the prosecution version, and reject PW-33's clatter that he had signed Exhibit PW-21/A, but did not know what was written.
32. Pursuant to disclosure statement of Rakesh Exhibit PW-22/A dated 4th March, 2002, a substantial amount of Rs.5,81,000/- in the form of 9 wads of currency notes of Rs.100/- denomination with the slip of Federal Bank, 1 wad of currency notes of Rs.50/- denomination again with the slip of Federal Bank and, 48 wads of currency notes of Rs.100/- denomination without any slip and

60 loose currency notes of Rs.100/- denomination from the house of Rakesh's aunt (bua-Santra Devi) at house No. 102, Friends Enclave, Nangloi. SI Rajesh Kumar (PW-41) and Inspector V.S. Meena (PW-23) has spoken in detail about the said recovery, which was made in fact from the third appellant Om Prakash. The currency notes were found in a cloth bag lying with the appellant Om Prakash.

33. Vijay @ Rajesh was arrested in FIR no.122/2002, Police Station Preet Vihar, as deposed by SI Vijal Pal (PW-20) and constable Bijender Singh (PW-14). He was subsequently taken into custody and formally arrested in the present FIR on 5th April, 2002 [Again see testimony of head constable Bijender Singh (PW-14), S.I. Vijay Pal (PW-20).] Pursuant to his disclosure statement Ex.PW-22/B, Rs.37,500/- was recovered at his behest from the property No.Q-10/168, Mangol Puri, Delhi and seized vide seizure memo Ex.PW-1/G [See deposition of ASI Gajraj Singh (PW-1), S.I. Dinesh Chand PW-22, Constable Surender Kumar (PW-31) and Inspector Randhir (PW-37)]. The aforesaid amount of Rs.37,500/- consisted of three wads of Rs.100 denomination, which had the print slip of Federal Bank and 75 loose notes of 100 denomination. The recovery affirms and supports the deposition of Mohan Lal Sharma (PW-4), recognizing and identifying the Vijay @ Rajesh as the one of the persons who had came on the motor-cycle.
34. Two contentions have been raised by the appellants Rakesh and Om Prakash challenging the said recoveries. Referring to the testimony of Ashok Goel (PW-5) it is submitted that these currency notes have been planted as the Federal Bank had not disbursed or paid cash in currency notes of Rs.50/- denomination. Secondly, in the trial court records, photocopy of currency notes of value of Rs.2,88,000/-, and not Rs.5,81,000/- were available. We take the second contention first and reject the same, as a weak and desperate

argument. The recoveries of Rs.1,65,000/-, Rs.10,000/- and then Rs.5,81,000/- in the year 2002 were substantial and not insignificant. The aforesaid recoveries, including Rs.5,81,000/- being case property, were required to be produced in the court. However, Rs.7,52,000/- was paid to Shashi Bansal (PW-12) as deposed and stated by her. Shashi Bansal (PW-12) had testified and stated that photocopy of the currency notes was taken when the money was released in her favour. She was not cross-examined. It is impossible for us to ascertain and calculate the total value of currency notes of which photocopies are available. The wads of currency notes as such, have been photocopied, for it was not possible to open the wads with the slips of Federal Bank and take individual photocopies. However, one thing is certain that the currency notes did have the printed flap or slip of Federal Bank Limited with the ink stamp dated 27th February, 2002. This indicates and affirms that the notes were issued or disbursed by Federal Bank Limited as there is a printed slip of the said bank. The ink stamp with the date 27th February, 2002 stamped on the slips, manifests that the currency notes were issued or dealt with by the said bank on 27th February, 2002. The printed slip and the ink stamp could not have been affixed later, unless the staff at Federal Bank, had connived and deviously provide to the police, the printed slips and possibly the ink stamp. Ashok Goel (PW-5) has deposed that Rs.25 lacs were withdrawn from the Federal Bank Limited on 28th February, 2002 and we perceive that PW-5's version as to the denomination of currency notes was a statement made on the basis of memory. Keeping in view the large amount, PW-5 had deposed the currency notes were at the denomination of Rs.500/- and Rs.100/-. The recovery, however, shows that some wads of Rs.50/- with the slip of Federal Bank and their stamp were recovered. The

deposition of Ashok Goel (PW-5) would not be a ground to disbelieve the recovery.

