

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

+ **CRIMINAL APPEAL No. 347/2014**

% **Reserved on : 1st September, 2015**
Date of Decision: 4th November, 2015

DEEPAK NANDA Appellant
Through Mohd. Nasir, Mohd. Saleem, Mohd.
Tabrez and Mohd. Khursheed, Advocates.

Versus

STATE Respondent
Through Ms. Aashaa Tiwari, Additional Public
Prosecutor with Inspector Satyavir Janaula, PS
Bindapur.

CRIMINAL APPEAL No. 513/2014

BHAGIRATH Appellant
Through Mr. M.L. Yadav, Advocate.

Versus

STATE Respondent
Through Ms. Aashaa Tiwari, Additional Public
Prosecutor with Inspector Satyavir Janaula, PS
Bindapur.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.K. GAUBA

SANJIV KHANNA, J:

1. Perfect matching of specimen finger prints of the two appellants Deepak Nanda and Bhagirath with the chance prints lifted from the tea cups at the place of occurrence, the prosecution alleges and the judgment under challenge dated 6th January, 2014 pronounces, unravels baffling homicidal deaths of Seema, aged 33 years and her two children Nishant and Kunal, aged about 4 and 7 years. Per contra, the two appellants seek acquittal

primarily predicated on alluded technical and procedural lapses and failure of the prosecution during investigation and trial, which it is submitted dents and nullifies the affirmative finger print report marked Ex.PW35/A. For clarity we do record that the impugned judgment also relies on corroborative circumstantial evidence.

2. The appellant Bhagirath, son of Raja Ram, is cousin brother of Hemchand (PW24), husband of late Seema and father of Nishant and Kunal. Deepak Nanda, the second convict and co-participant, is stated to be a friend and neighbour of Bhagirath.
3. On 9th January, 2009 at about 10.49 P.M., DD No.31A was recorded at police station Bindapur that a caller had informed that two boys and a woman had been murdered at B-42, School Road, near post office, Uttam Nagar, Delhi. ASI Lakh Ram (PW19) and Constable Vishram Singh (PW18), on visiting the spot, ascertained that the information was true and identified the victims as Seema, Nishant and Kunal. A crime Team member, Constable Praveen Kumar (PW30) took photographs marked Ex.PW30/A1 to A-32. The Crime Team led by ASI Khazan Singh (PW8) had remained at the spot from 11.20 P.M. to 1.20 A.M. and included a finger print proficient Constable Devender (PW7). ASI Khazan Singh (PW8) affirms having seen the three dead bodies. In addition, we have testimony of Moti Lal (PW3) that at about 10.15-10.30 P.M. on 9th January, 2009, his son-in-law Hemchand (PW24) had informed him that Seema and her children Kunal and Nishant had been murdered at their house by slitting their throats. PW3 had seen the dead bodies in the Deen Dayal Upadhyay Hospital (DDU Hospital) and identified them.

4. Hemchand (PW24) has deposed that on 9th January, 2009 on return from work, he had seen the dead body of his wife lying in front of the *almirah* and his two children lying dead on the bed in a pool of blood. The three had deep-sharp injuries on their neck and other parts of their bodies.
5. Dr. B.N. Mishra (PW6), Medical Officer, DDU Hospital who had conducted the post-mortem on the dead body of Seema, proved the post-mortem report marked Ex.PW6/A. He opined the cause of death as asphyxia caused by cutting of trachea and large blood vessels of the neck by a sharp edged weapon like knife. He had also given the opinion marked Ex.PW6/B regarding injury No.1 with reference to the weapon of the offence. In cross-examination on behalf of the appellant Bhagirath, Dr. B.N. Mishra (PW6) affirmed that this was a case of slash injury.
6. Dr. Kamal Singh (PW16) had conducted post mortem on the dead bodies of Kunal and Nishant on 10th January, 2009 and had proved the post-mortem reports marked Ex.PW16/B and Ex.PW16/A respectively. In both cases, the death was due to hemorrhagic shock subsequent to cut throat, which was sufficient to cause death in ordinary course of nature. He opined that the injuries in question were possible by the ustra/razor produced before him. PW16 in the cross-examination elucidated that the food pipe and trachea were cut in a single stroke, though this fact was not mentioned in the post-mortem reports.
7. The aforesaid evidence conclusively proves that Seema, Kunal and Nishant had suffered homicidal death in the afternoon of 9th January, 2009 at their residence on the first floor. The *primary* issue and contention raised in this appeal is whether the two

appellants are the perpetrators, who had committed the said offence.

8. Hemchand (PW24), initially, was the prime suspect, even though he was father of Kunal and Nishant and husband of Seema. Even Moti Lal (PW3), father of Seema, in his Court testimony has accepted that primordially he had doubted his son-in-law i.e. Hemchand. This assertion is acknowledged by the Investigating Officer Inspector Hoshiyar Singh (PW33). Similar statement has been made by Inspector Digvijay Singh (PW31) who had investigated the case between 13th January, 2009 and 4th February, 2009, before the investigation was again handed over to Inspector Hoshiyar Singh (PW33).
9. There are a number of reasons as to why Hemchand (PW24), it has to be observed, was not the perpetrator, though his marital life with the deceased Seema was troublesome and in fact, on 5th February, 2009, Moti Lal (PW3) had written a letter to the Chief Justice of the Delhi High Court leveling allegations against the police for their failure to implicate and arrest Hemchand (PW24). PW3 had alleged that threats had been extended by PW24 and his family members.
10. Hemchand (PW24) has testified that on 9th January, 2009, he had left his house at about 10:15-10:30 A.M. for his workplace in Gurgaon and had only returned in the evening at about 10.30 P.M. Presence of Hemchand (PW24) at Gurgaon stands affirmed by Rajeev (PW14) and Vijay Pratap Singh (PW15). Rajeev (PW14) has deposed that Hemchand (PW24) was employed in their factory and on 9th January, 2009, PW24 was with him till 8:00-8:15 P.M. and had not left the workplace. In his cross-

examination, PW14 has accepted that he was present in the factory from 5 P.M. onwards till 8:15 P.M. Vijay Pratap Singh (PW15), who was also an employee of Rajeev (PW14), has deposed that Hemchand (PW24) had reached the factory at about 1:30 PM and had remained there till 8 P.M. During this period, PW-24 had not gone out anywhere. We do not have any reason or ground to disbelieve the positive assertions made by Vijay (PW15) and Rajeev (PW14).

