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

Judgment reserved on: 20th January, 2018

Judgment pronounced on: 09th May, 2018

+ **CRL.A. No. 243/2017**

KALU @ RAJVIR @ RINKU Petitioner

Through: Mr.Sumeet Verma and
Mr.Aman Chaudhary, Advs.

versus

STATE Respondents

Through: Mr. Rajat Katyal, APP with
Insp. Suresh Chand and ASI
Puran Singh, PS Gokal Puri

+ **CRL.A. No. 309/2017**

LALIT YADAV @ MENTAL Petitioner

Through Mr. Ashok Kumar Sharma and
Mr. C. Kannan, Advocates

versus

STATE Respondents

Through: Mr. Rajat Katyal, APP with
Insp. Suresh Chand and ASI
Puran Singh, PS Gokal Puri

CORAM:-
HON'BLE MR JUSTICE S.P.GARG
HON'BLE MR JUSTICE C. HARI SHANKAR

% **(JUDGMENT)**

C. HARI SHANKAR, J

1. These appeals, at the instance of the appellants Kalu @ Rajvir @ Rinku and Lalit @ Mental, assail (i) judgement, dated 18th October, 2016, passed by the learned Special Judge, NDPS (hereinafter referred to as “the learned Special Judge”), which holds the said appellants guilty of committing the murder of the deceased Sahdev and, accordingly, convicts them under Section 302, read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as “the IPC”), as well as Section 392 read with Section 34 of the IPC and, additionally, convicts Lalit under Section 397 and Section 411 of the IPC, and (ii) consequent order, dated 25th November, 2016, of the learned Special Judge, which sentences (i) Kalu to

(a) imprisonment for life and fine of ₹ 10,000/–, with default simple imprisonment of 6 months, for the offence under Section 302 of the IPC, and

(b) rigorous imprisonment for 3 years, with fine of ₹ 5000/–, with default simple imprisonment for 3 months, for the offence under Section 392 of the IPC, and

(ii) Lalit to

- (a) imprisonment for life and fine of ₹ 10,000/–, with default simple imprisonment of 6 months, for the offence under Section 302 of the IPC,
- (b) rigorous imprisonment for 3 years, with fine of ₹ 5000/–, and default simple imprisonment of 3 months, for the offence under Section 392 of the IPC,
- (c) rigorous imprisonment for 7 years, with fine of ₹ 5000/– and default simple imprisonment for 3 months, for the offence under Section 397 of the IPC, and
- (d) rigorous imprisonment for one year, with fine of ₹ 1000/–, with default simple imprisonment for 15 days, for the offence under Section 411 of the IPC.

The Case of the Prosecution

2. The facts, as alleged by the prosecution, may be set out as under:

2.1 At 9:25 PM. on 15th August, 2011, PW-5 (Rakesh Kumar) made a call to the PCR, informing that someone had murdered Sahdev Singh, 35 to 36 years of age, in the *Gali* (Lane) in front of the petrol pump at Loni Road. The call was received by Ct. Kamlesh (PW-20), who dispatched the call to the PCR, where it was received by PW-17 ASI Rajinder Prasad (PW-17) at 9:28 PM. He recorded the

information in the *roznamcha vide* DD Entry No 22-A (Ex PW-17/A), and assigned it, for appropriate action, to SI Ishwari Prasad (PW-25). Following thereupon, SI Ishwari Prasad (PW-25) and Const. Rajender (PW-23) reached the spot, where they found the dead body of a male, bearing two stab injuries in the abdomen. They met PW-5 Rakesh Kumar (who had made the call to the PCR), who identified the dead body as that of Sahdev Singh, who used to work in his factory. Beat Const. Narinder, and Const. Pramod (PW-26), also reached the spot. The dead body was taken, by SI Ishwari Prasad (PW-25), and Const. Rajender (PW-23), to the GTB Hospital, where they reached around 10:58 PM. Dr. Nitin Chawla (PW-14) declared that Sahdev Singh had been brought in dead, and prepared MLC accordingly (Ex PW-14/A). SI Ishwari Prasad (PW-25), thereafter, returned to the scene of the crime, but could not find any eyewitness thereto. He, accordingly, prepared *tehrir* (Ex PW-25/A), for registration of the case under Section 302 IPC.

2.2 Following thereupon, on 16th August, 2011, at 12:10 AM, ASI Braham Singh (PW-13) registered an FIR, under Sections 392/397/482/411/34 IPC, and assigned the investigation to Insp. Karan Singh Rana (PW-35).