35. We also record that the recoveries of the currency notes from Vijay @ Rajesh and Rakesh is not the sole basis or reason for upholding his conviction. The said recovery is a supportive or a corroborative circumstance. The appellant-Vijay @ Rajesh, has highlighted the time gap of about 40 days between the date of occurrence i.e., 28th February, 2002 and the recovery, i.e. 10th April, 2002, but the said arguments fail to notice that the requirement of “soon after” in Illustration (a) to Section 114 is elastic and not static. In the present case, Rs.25 lacs were looted and given the time period recovery of Rs.37,500/- on 10th April, 2002 from the appellant-Vijay @ Rajesh after he was arrested is a material and relevant evidence. The aforesaid recovery was made from a shop cum house at Mangolpuri. The contention of the appellant is that the said place was a shop, which did not belong to the appellant and it was not verified and ascertained whether the shop belonged to the appellant. This contention again does not have any merit. SI Dinesh Chand (PW-22) has stated that they had learnt that the maternal grandmother of the appellant-Vijay @ Rajesh was living in the said premises, though they had not gone to the first floor portion to ascertain whether anybody was residing there. Constable Surender Kumar (PW-31) has also referred to the factum that *Nani* (maternal grandmother) of the accused, i.e., appellant-Vijay @ Rajesh had been called. Inspector Randhir Singh (PW-37) version in his cross-examination that he did not know who were owners of the said house, has to be read with the immediately preceding sentence, that the house was of Vijay @ Rajesh. Submission that appellant-Vijay @ Rajesh was taken to his house at Prem Nagar, Sultanpuri, but no recovery was made, is inconsequential. Disclosure statements to the police are only relevant when there is discovery

of a new fact corroborated by recovery of a physical object as stipulated and required by the statutory mandate of Section 27 of the Evidence Act. Absence of public witnesses at the time of recovery, in our opinion, would not in the facts of the present case, be a good reason or justification to reject and not accept the said recovery. Importantly, the three wads of the currency notes had the slip of Federal Bank attached to them, which indicates that the money recovered was a part of the loot. We do not also find any merit in the contention that SI Dinesh Chand (PW-22) could not recollect the time of departure, etc. The deposition of the said witness would only reflect lapse of memory and failure to recollect. Similarly, the contention that Inspector Randhir Singh (PW-37)'s deposition that the DD entry with regard to his departure was not placed on record or not recorded in the police file, is not a significant factor, which would invalidate and justify rejection of the recovery. The police case file does mention that the police team had visited the aforesaid premises and cash amounting to Rs.37,500/- was recovered.

36. On behalf of appellant-Vijay @ Rajesh, it was highlighted that Mukesh Kumar Sharma (PW-4) had not named him in his statement under Section 161 Cr.P.C. and even in the examination-in-chief on 18th October, 2002 and 15th March, 2003. The appellant-Vijay @ Rajesh was named on 24th March, 2003. This fact does not in any way affect the credibility of identification of Vijay @ Rajesh by the said witness. Mukesh Kumar Sharma (PW-4) did not earlier know and was not acquainted with the appellant Vijay @ Rajesh. Thus, it was natural that he did not identify and name Vijay @ Rajesh. We do not agree that Mukesh Kumar Sharma (PW-4) did not identify the perpetrators. He had taken their names in the court only for the purpose of identifying the witnesses and not because he knew their names on or before or even after the occurrence. The assertion that Mukesh Kumar Sharma(PW-4) only had a

fleeting glance and, therefore, his identification should not be accepted, is unacceptable and devoid of force. In the present case, the witness and the deceased were together in a car with Rs.25 lacs at the time of the heist and murder. It is obvious that the car was being driven cautiously and the victim and PW-4 were watchful and PW-4 precitably noticed the persons who had committed the crime. Mukesh Kumar Sharma(PW-4) has vividly and graphically described the entire occurrence. The appellant-Vijay @ Rajesh had refused to participate in the TIP proceedings and, therefore, cannot complain and submit that the dock identification should be disbelieved.