11. This brings us to the testimony of the neighbours living on the ground floor at B-42, School Road, Uttam Nagar, Delhi, namely, Sumit Kumar (PW1), Amit Kumar (PW2), Kanchan (PW12) and Satish Kumar (PW13), where Hemchand (PW24) was residing as a tenant on the first floor with his wife and two children. Sumit Kumar (PW1) has stated that on 9th January, 2009, at about 1:45 P.M., while going to bathroom, he had seen one person whom he probably thought was Hemchand (PW24). The same evening, at about 10:30 P.M., someone had rung the bell of the backside door. On asking of his father, his brother Amit Kumar (PW2) had opened the door and Hemchand (PW24) entered and had proceeded to his flat on the first floor. On reaching the first floor, Hemchand (PW24) started crying. PW1's father Satish Kumar (PW13) then went to the first floor and learnt that the wife and children of Hemchand (PW24) had died. Statement of Sumit Kumar (PW1) remains substantially unchallenged.
12. Amit Kumar (PW2) confirms that on 9th January, 2009, at about 10:30 P.M., after the door bell was rung, he had opened the door and Hemchand (PW24) came inside and had proceeded to the first floor. There, Hemchand (PW24) started weeping and crying

loudly on which PW2's father had followed PW-24 to the first floor and had seen dead bodies of Hemchand's wife and children lying in a pool of blood. In his cross-examination, Amit Kumar (PW2) has stated that the children of Hemchand (PW24) used to go to school and return at 1:30 P.M. and the wife of Hemchand (PW24) would fetch them from school.

13. Kanchan (PW12) has similarly testified that on 9th January, 2009, she was present at her home and had seen the deceased Seema bring her children from the school at about 1:00 P.M. After some time, she had heard noise as if an object had fallen down and had bounced 2-3 times on the staircase before it was lifted. Kanchan (PW12) had slept to wake at about 4:00-5:00 P.M. In the evening, PW12 had noticed that the rear door of Seema's house was open and she had bolted the same. At about 10:30 P.M., Hemchand (PW24) had returned from work and as despite repeated rings (of the call bell) no one had opened the door, her husband had asked Amit (PW2) to open the door. Kanchan (PW12) has affirmed, that she had heard Hemchand (PW24) crying loudly upon which her husband along with their son had gone upstairs and learnt what had happened. They had informed the police. PW12 professed that the water supply used to come at about 6 P.M. and the deceased Seema would fill water with her. On 9th January, 2009, Seema did not come down to fill water. On the date of occurrence, she had not heard Hemchand (PW24) taking his scooter from the parking spot, where it was used to be tied with a chain. PW12 has accepted that there were two gates and she would not always notice when Hemchand (PW24) would leave for work. Kanchan (PW12) had not gone

upstairs when she had heard Hemchand cry. She had never seen Hemchand (PW24) and Seema fighting. Testimony of Satish Kumar (PW13) is similar to the effect that on 9th January, 2009, at about 10:30 P.M., Hemchand (PW24) had repeatedly rung the door bell and thereafter, PW13 had asked Amit Kumar (PW2) to open the door. He had then heard Hemchand (PW24) crying and had gone to the first floor where he had seen the wife and children of Hemchand (PW24) lying dead. He had informed the police about the occurrence. He has affirmed that the police had recorded his statement and statement of his wife and his children, a day after the occurrence. The police had visited the house of Hemchand (PW24) the very next day and 3-4 days thereafter. Keys of the house i.e. the residence of Hemchand (PW24) had remained with the police and PW24 had never visited the house with the police for inquiry or otherwise after the occurrence.

14. Hemchand (PW24) has testified that on 9th January, 2009, he had left for work at about 10:15-10:30 A.M., leaving behind his wife Seema. His two sons had already left for the school. At about 10:30 P.M., he came back and rang the door bell 3-4 times but as his wife had not responded, he had knocked at the door on the ground floor. Thereafter, son of the tenant who was residing on the ground floor had opened the main gate. Hemchand (PW24), on going upstairs, noticed that the main door of his house was open and the door of the inner room was bolted from outside. On opening the door, he found his wife Seema lying dead on the floor in front of the *almirah* and his sons were lying on the bed bathed in blood. The three had deep sharp injuries on their necks and other parts of their bodies. He started weeping. Satish

Kumar (PW13), who was residing on the ground floor, came and informed the police on number 100. His condition at that time was unstable and that was the reason that he had asked Satish Kumar (PW13) to make the said call. Police had reached the spot, made inquiries and had asked PW24 to check their articles and belongings. He noticed that his helmet which was kept on the table was missing. On the said date, he had not taken his scooter to Gurgaon. In the court yard, he noticed that utensils used for preparing tea were lying. Tea cups, which they would normally use to serve tea to guests, had been taken out. Tea, he guessed and inferred, had been prepared twice as there were two other glasses. In the morning, he had taken tea in a steel glass. As Hemchand (PW24) was shocked, he did not immediately check other belongings in the house and the said check was made by him on 1st February, 2009, when he had received a telephone call from Inspector Digvijay Singh. Thereupon, PW24 had proceeded to the police station and from the police station, he came to his house with Moti Lal (PW3). On checking the *almirah*, he noticed that one gold necklace, one pair of gold ear rings, one pair of gold *jhumka*, one small gold finger ring and a pair of silver *pajeb* of his wife were missing. Two silver *karas* of his son and Rs.5,000/- which he had given to his wife 4-5 days prior to the incident were also missing. Police had recorded his statement. Hemchand (PW24) affirmed that the appellant Bhagirath was the son of his uncle Rajaram, brother of his father Rampal. Appellant Bhagirath, along with his father, had visited them some times between 15th - 20th November, 2008, to invite them for marriage of Kishore, other son of Rajaram. PW24 had

handed over the marriage card, which was taken into possession vide seizure memo (Ex.PW24/A). Appellant Bhagirath was on visiting terms with them. He identified the two tea cups which were collectively marked Ex.P11 and stated that they were lying in the courtyard (verandah). He also identified the two glasses, one of which was broken, stating that they were to be found in the verandah. In his cross-examination, Hemchand (PW24) accepted that they had shifted to this rental accommodation at Uttam Nagar because of misunderstanding/dispute between his wife and elders of his family. About a week prior to the date of incident, he had visited the house of his in-laws to leave his wife and children as it was vacation time. After 4-5 days, he had brought them to their residence. Hemchand (PW24) accepted as correct that the police had taken photograph of his palms, a fact which stands affirmed from one of the photographs included in Exhibit Mark PW30/A1 to A-32.