2.3 The MLC of the deceased Sahdev was received, by the IO Insp. Karan Singh Rana, from SI Ishwari Prasad (PW-25) following

whereupon Site Plan was prepared by the IO, who also took samples of blood, earth, etc., which were seized *vide* Seizure Memo exhibited as Ex PW-5/A. The IO (PW-35), thereafter, recorded the statement of Satpal Singh (PW-1), under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Cr.P.C.”), wherein Satpal Singh stated that, at about 8:30 PM. on 15th August, 2011, when he, along with his brother-in-law (the deceased Sahdev), were walking towards the factory of Sahdev, they were attacked by two boys, one of whom snatched the mobile phone of Sahdev and the other, who was holding a knife, stabbed him twice in his abdomen. The mobile phone which was snatched, was stated to be of “GILD” make, with No. 8826275946. He further stated that the Passbook, as well as money, being carried by Sahdev, were also stolen. From their conversation, he deduced the name of the boy who stabbed Sahdev, and the boy who stole the mobile phone, LIC policy and passbook from him, as Lalit and Kalu respectively, and stated that, while he could identify Kalu, he could not identify Lalit, as his back was turned towards him.

2.4 Post mortem of the dead body of Sahdev was conducted, by PW-28 Dr. Meghali Kelkar, between 11:45 AM and 1:15 PM. on 16th August, 2011. The details of the said report would be referred to later in the course of this judgement.

2.5 Call Detail Records (CDRs) of Airtel No 8826275946 (Ex PW-15/B), being the phone No. of the deceased Sahdev, (as per the statement of PW-1 Satpal Singh) were obtained, by the IO (PW-35). From the said CDRs, the IMEI No. of the said mobile phone was traced as 3568 4204 1277 020, wherefrom it was further revealed that the said phone had been used for Vodafone Mobile No. 7838205464. CDRs of Vodafone No. 7838205464 were, thereafter, obtained (Ex PW-27/C), on analysis whereof it was revealed that, at 21:36:24 hours, and 21:36:07 hours, on 15th August, 2011, calls were made from the said Vodafone No. 7838205464, to 9716943654. This number, i.e. 9716943654 was found to belong to PW-6 Bhupender @ Jalim, whose statement was, therefore, recorded under Section 164 of the Cr.P.C. (Ex PW-6/B). The said statement read thus:

“On 15.08.2011 at about 9:15 p.m., I received a call on my mobile phone from Mobile of Kalu @ Rajvir. Lalit @ Mental talked to me from his mobile No. He said to me that he (Lalit) and Kalu had committed murder in the *Gali* in front of *Theka* in Gokalpur. He asked me if I could arrange for a place for them to hide out. I know both Lalit @ Mental and Kalu @ Rajvir. Lalit @ Mental lives in H Block in Gali No. 4, Ganga Vihar and Kalu works with my neighbour Prem. Prem has many buffaloes and he runs a dairy.”

2.6 On 18th August, 2011, Lalit surrendered, whereafter, on 26th August, 2011, he was formally arrested, in Court, by SI Ishwari Prasad (PW-35) and Const. Satender (PW-24). During his police

remand, Lalit was identified by PW-1 Satpal Singh, at the Police Station.

2.7 The IO (PW-35), thereafter, recorded the disclosure statement of Lalit, which was exhibited as Ex PW-35/B. In the said statement, Lalit narrated the incident as already set out hereinabove, and stated that he had given the dagger, with which the crime had been committed, to Kalu, and retained, with him, the mobile phone and passbook stolen from Sahdev. He stated that the mobile phone and passbook were at his house, and that he could also guide the Police team to Kalu, as he was aware of the places where he used to hide.

2.8 Following the above disclosure statement, Lalit led the IO and Const. Varun Kumar (PW-23) to his house, where, from the *almirah* (cupboard), were recovered (i) one “GILD” make mobile phone, with two SIM cards, having IMEI Nos. 356842041277026 and 356842041277034 (Ex P-2), (ii) one passbook of Punjab National Bank, of Kapil Kumar (Ex P-3), (iii) the LIC policy of the deceased Sahdev (Ex PW-23/P-1) and (iv) 8 passport size photographs (Ex PW-33/P-2), all of which were seized.