37. In the case of appellant-Om Prakash, it was similarly highlighted that the recoveries of Rs.5,81,000/- should be disbelieved because the recovery was eight days after the incident. We have referred to the “soon after” time test in Illustration (a) to Section 114 of the Evidence Act. Quantum of recovery and the factum that the currency notes recovered had the slip of Federal Bank and the stamp dated 28th February, 2002, the connection between the looted property and the recovery is reflected and proximate. We do not think the time gap of eight days in the case of Rakesh, in these circumstances, is too long so as to disconnect the recovery from the offence. Pertinently, Rs. 1,65,000/- again with the slips of Federal Bank were recovered immediately after his arrest on 4th March, 2002. Appellants Rakesh and Om Prakash have not been able to explain the source and how the latter had procured Rs.5,81,000/-, a substantial sum of money with the seal of Federal Bank, etc. We are not relying upon the disclosure statement of appellant-Om Prakash (Exhibit PW-40/A), but on the fact that recovery was made from him. The factum that the police did not collect Call Detail Records (CDRs) does not show and prove tainted investigation. The year in which the offence was committed is 2002 and at that time, importance and relevance of the CDRs

had not been recognised and realised. The contention that no finger prints were lifted from the pistol recovered from the appellant Rakesh or the public witnesses were not joined at the time of the raids, would show tainted investigation is unacceptable and a feeble argument. The entire operation to locate appellant-Rakesh and his companions, who were party to the murder and heist, was conducted in secrecy and on the basis of leads available, which had led the police team to house No. 704, Janta Flats, Hastal at Uttam Nagar. The appellant Rakesh was caught with the pistol at the said spot and the pistol was seized. We do not think in these circumstances the police team should have waited for a finger print proficient to come to the spot before seizing the pistol. We have already referred and rejected the contention that the dock identification by Mukesh Kumar Sharma (PW-4) should not be accepted.

38. At this stage, we would also like to deal with the defence evidence. Pratibha Singh (DW-1) had produced an account of Star Enterprises belonging to Ashok Kumar Goel (PW-5). The said evidence is of no relevance. Pertinently, DW-1 was Manager, Administration with the Federal Bank, which was the bank from where Rs.25 lacs was withdrawn. Balram Singh (DW-2) had produced records from Jail No. 4, Tihar regarding treatment given to Rakesh on his arrest and detention in jail on 4th March, 2002. Rajesh Saroha (DW-3), a reporter working with Nav Bharat Times, had proved a print of a macro film marked DW-3/A. This is a copy of the newspaper report, which again we do not think is of much relevance. The newspaper report by itself is not evidence of the truth of the contents. Head Constable Moti Ram (DW-4) had produced a log book of a police vehicle for the dates 6th March, 2002 and 7th March, 2002 and on the said dates the vehicle had covered a distance of 105 kilometres and 193 kilometres, respectively. The

log book did not mention the time of leaving and return to the office. It had recorded the destination point without specifically stating to the route taken.