15. Hemchand (PW24) has stated that his wife would clean utensils after lunch and the utensils found to be lying outside in the verandah were not washed. Tea leaves could be seen in the utensil (*patila*) in which tea had been prepared. PW24 has stated that between 10th January, 2009 to 1st February, 2009, he had not gone to the spot i.e. his residence at B-42, School Road, near post office, Uttam Nagar, Delhi. On 1st February, 2009, the lock was opened by Inspector Digvijay Singh with the keys which had been retained by the police.
16. Head Constable Vishram Singh (PW18) along with ASI Lakh Ram (PW19), was one of the first police officers to have visited the spot and seen the three dead bodies. Hemchand (PW24) was

also present there and had identified himself as the husband of deceased Seema and father of Kunal and Nishant. PW18 has deposed that photographs were taken, Crime Team had reached the spot and the FIR etc. was registered. He had noticed that two glasses were lying in front of the room, which were seized, sealed and taken into possession vide seizure memo Ex.PW18/H. Two tea cups, which were also lying in front of the room, were seized vide seizure memo Ex.PW18/K. Head Constable Vishram Singh (PW18) had also seen an empty jewellery box marked Ex.P5.

17. ASI Lakh Ram (PW19) has similarly deposed and has affirmed that the Crime Team had lifted finger prints from inside as well as outside the room. Hemchand (PW24) had told SHO Inspector Hoshiyar Singh that the helmet on the table did not belong to him. After noticing the glasses and tea cups, which were used for serving to the guests, PW24 had indicated that tea had been prepared twice. At that time, Hemchand (PW24) was shocked and had stated that he would disclose about the missing articles later on. ASI Lakh Ram (PW19) has proved seizure memos Ex.PW18/K and H with regard to the tea cups and glasses. He identified the empty jewellery box seized and taken into possession vide seizure memo Ex.PW18/E. The two tea cups were collectively marked Ex.P11. ASI Lakh Ram (PW19) has accepted that Hemchand (PW24) was initially a suspect and hence, the FIR was not based upon his statement. PW-19 had called the Crime Team from his mobile phone. The room in which the dead bodies were found was locked and the keys were kept by the Investigating Officer. Photographs were taken by the

Crime Team. However, PW19 had claimed that the cups and glasses were not sealed when they were deposited in the *Maalkhana* and they were in an open condition. The *almirah* in the room, PW19 testified, was opened by the Crime Team, but he could not tell whether the *almirah* was opened with a key or without the same.

18. ASI Khajan Singh (PW8), testified that he along with Constable Praven Kumar, Photographer and Constable Devender (PW7), finger print proficient had reached the spot on 9th January, 2009. Constable Devender (PW7) had lifted chance prints and prepared his report. He had also prepared a detailed report of inspection marked Ex.PW8/A. Constable Devender (PW7) was directed to inspect the entire scene and lift chance prints, wherever available and possible. To his knowledge, Constable Devender (PW7) had checked the *almirah*, bed, cups, glasses etc. and had lifted chance prints. ASI Khajan Singh (PW8) denied deposing falsely regarding direction and lifting of the chance prints and visiting the crime scene. PW28 denied the suggestion that the chance prints were manipulated later on in office.
19. Constable Devender (PW7) has affirmed lifting of chance prints from the glasses, tea cups and dressing table glass as recorded in his report marked Ex.PW7/A signed by him at point A. He had seen the dead bodies of a lady and two children at the spot. In his cross-examination, PW7 affirmed that he was working as a fingerprint lifting expert in the Mobile Crime Team for last two years. The cups and glasses were kept in open in the courtyard. The cups were of china clay and glasses were of glass. However, he did not remember the chemical names of the powders used to

lift the chance prints. The prints were lifted with the help of a lifting tape. Constable Devender (PW7) did not know the number of photographs taken by the photographer. He had spent about 2 hours at the spot. PW7 had not handed over the chance prints and the lifting tape to the IO and had sent the same directly to the laboratory for analysis. However, he could not tell as to when he had sent the chance prints and the lifting tape.

20. Constable Praveen Kumar (PW-30) has stated that on 9th January, 2009, he had gone to the place of occurrence and had clicked 32 photographs of the dead bodies of a lady and two children marked Ex.PW30/A1 to A32. Negatives of the same were marked Ex.PW30/B-B32. The photographs and negatives were handed over to Inspector Digvijay Singh (PW31). PW30, however, in his cross-examination affirmed that he had not taken photograph of any cup, utensil or glass. He affirmed that the Crime Team included a finger print proficient. He denied as incorrect that he had not taken photographs of any chance print. He affirmed that he had taken photograph of the lifting tape, which had the chance prints.
21. From the aforesaid evidence, it is apparent that seven chance prints were lifted from the spot by Constable Devender (PW-7), including chance prints from the tea cups. As per categorical testimony of Sumit Kumar (PW-1), Amit Kumar (PW-2), Kanchan (PW-12), Satish Kumar (PW-13), Hemchand (PW-24) and the two police officers, who had first visited and arrived at the spot i.e. S.I. Khazan Singh and Constable Vikram, there was no indication of a forced entry into the first floor by breaking the locks. Kanchan (PW-12) did hear some noise of a

falling object in the afternoon but she did not hear cry or scream of deceased Seema or the two children (Kunal and Nishant). Hemchand (PW-24), in a categorical and affirmative manner, has stated that presence of the two tea cups indicated that known persons had visited the residence and were served tea. Two cups of tea reflect presence of two persons, which inference is re-enforced from the fact that three persons were murdered by assault from a sharp-edged weapon on their necks. One perpetrator could not have committed the offence and murdered Seema and the two children. Kanchan (PW-12) has affirmed the fact that she had seen the deceased Seema bringing her two children from school at about 1:00 p.m. on 09.01.2009, but did not meet Seema in the evening when she had gone to fill up water at 6:00 p.m. The crime, it can be safely said, had taken place between 1:00 p.m. and 6:00 p.m.

22. Learned counsel for the appellants has challenged presence of the finger print proficient Constable Devender (PW-7) at the spot as his name was not mentioned by the photographer, Constable Praveen Kumar (PW-30). The said contention is devoid and looses force when we refer to the statement of ASI Khajan Singh (PW-8), who has stated that the finger print proficient, Constable Devener (PW-7) and Constable Praveen Kumar, photographer, (PW-30) were present with him. ASI Khajan Singh (PW8) was the head of the crime team, a fact affirmed by Constable Praveen Kumar (PW30). Constable Praveen Kumar (PW-30) may not have specifically named the finger print proficient but he has not denied or repudiated presence of Ct. Devender (PW7), the finger print proficient. PW30 has categorically accepted that he was

present and that he had taken photographs of the lifting tape and the chance print itself contained the photograph of the lifting tape. The aforesaid discussion also takes care of the feeble and far-fetched argument that the crime team report marked Ex.PW-8/A prepared by ASI Khajan Singh (PW-8) does not refer to the lifting of finger prints, for there is a separate report of the finger print expert by Ct. Devender, marked Ex.PW-7/A. This report refers to lifting of finger prints from two tea cups, two glasses and the dressing table glass. It records that seven chance prints were lifted on 09.01.2009 between 11:20 p.m. to 1:20 a.m.

23. Inspector Hoshiyar Singh (PW-33) has also affirmed presence of Crime Team at the spot and the photographer having taken photographs. He had stated that on 06.02.2009, at about 4:20 p.m., he received secret information that the culprit of murder case could be apprehended from the Dhaula Kuan bus stand as they were planning to flee away to Rajasthan in the evening. At that time, ASI Tej Singh, Head Constable Naresh Kumar and others were present with him. The appellants were thoroughly interrogated and thereafter arrested vide arrest memo Ex.PW-22/C and Ex.PW-22/D respectively. Thereafter, they had made the disclosure statements Ex.PW-22/B and Ex.PW-22/A, which were signed by Inspector Hoshiyar Singh (PW-33). On 07.02.2009, the appellants were again interrogated and Bhagirath and Deepak Nanda had made supplementary disclosure statements marked Ex.PW-22/R and PW-22/S, which were signed by PW-33 at point 'C'. On 08.02.2009, Bhagirath had got the blood-stained T-shirt recovered from the North side of the park, which was seized vide seizure memo Ex.PW-22/T and

blood-stained helmet of Hem Chand, which was seized vide seizure memo Ex.PW-22/U; and from a plastic bag kept in an iron box in the room on the ground floor, a blood stained grey colour pant, a jacket and shoes were recovered and seized vide seizure memo Ex.PW-22/W. Similarly, Deepak Nanda had got recovered from a plastic bag kept in his bed-box, blood stained clothes which were seized vide seizure memo Ex.PW-22/X; and a blood-stained helmet kept on the top of *almirah* which was seized vide seizure memo Ex.PW-22/Y.

24. We have some doubts on recovery of the blood-stained clothes etc. from the house after a long delay between the day of occurrence, 09.01.2009, and the date of arrest, 06.02.2009. We also notice that the alleged Helmet of Hemchand which was found to be missing from the place of occurrence was not shown and identified by Hemraj. At the behest of the two appellants Deepak Nanda and Bhagirath, one blood-stained razor (*ustara*) each were also recovered from the open plot, opposite to the house of Garima Tailor, Mohan Garden, which were seized vide seizure memo Ex.PW-22/M and Ex.PW-22/K respectively. The sketch of the razor were drawn and exhibited as Ex.PW-22/J and ExPW-22/L. However, what is material and relevant is the recovery of the jewellery pursuant to the disclosure statement made by Deepak Nanda from his *almirah* on the first floor of his house, consisting of one gold ear tops, one pair gold ear rings, one gold ring, three pairs of silver *pajeb* and two silver *karas*, which were seized vide seizure memo Ex.PW-22/P. At the behest of Bhagirath, one gold necklace was recovered from the trunk kept on the ground floor of the house which was seized

vide seizure memo ExPW-22/N.

25. The jewellery items were identified by Moti Lal (PW-3) and were marked Ex.P-1. He has testified that the same belonged to his daughter and the silver bangles belonged to Kunal (son of his daughter). He had identified the gold necklace, which was marked as Ex.P-2. PW-3 has testified that the said articles were earlier identified by him in the TIP proceedings (Ex.PW-3/E). Sumedh Kumar Sethi, Metropolitan Magistrate as PW-9 proved the said proceedings dated 30.3.2009 and marked Ex.PW-9/B. In his cross-examination, PW-9 has deposed that the property/ items produced by the I.O. for inter-mixing were enclosed in a bag. The case property and other items produced by the IO were mixed up by him, after the IO had been sent out and thereafter, the witness was called inside the room to identify the items belonging to his daughter and other family members. The jewellery articles were also identified by Hemchand (PW-24) in the court proceedings who testified that these articles were looted on the date of the incident.
26. On the question how the investigation had centered and the appellants were apprehended, we would like to refer to the testimony of Hemchand (PW-24), who has stated that appellant Bhagirath along with his father Rajaram had come to their residence sometimes between the 15th to 20th November, 2008, to invite them for marriage of Kishore, his brother and had also produced the marriage card marked Ex.PW24/C. Naresh Kumar (PW-32), brother of Hemchand (PW-24) has deposed that in the year 2009 they were residing in house No.313/82E, Tulsi Nagar, Inderlok, Delhi, which was his parental house and consisted of

two portions. In one portion, family of Raja Ram, with his son Bhagirath would reside. Bhagirath was habituated to liquor and would be with Deepak Nanda, who used to reside 50-60 meters away from their house. Bhagirath and Deepak were identified by him in the court and it was stated that they were not working for living at that time. In his cross-examination, PW-32 has accepted that he had not visited Deepak's house and could not tell the date when Deepak's father had expired. However, he knew Deepak had two brothers. He also did not know whether Deepak's father owned a factory at Mohan Garden. After the incident PW-32's father had sold the house.

27. One of the contentions raised before us was that Hemchand's statement regarding missing of jewellery under Section 161 Cr.P.C. was recorded belatedly on 10.01.2009. This is correct, but to us it is apparent that the aforesaid delay can be explained and attributed to the fact that Hemchand (PW-24) was initially himself a suspect. However, the factum that a jewellery box was seen on the bed stands recorded in several statements under Section 161 Cr.P.C. More importantly, photographs marked Ex.PW-30/A-1 to A-32 clearly show that the steel locker in the almirah had been opened. A key and the open locker can be seen along with the blood stains. In view of the said facts, we do not think that the factual assertion that the jewellery items were stolen and robbed and subsequently recovered from the appellants and their identification by Motilal (PW-3) and Hemchand (PW-24), can be doubted or disbelieved. Noticeably, the key of the premises remained with the police after the occurrence.