39. Virender Singh (DW-5), a transporter, has deposed that on 28th February, 2002 at about 8 A.M. Rajesh brother of Rakesh had come to his house and informed that Rajesh had been taken to police station Nangloi in connection with a robbery case at Mundaka PVC Market in the month of February. DW-5 professes that he along with Rajesh (brother of Rakesh) had proceeded to the Police Station Nangloi and had remained there till 10 P.M., when Rakesh was released. Rakesh was brought back to his residence. The insinuation is that appellant Rakesh was not present at the place of occurrence, because he had been detained by Police Station Nangloi on 28th February, 2002. The statement of DW-5 is an illusion and lacks credibility. DW-5 did not have any document to establish his version. DW-5 also agreed that they did not inform any senior police officers, voluntarily stating that appellant-Rakesh was not tortured. DW-5 claimed that he knew Rajesh since 2001 as he was in the same business. Pertinently, Rajesh brother of Rakesh did not dispose. We reject this version given by DW-5, as a precipitous and predatory attempt to help Rakesh.
40. However, there is one aspect on which we agree with the counsel for the appellant, Rakesh. As per the prosecution version, Santro Car bearing No.DL 8CG 4268 was recovered on 7th March, 2002 at the behest and after the disclosure statement of Rakesh, Ex.PW-22/A. S.I. Amir Chand (PW-21), Inspector Raj Kumar (PW-40) and S.I. Rajesh (PW-41), have deposed as to the said recovery from the market opposite Venkateshwar College, New Delhi. As per their version, the car was seized on 7th March, 2002 vide seizure memo Ex.PW-22/H. There is conclusive and certain evidence that this car was found on 2nd March, 2002 and not on 7th March, 2002 as is

apparent from the contemporaneous official records and the reluctant and their hesitating acceptance by the S.I. Naresh Dagar (PW-3), who had taken chance prints of the aforesaid Santro Car from Satya Narayan area near Dhaula Kuan and lifted chance prints. In the cross-examination on 11th May, 2010, Inspector Naresh Dagar (PW-3) testified having lifted chance prints on 2nd March, 2002. He was recalled for examination on an application filed by the prosecution, allowed vide order dated 20th September, 2010. In his re-examination on 29th November, 2010 PW-3 professed that he could not remember whether he had taken the chance prints from the car on 2nd March, 2002 or 7th March, 2002. In his cross-examination on behalf of counsel for Rakesh and Om Prakash, Naresh Dagar (PW-3) has accepted that his unit being independent, had full fledged office and were maintaining separate registers as per rules. He was asked to produce the requisite register called 'Scene of Crime Register', which was produced after lunch on 26th November, 2010. On examining the said register Inspector Naresh Dagar (PW-3) had no option but to accept the entry at serial no.71 dated 2nd March, 2002 (Ex.PW-3/DA) relating to this case. There was no entry pertaining to the FIR in question on 7th March, 2002. There was an earlier entry on 28th February, 2002 at serial No.69 which has reference to lifting the chance print from the motor-cycle. The aforesaid contemporaneous official record maintained by Inspector Naresh Dagar (PW-3), contradicts and rebuts the prosecution version that the Santro Car in question was recovered on 7th March, 2002. The police has deliberately tried to establish the car which was recovered on 2nd March, 2002, as found and recovered on 7th March, 2002, at the behest and instance of Rakesh, after he was arrested on 3rd / 4th March, 2002. The car had been recovered on 2nd March, 2002 i.e. prior to arrest of Rakesh. Statement of the Police officers i.e. S.I. Amir Chand (PW-21), Inspector Raj Kumar (PW-40) and S.I. Rajesh

(PW-41), to this extent is false and has to be deprecated. The said recovery cannot be used as a recovery at the behest of Rakesh and is not an evidence against him.

41. Before we conclude, we must record that counsel for the appellants Rakesh and Vijay @ Rajesh had filed the following compilation of judgments:

Eye-witness is not reliable:- Mohd. Iqbal M. Shaikh & Ors vs. State of Maharashtra; 1998 SCC (Cri.) 1064.