28. Relying upon testimony of Puneet Nanda (DW-3), it was urged that the appellant-Deepak Nanda was detained at Police Station Bindapur at about 6.30 A.M. on 6th February, 2009. Reliance was also placed on the news report published in the newspaper 'Sandhya Times' dated 6th February, 2009 marked Exhibit DW-4/A as testified by Vishal Anand (DW-4). We do not think anything turns on the newspaper report Exhibit DW-4/A, the contents of which should not be read in evidence. The journalist, who had compiled and written the said report, has not been examined. The heading suggests that the police had solved the mystery of the triple murder case and one Deepak Nanda and Bhagirath were involved. If we read the said report and treat it as correct and true, other assertions made in the report would have to be read and may go against the appellants. At best, the report would indicate that both Deepak Nanda and Bhagirath were interrogated on 6th February, 2009 and thereafter murder mystery of the triple murder case was resolved. Even if we accept that the appellants were not arrested in the manner stated, it would not negate and effect the recoveries in the present case and the final outcome.
29. B.S. Yadav (DW-5) has deposed about a Sessions Case filed by Central Bureau of Investigation against Tej Singh (PW-22). This case under the Prevention of Corruption Act was registered on a complaint made by Rakesh Kumar regarding demand for illegal gratification. The said case and demand of bribe has nothing to do with the present case. Our attention was drawn to the transcript of a CD marked Exhibit DW-5/C. The said transcript relates to purported conversation and comments of Tej Singh

regarding preparation or completion of the case diary as charge sheet had to be filed in a case relating to murder of three children. Members of the crime team were present. Finger print report had been received. We do not think anything turns on the said transcript as we have threadbare examined the evidence on record on the chance prints and the finger print report. We cannot affirm or negate, whether the comments relate to this case or some other case, or in what context or for what reason the comments were made. Finger print report (Ex.PW-35/A to C) is dated 21–23/10/2009 and the charge sheet was filed earlier on 25.4.2009.

30. The contention that Constable Devender (PW-7) had made false assertion regarding lifting of finger prints in his statement under Section 161 Cr.P.C. which was recorded on 31.3.2009, is hollow and merits rejection. Our attention was drawn to the testimony of S.I. Gyanendra Singh (PW-35) [also referred to as Gyandender Singh], who has stated that chance prints marked Q1 to Q-7 alongwith negative, finger print slips of Deepak Nanda and Bhagirath were marked to him for comparison. Four chance prints were partial and smudged and did not disclose sufficient number of ridge detail in their relative position and hence they were not fit for comparison and examination. Chance print Q-3 was identical to the specimen right thumb impression mark S-1 of Deepak and chance print Q-4 and Q-7 were *inter se* identical and further identical to the right thumb impression mark S-2 on the finger impression slips of Bhagirath. The report was marked Ex.PW-35/A and enlarged photographs and description of identical points of examination of Bhagirath were marked

Ex.PW-35/B-1 to B-3. The enlarged photographs and enlarged description of identical points of Deepak which had not been collected by the IO and produced in the court by Gyandender Singh (PW-35) were marked Ex.PW-35/C1 to C-3. Thus, the report Ex.PW-35/A and testimony of S.I. Gyandender Singh (PW-35) conclusively affirm that the chance print Q-3 was that of Deepak and chance prints Q-4 and Q-7 were that of Bhagirath. In spite of extensive cross-examination, deposition of Gyandender Singh (PW-35) and his report Ex.PW-35/A remain unchallengeable and should be affirmed. The said report was prepared on 21.10.2009, after the charge-sheet had been filed on 25.4.2009. PW-35 has testified that negatives along with photographs were assigned to him and he had brought the photographs with him to the court. In his cross-examination, Gyandender Singh (PW-35) has stated that the chance prints were at on lifting sheet of paper and the same were already developed. PW-35 did not develop the same and had only compared the chance prints with the specimen finger prints.

31. Gyandender Singh (PW35) had identified signatures of SI Shivraj Singh, who had made the noting at point "X" vide document PW-33/DX2. The said document is an application for examination / matching finger prints, which was sent by the investigating officer to the Director, Finger Prints Bureau, Malviya Nagar. It records that two persons Bhagirath and Deepak, who were the accused, had been arrested and their finger-prints had been obtained. Five copies of finger print of each of them had been sent for matching. The letter further records "the crime team of the South West District had already lifted the finger print at the

spot which are already sent to your office”. This letter dated 23.2.2009 written by Insp. Hoshiyar Singh (PW33) marked Ex.PW33/DX-2 was received by the Finger Print Bureau on 27.2.2009. S.I. Gyandender Singh (PW-35) has proved on record Ex.PW-35/DA, which are the specimen fingerprint of the appellant, Deepak Nanda, attested by Inspector Hoshiyar Singh.

32. Challenging the credibility of the finger print report (Ex.PW35/A), our attention was drawn to the fact that in the case diary the investigating officer and Inspector Hoshiyar Singh (PW-33) had not recorded that the finger prints of the two appellants Deepak Nanda and Bhagirath were taken on 07.02.2009. It appears that the counsel for the appellant had been privy to the case diary wherein this fact has not been mentioned in the recordings made on 7.2.2009. However, Inspector Hoshiyar Singh (PW-33) has stated that on 27.2.2009 he had sent a letter, requesting for finger print analysis and along with the letter he had also sent dossier of the two appellants through Head Constable Chanderpal. In his cross-examination, PW-33 reiterated that the Dossier Cell had prepared dossiers of the appellants on 7.2.2009. Inspector Hoshiyar Singh (PW-33) was not confronted with the case diary to contradict the witness. Inspector Hoshiyar Singh (PW-33) in the cross-examination has stated that the dossier i.e. the finger prints were taken by District Cell of South-West District. Further, Head Constable Chanderpal had collected the dossier from the Dossier Cell and forwarded the same to the Finger Print Bureau for comparison. PW33 voluntarily added that the chance prints were retained by the Crime Team and were directly sent to the Finger Print Bureau

by the Crime team. He had only sent photocopies of the dossier finger print to the Director, Finger Print Bureau through his letter Ex.PW-33/DX-2.

33. In his cross-examination, Inspector Hoshiyar Singh (PW-33) affirmed that the appellant Deepak Nanda had moved an application that during police custody his finger prints were taken. The said application dated 12.2.2009 and the reply filed by PW-33 is on record and affirms that Deepak Nanda's specimen finger prints were certainly taken.
34. There is no doubt in our mind that the public prosecutor should have taken caution to leave no scope for debate and argument as to the specimen finger prints prepared by the Dossier Cell of the South-West District and should have also produced the letter by which the Crime Team had sent the chance prints to the Finger Print Bureau. This would have curtailed this argument before the appellate court on how the chance prints were sent to the Finger Print Bureau, and who had taken the specimen prints on the dossier. Similarly, if Head Constable Chanderpal had been examined, he would have deposed regarding collection of the specimen prints and forwarding the same to the Finger Print Bureau.
35. However, in the facts of the present case, we feel that the aforesaid gaps are make-believe and mere arguments of convenience, as we are satisfied that there is no interpolation or fabrication. Noticeably, Constable Devender (PW-7) has categorically stated that the chance prints developed by him were retained by them and were directly sent by them, and not by the Investigating Officer, for analysis. This statement which

remained unchallenged, and substantiated by the letter dated 23.2.2009, curtails and negates possibility of any interpolation or manipulation of the chance prints after the arrest of the accused-appellants. Moreover, photographs of the chance prints were also taken by Constable Praveen Kumar (PW-30), who has deposed and affirmed the said fact. This factual position is affirmed from Ex.PW-33/DX2 i.e. the application of the investigating officer, which specifically records that the crime team of the South-West District had lifted the finger prints and had sent the same to their office earlier. On dossier of the specimen finger prints, we have the statement of the investigating officer as well as the Ex.PW-33/DX2, which records that the investigating officer was sending the specimen finger prints of the appellants Bhagirath and Deepak Nanda. Thus there is sufficient evidence and material to establish and show that the chance prints always remained with the Crime Team and not with the investigating officer or in the police station Bindapur. Similarly, the dossier of specimen finger prints was not prepared by the investigating officer, but the specimen finger prints taken in the office of the Dossier Cell, South-West District. As recorded by us, if the prosecution had been careful and had led evidence, such arguments would have been curtailed and nipped. The hard-work in solving the present triple murder case would not have been questioned and tested with reference to technical lapse on the part of the prosecution in producing letters, and formal witnesses, who would have deposed on specific aspects.

36. At this stage, we must also reject the contention of the appellant

with reference to pen noting on the back-side of Ex.PW-33/DX2. We do not know who is author of the said noting and when the said noting was made. There is no signature or evidence to establish identity of the person making the noting. Importantly, S.I. Gyandender Singh (PW-35) was not shown and confronted with the said noting on the back side of the form. S.I. Gyandender Singh (PW-35) has specifically stated that the noting on the form (front side) was made on 27.2.2009 by S.I. Shivraj Singh. This noting is on the front side of the application, whereas the writing or noting relied upon by the appellants is on the back-side of the said page. Anyone could have written the said words on the back-side. In fact, the noting relied by the appellant on the back-side of the form Ex.PW-33/DX-2 - “1) File of the case not yet recovered from crime team 2) Finger print slips of deceased and inmates 3) Palm prints of accused”, is contrary to the noting made on the front side by the S.I. Shivraj Singh, as recorded above.

37. The last contention raised relates to admissibility of specimen finger prints as the procedure prescribed under the Identification of Prisoners Act, 1920 (1920, Act for short) has not been followed.
38. In ***Bhupender Vs. State*** [Crl.A.No.1005/2008 decided on 30th September, 2011], a Bench of three Judges of this court had overruled earlier decisions in ***Harpal Singh Vs. State*** [Crl.A.No.362/2008 decided on 25th May, 2010] and ***Satyawan Vs. State*** [Crl.A.No.34/2001 decided on 9th July, 2009], after referring to ***Shankaria Vs. State of Rajasthan*** (1978) 3 SCC 435; ***Mohd Aman Vs. State of Rajasthan*** (1997) 10 SC 44;

State of Madhya Pradesh Vs. Devendra (2009) 14 SCC 80; *State of U.P. Vs. Ram Babu Misra* 1980 (2) SCC 343 and *Manikram Vs. State* 2009 (5) CTC 316. Reliance was placed on *State of Bombay Vs. Kathi Kaluoghad* AIR 1961 SC 1808.

The question referred to the larger Bench of three Judges was:

“Whether the sample finger prints given by the accused during investigation under section 4 of the Identification of Prisoners Act, 1920 without prior permission of the Magistrate under Section 5 of the Act will be admissible or not?”

The Full Bench decision expounds that the question raised relates to interpretation of the 1920 Act and has quoted definition of the term ‘measurement’ in section 2 (a); section 3, which provides taking measurements etc. of convicted person; section 4, which stipulates taking of measurement of a non-convicted person; and section 5 which deals with the power of the Magistrate to order a person to be measured or photographed. For the sake of convenience, we are reproducing the said sections:

“Section 2(a) defines “measurements” as follows:

“(a) “measurements” include finger impressions and foot-print impressions.”

xxx

“3. Taking of measurements, etc., of convicted persons. — Every person who has been, —

(a) convicted of any offence punishable with rigorous imprisonment for a term of one year or upwards, or of any offence which would render him liable to enhanced punishment on a subsequent conviction; or

(b) ordered to give security for his good behaviour under section 118 of the Code of Criminal Procedure, 1898, shall, if so required, allow his measurements and photograph to be taken by a police officer in the prescribed manner.”

“4. Taking of measurement, etc., of non-convicted persons.— Any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurements to be taken in the prescribed manner.”

5. Power of Magistrate to order a person to be measured or photographed. — If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898 (5 of 1898), it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:

Provided that no order shall be made directing any person to be photographed except by a Magistrate of the First Class:

Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.”

Before interpreting the said provisions the Full Bench referred to the Statement of Objects and Reasons of the Act, 1920 Act, which are as under:

“The object of this bill is to provide legal authority for taking of measurements, finger impressions, foot-prints and photographs of persons convicted of, or arrested in connection with, certain offences. The value of the scientific use of finger impressions Crl.A. No.1005/2008 Page 3 of 15 and photographs as agents in the detection of crime and the identification of criminals is well known, and modern development in England and other European countries render it unnecessary to enlarge upon the need for the proposed legislation.

The existing system by which the police in India take finger impressions, photographs, etc., of criminals and suspected criminals is void of legal sanction, except as regards registered members of criminal tribes, in whose case provision exists for the taking of finger impressions in Section 9 of the Criminal Tribes Act, 1911 (III of 1911). The need for legalising the practice has long been recognized, but it was not thought expedient to take the matter up so long as no practical difficulties arose. Instances have recently been reported to the Government of India where prisoners have refused to allow their finger prints or photographs to be taken. With a view to prevent such refusals in future it is considered necessary without further delay to place the taking of measurements, etc., which is a normal incident of police work in India as elsewhere, on a regular footing. No measurement, etc., of any person will be taken compulsorily unless that person has been arrested.”

Referring to Section 4 of the 1920 Act, the Full Bench observed that it was perceptible that if required a police officer can take measurement of a person who has been arrested in connection with the offence punishable with rigorous imprisonment for a term of one year or upwards, in the prescribed manner. The term ‘prescribed’ means prescribed by

the rules under the 1920 Act. Section 5 of the 1920 Act, authorizes the Magistrate to direct a person to allow the measurement or photograph to be taken, if he is satisfied that it is expedient for the purpose of investigation or proceedings under Cr.P.C. After referring to the aforesaid case law, it was held that Section 4 of the 1920 Act, deals with taking of measurement etc. of a non-convicted person and that measurement is taken if the investigating officer so requires it, and it has to be done in the prescribed manner. Section 5 deals with the different aspect and confers power on the Magistrate to direct any person to be measured or photographed, if he is satisfied that for the purpose of an investigation or proceeding under the Cr.P.C., the same is necessary. Specific reference was made to the decision of the Supreme Court in *Devendra (Supra)*, which carves out the said distinction. Referring to the decision in *Manikram (Supra)* it was held neither Section 5 of the 1920 Act nor section 311 A Cr.P.C. put any embargo on the investigating officer from taking finger prints etc. during the course of investigation. In *Ram Babu (Supra)* the Supreme Court had referred to Section 73 of the Evidence Act and Section 5 of the 1920 Act, to observe:

“6. There are two things to be noticed here. First, signature and writing are excluded from the range of Section 5 of the Identification of Prisoners Act and, second, 'finger impressions' are included in both Section 73 of the Evidence Act and Section 5 of the Identification of Prisoners Act. A possible view is that it was thought that Section 73 of the Evidence Act would not take in the stage of investigation and so Section 5 of the Identification of Prisoners Act made special provision for that stage and even while making such provision, signature and writings were

deliberately excluded. As we said, this is a possible view but not one on which we desire to rest our conclusion. Our conclusion rests on the language of Section 73 of the Evidence Act.”