No independent witness:- Mathura Yadav @ Mathura Mahato and Ors. vs. State of Bihar; (2002) 6 SCC 451; Murugesan and Ors. vs. State through Inspector of Police; (2012) 10 SCC 383; Sunil Kumar and Ors. vs. State of M.P.; (1997) SCC (Cri.) 879

Conviction cannot be based solely on the basis of recovery:- Wakkar and Anr. vs. State of Uttar Pradesh; (2011) 3 SCC 306

Unnatural conduct:- Khalil Khan vs. State of M.P.; (2003) 11 SCC 19

TIP:- Murari vs. State; 2011 (2) JCC 1233; Nanhe vs. State; 2014 (3) JCC 1862

Disclosure Statement:- Vijender vs. State of Delhi; 1997 6 SCC 171 ; Raj Kumar @ Raju vs. The State of the NCT of Delhi; 2013 (3) JCC 2272

Tainted Investigation:- Mohd. Allaudin vs. State of GNCT of Delhi; (2010) Law suit (Del.) 1974 ; Awadhes and Anr. vs. State of Madhya Pradesh (1988) 2 SCC 557

No adverse inference can be drawn from the 313 Cr.P.C. statement of the accused:- Nagaraj vs. State; 2015 SCC Online SC 199

Defence evidence was not considered:- Munshi Prasad and Ors. vs. State of Bihar; (2002) 1 SCC 351; Dudh Nath Pandey vs. State of Uttar Pradesh; (1981) 2 SCC 166

Prosecution has to stand on its own leg:- Bhagirath vs. State of Madhya Pradesh; (1976) 1 SCC 20

Major contradictions in PW's:- State of Rajasthan vs. Rajendra Singh; 1998 SCC (Cri.) 1605, Anand Kumar @ Beeru & Ors. vs. State; 2014 (1) JCC 495, Narender Kumar vs. State (NCT of Delhi); (2012) 7 SCC 171, A. Shankar vs. State of Karnataka; AIR 2011 SC 2302, Shivalal and Anr. vs. State of Chhattisgarh; (2011) 9 SCC 561, State of Rajasthan vs. Rajendra Singh; (2009) 11 SCC 106, Vijay Kumar vs. State of Rajasthan; (2014) 3 SCC 412, Arshad Hussain vs. State of Rajasthan; (2013) 14 SCC 104, Rabindra Kumar Pal vs. Republic of India; (2011) 2 SCC 490

Site plan:- Tori Singh & Anr. vs. State of U.P.; AIR 1962 SC 399

Source information:- Bhugdomal Gangaram and Ors. vs. State of Gujrat; 1984 (1) SCC 319, Surender vs. State; IV (2009) DLT (CRL.) 785 (DB)”

42. We are not specifically referring to these judgments for the issues and contentions raised before us were primarily factual. The ocular testimony of witnesses has been examined with reference to the factual matrix and surrounding circumstances.
43. In view of our elucidation on the facts and circumstances and the contentions raised, we uphold the conviction of Rakesh and Vijay @ Rajesh under Sections 302/34 IPC and conviction of Rakesh under Section 397 IPC and Section 27 of the Arms Act. Conviction of Vijay @ Rajesh under Section 392 IPC is sustained. Conviction of Om Prakash under Section 411 IPC is also upheld. We do not see any reason to interfere with the order on sentence dated 15th December, 2012 in the case of Rakesh and Vijay @ Rajesh and we confirm the said sentences. Om Prakash has been sentenced to rigorous imprisonment for a period of six months with fine of Rs.10,000/- and in default to undergo simple imprisonment for two months for the offence under Section 411 IPC. By order dated 4th February, 2013, Om Prakash was released on bail during pendency of the present appeal. Om Prakash, had already undergone incarceration of more than five months. In these

circumstances, we are not inclined to direct that the appellant- Om Prakash should surrender to undergo the remaining sentence of one month. However, we increase the quantum of fine from Rs.10,000/- to Rs.25,000/-, and direct that in default Om Prakash shall undergo simple imprisonment of 3 months. Order on sentence in the case of appellant Om Prakash is modified to this extent.

44. The appeals are accordingly disposed of.

(SANJIV KHANNA)
JUDGE

(ASHUTOSH KUMAR)
JUDGE

18th DECEMBER, 2015
VKR/SSN