39. The aforesaid quoted paragraph would elucidate that section 73 of the Evidence Act possibly would not enable and empower a Magistrate to give directions when the case is still under investigation for the said provision fundamentally contemplates pendency of some proceedings before the Court. Relying on ***State of Andhra Pradesh Vs. M. Krishna Mohan 2007 (14) SCC 667*** it was observed that specimen fingerprints etc. can be taken from an accused. Thereafter reference was made to the term ‘investigation’ as understood in law and as defined in Section 2(h) Cr.P.C., which pertinently stipulates that the term ‘investigation’ includes all proceedings under the said Code for collection of the evidence conducted by the police or any person other than the Magistrate, who is authorized by the Magistrate in this behalf. The said definition is inclusive and therefore, will encompass collection of evidence in all forms, be it proceedings at the spot, ascertaining facts and circumstances, discovery and arrest of the offender and examining of various persons including accused, search of places and seizure of anything which are considered essential for investigation and to be produced at the trial.
40. Reference was made to ***Pooran Mal Vs. Director of Inspection (Investigation)***, 1974 (1) SCC 345, wherein it has been held that evidence obtained on an illegal search cannot be excluded and is admissible evidence. The full bench has thereafter held:-

“In ***State of Karnataka v. Yarappa Reddy***, AIR 2000 SC 185, it has also been held that criminal justice

should not be allowed to become casualty for the wrongs committed by the investigating officers.

In *Inspector of Police & Ors. v. N.M.T. Joy Immaculate*, (2004) 5 SCC 729, it has been clearly laid down that the admissibility of evidence or a piece of evidence has to be judged having regard to the provisions of the Evidence Act. In *State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 SCC 600, their Lordships opined that even if evidence is illegally obtained, it is admissible.

We may hasten to add that we have referred to the aforesaid authorities only for the purpose that the concept of investigation has a different connotation and how the material collected during investigation is to be appreciated remains within the domain of the trial Court. In the case at hand, on the basis of the authorities we have referred to hereinabove, it is clearly discernible that there is a difference in the language employed in Sections 4 and 5 of the 1920 Act. That has been explained by their Lordships in *Shankaria (supra)*, *Mohd. Aman (supra)*, *Devendra (supra)* and *M. Krishna Mohan (supra)*.

Thus understood, in our considered opinion, the view expressed in the decisions in Harpal Singh (supra) and Satyawar (supra) is not the correct view. Therefore, the decisions rendered therein are hereby overruled. The view expressed in the case of Sunil Kumar (supra) by the learned Single Judge lays down the law in correct perspective.”

41. In *Sapan Haldar and Anr. Vs. State* reported as (191) 2012 DLT 225, another three Judges Bench of this court had examined the question of admissibility of sample handwriting or signature obtained from the person, accused of having committed an offence or during investigation of a crime by an investigating Officer. After noticing that the opinion given by the Full Bench

in *Bhupinder Singh (Supra)* in respect of finger prints i.e. measurement as defined in Section 2(a) of the 1920 Act and it was elucidated that in *Bhupinder Singh (supra)* the question referred, did not embrace the issue whether the investigating officer can obtain specimen handwriting or signature of a person accused of any offence while in police custody. After extensively referring to the case law on the subject and quoting section 311A of Cr.P.C. inserted with effect from 23rd June, 2006, the Full Bench in *Sapan Haldar (supra)* answered the reference as under:

“(i) Handwriting and signature are not measurements as defined under clause (a) of Section 2 of The Identification of Prisoners Act, 1920. Therefore, Section 4 and Section 5 of The Identification of Prisoners Act, 1920 will not apply to a handwriting sample or a sample signature. Thus, an investigating officer, during investigation, cannot obtain a handwriting sample or a signature sample from a person accused of having committed an offence.

(ii) Prior to June 23, 2006, when Act No.25 of 2005 was notified, inter-alia, inserting Section 311A in the Code of Criminal Procedure, 1973, even a Magistrate could not direct a person accused to give specimen signatures or handwriting samples. In cases where Magistrates have directed so, the evidence was held to be inadmissible as per the decision of the Supreme Court in *Ram Babu Mishra*’s case (*supra*). According to Section 73 of the Indian Evidence Act, 1872, only the Court concerned can direct a person appearing before it to submit samples of his handwriting and/or signature for purposes of comparison.”

After so answering, the Full Bench in *Sapan Haldar (supra)* has proceeded to observe:

“Though not falling for consideration in this reference, with respect to finger prints, which are included in “measurements”, the weight of the authorities is that if by way of Rules or Executive instructions the manner is prescribed to take the measurements, alone then can an Investigating Officer, under Section 4 obtain the measurements but strictly as per manner prescribed; but it would be eminently desirable, as per the decision in Mohd. Aman’s case (supra) to follow the procedure ordained under Section 5 of The Identification of Prisoners Act, 1920. Relevant would it be to further note that in relation to offences punishable with death or imprisonment for life, Section 4 of The Identification of Prisoners Act, 1920 would not be applicable because the said provision specifies a prerequisite : that the person concerned is accused of having committed an offence which is punishable with a sentence to undergo rigorous imprisonment for a term of one year or upwards i.e. the sentence must relate to imprisonment for a term and would thus exclude such offences where either capital punishment or imprisonment for life is the sentence contemplated.”

42. The question would arise whether the last quoted paragraph from the decision in *Sapan Haldar (Supra)* is a mere *obiter dicta* or *ratio decidendi*, which would be applicable and bar the investigating officer from relying upon “specimen” fingerprints obtained during investigation. We observe that in some cases decided by the Division Bench of this court [Sanjay Vs. State (Crl.A.No.1151/2010) decided on 24.11.2014] and [Rajeev Kumar Vs. State (Govt. of NCT of Delhi) (Crl.A.No.1209/2013)] decided on 28.8.2014, observations in *Sapan Haldar (Supra)* were taken as *ratio decidendi*. We may have referred the matter to a larger Bench, but do not feel the said need or requirement in view of the subsequent pronouncement of the Supreme Court in

Prakash Vs. State of Karnataka 2014 (5) SCALE 83, wherein it has been observed:

“46. Assuming Prakash’s fingerprint was in fact obtained by D’Souza, it was clearly not given voluntarily, but perhaps unwittingly and in what seems to be a deceitful manner. To avoid any suspicion regarding the genuineness of the fingerprint so taken or resort to any subterfuge, the appropriate course of action for the Investigating Officer was to approach the Magistrate for necessary orders in accordance with [section 5](#) of the Identification of Prisoners Act, 1920. *In Mohd. Aman v. State of Rajasthan* (1997) 10 SCC 44 this Court referred to the possibility of the police fabricating evidence and to avoid an allegation of such a nature, it would be eminently desirable that fingerprints were taken under the orders of a Magistrate. We may add that this would equally apply to the creating evidence against a suspect. This is what this Court had to say:

“Even though the specimen fingerprints of Mohd. Aman had to be taken on a number of occasions at the behest of the Bureau, they were never taken before or under the order of a Magistrate in accordance with [Section 5](#) of the Identification of Prisoners Act. It is true that under [Section 4](#) thereof police is competent to take fingerprints of the accused but to dispel any suspicion as to its bona fides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate.”

47. The Karnataka High Court has taken the view that it is not incumbent upon a police officer to take the assistance of a Magistrate to obtain the fingerprints of an accused and that the provisions of the [Identification of Prisoners Act](#) are not mandatory in this regard. However, the issue is not one of the provisions being mandatory or not – the issue is whether the manner of taking fingerprints is suspicious or not. In this case, we do not know if

Prakash's fingerprint was taken on 7th November, 1990 as alleged by him or later as contended by the Investigating Officer, or the circumstances in which it was taken or even the manner in which it was taken. It is to obviate any such suspicion that this Court has held it to be eminently desirable that fingerprints are taken before or under the order of a Magistrate. As far as this case is concerned, the entire exercise of Prakash's fingerprint identification is shrouded in mystery and we cannot give any credence to it."

43. The aforesaid quotations take note of the decision of the Supreme Court in *Mohd. Aman (Supra)* and a decision of the Karnataka High Court in *State by Rural Police Vs. B.C. Manjunatha ILR 2013 KARNATAKA 3156* and it has held that it is not incumbent upon a police officer to take assistance of a Magistrate to obtain fingerprints and provisions of Section 5 of the 1920 Act, are not mandatory in this regard. Resort to taking of fingerprints before or under an order of a Magistrate in accordance with section 5 of 1920 Act, would be eminently desirable to obviate any cause of suspicion and to ensure that fingerprint identification is not shrouded in mystery, but this is not mandatory, for under section 4 of the 1920 Act, police is competent to take finger prints of the accused. Need to eliminate possibility of fabrication or subterfuge is highlighted and keeping in mind this parameter we have treaded with great caution and care in accepting the prosecution case.
44. Decision in the case of *Prakash* (supra) affirms and holds that specimen finger prints taken by the police are admissible and therefore judicial evidence which can be used to prove facts in issue or facts from which inference as to the facts in issue can be drawn. Admissibility of evidence and manipulation or creation of

false evidence should be distinguished and differentiated. Evidence is admissible in judicial proceedings if it is relevant and is not rendered inadmissible under the exclusionary rules which are applicable. Inadmissible evidence is excluded from consideration and is not judicial evidence. Admissible evidence must be proved and should not be manufactured or tutored evidence for the latter is fraudulent and fabricated and for this reason gets excluded from consideration. Thus jurisprudentially questions relating to the admissibility of evidence must be distinguished from those relating to fraud or falsehood and evidentiary or probative value. The former is primarily a matter of law and statute though may at times depend on preliminary findings of facts, the latter is a finding of fact. Of course weight or evidentiary value of evidence may effect its admissibility dependent on the relevancy of the matter under consideration (Monsore (1954) 70 LQR 527 as quoted at page No. 61 in Cross on Evidence, 7th Edition by Colin Tapper).

45. The aforesaid elucidation affirms our conclusion that the two appellants have been rightly convicted for the triple murder of Seema and her two children (Kunal and Nishant). The facts on record show that it is a case where the perpetrators had gained friendly entry into the house and were even served tea before the crime was perpetrated. The object and purpose as clearly established was to loot valuables in the form of jewellery. Chance prints lifted from the spot match with the specimen fingerprints of the two appellants. The stolen jewellery was recovered at the behest of the two appellants, has been identified as the looted jewellery etc. It has been established and proved that Bhagirath,

was known being related to the deceased. Deepak Nanda was his friend and partner in crime.

46. In view of the aforesaid finding, we concur with the impugned judgment convicting the two appellants under Sections 302 read with Section 34 IPC. However, conviction under Section 397 read with Section 34 IPC should be converted to Section 394 read with Section 34 IPC for the reason that Section 397 is attracted when the offender during the course of robbery or dacoity uses any deadly weapon. The word 'offender' in the said Section means the actual offender, who had used the deadly weapon but does not include all persons, who had participated in the robbery or dacoity. These persons though an accused as participants in the crime, cannot be convicted under Section 397 IPC on account of vicarious liability including Section 34 IPC.
47. By the impugned order on sentence dated 30th January, 2014, the appellants have been sentenced to imprisonment for life with fine of Rs.10,000/- each and in default of payment of fine to further undergo simple imprisonment for six months for the offence under section 302 read with section 34 IPC. This sentence is maintained. For the offence under Section 397 read with section 34 IPC the trial court has sentenced the appellants for rigorous imprisonment for ten years with fine of Rs.10,000/- each and in default of payment of fine to further undergo simple imprisonment for one month. The punishment imposed by us for the offence under Section 394 read with section 34 IPC is the same as has been imposed by the order on sentence dated 30th January, 2014 for the offence under Section 397 IPC i.e. rigorous imprisonment for ten years with fine of Rs.10,000/- each and in

default of payment of fine to further undergo simple imprisonment for one month. The sentences shall run concurrently and Section 428 Cr.P.C. would apply.

48. We accordingly, uphold the conviction of the appellants under Section 302 IPC read with Section 34 IPC. We have converted conviction under Section 397 read with Section 34 to Section 394 read with Section 34 IPC and the appellants have been sentenced as indicated above. The appeals are disposed of.

(SANJIV KHANNA)
JUDGE

(R.K. GAUBA)
JUDGE

NOVEMBER 4th, 2015
NA/ssn