2.9 On 4th September, 2011, at about 6:15 PM., Kalu was arrested by Const. Pramod (PW-26) and the IO *vide* Arrest Memo Ex PW-1/B. On his personal search being carried out, a black and red Samsung

mobile phone, with IMEI 351703041833090, but without any SIM card, and one mobile phone, having Vodafone No. 7838205464, were recovered and seized, *vide* Seizure Memos Ex PW-35/P-2 and Ex PW-35/P-3 respectively. The disclosure statement of Kalu (Ex PW-1/D) was recorded, during the course of which he disclosed that he could get the knife, with which the crime was committed, recovered. Following the report, Kalu led the police to his house, where, from the cupboard, the said knife (Ex PW-1/B-1) was recovered. The knife was sealed and seized. The knife was found to be 44 cm in total length, with a blade of length 22 cm, width 5.3 cm and 0.4 cm in thickness. Reddish-brown stains were seen on the blade.

2.10 The scene of crime was pointed out, by Lalit and Kalu, separately, *vide* Pointing Out Memos (Ex PW-33/A and PW-1/F), respectively.

2.11 The knife was sent, for analysis, to the FSL, by the IO, and was deposited in the FSL by PW-29 Const. Amit Kumar. The FSL Report (Ex PW-35/E) could not, however, detect any blood on the knife.

3. Kalu and Lalit were chargesheeted under Sections 302/34 IPC and 392/34 IPC. In addition, Lalit was also chargesheeted under Sections 397 IPC and 411 IPC, as also Sections 25 and 27 of the Arms

Act, 1959. The case was committed to Sessions, where the appellants pleaded not guilty and claimed trial.

The course of Trial

4. To the extent relevant, the evidence, of the witnesses who deposed on behalf of the prosecution and the defence, may be referred to, as under.

Prosecution Witnesses

4.1 PW-1 Satpal Singh was, at the time of investigation, regarded as an eye-witness to the robbery and murder of Sahdev Singh. It is imperative, therefore, to extract his testimony in full.

4.2 The record of examination-in-chief of PW-1 Satpal Singh, on 19th March, 2012, was as under:-

“On S.A.

On 15.08.2011, at about 8:30 p.m, I along with my brother in law (Jija) Sahdev was going to his plastic factory at Gokal Pur in the Gali. When we reached near the gali in front of petrol pump at Gokal Pur, I went to a nearby shop to purchase Gutka and my brother in law went ahead towards his factory. Within a few minutes I saw that my brother in law Sahdev (Jija) was stopped by two boys and they were snatching his personal belongings. One of the accused, asked

the other person by calling him Kalu to snatch mobile of Sahdev. On objection of Sahdev, Kalu asked the co-accused Lalit to stab Sahdev with the knife. Lalit stabbed Sahdev with knife two three times and both the accused persons snatched his personal belongings which include his mobile phone, money from his pockets and some papers. Thereafter, both the accused persons ran away from the spot. I can identify the accused persons, if produced before me. Due to fear I also ran away from the spot and from my mobile phone, I intimated the factory owner Sh. Rakesh. I thereafter, went to my house. I reached my house at about 9.30 p.m. and gave the information about the crime to Rakesh at about 10.00 p.m. Rakesh called me near the Petrol Pump at about 10.00 p.m. I had reached the petrol pump again at about 10.00 p.m.

Court Question. Whether you have seen your brother in law Sahdev near Petrol Pump.

Ans. No.

Thereafter, I alongwith Rakesh and the police officials went to the police station. Police has not asked anything from me and thereafter, I went back to my house. On the next day, I alongwith my other relatives again went to the police station in the morning. Police made enquiries from me and recorded my statement.

Again on 26.08.2011, I was called to PS by IO. When I reached the police station, I saw the police officials interrogating one boy. I identified that person as the person, who gave stab injuries to Sahdev. My statement was recorded by police. The witness has correctly identified the accused Lalit by pointing his finger towards him, present in the Court as the accused who stabbed his brother in law Sahdev. The accused has correctly identified the other accused Kalu by pointing his finger towards him, who had caught hold Sahdev and snatched his mobile phone and other articles.

On 04.09.2011, I was again called to PS. I accompanied the police team to the spot. Thereafter, the police team alongwith me went to Village Johripur. Accused Kalu was also in the custody of the police. Accused Kalu took the police team to his house and got recovered a knife from the almirah of his house. Police seized the knife vide memo Ex. PW1/A, which bears my signatures at point A. Thereafter, we returned to the police station. Both the accused are present in the Court today.

At this stage, Ld. Addl. P.P. for the State request to cross-examine the witness, as he is resiling from his earlier statement. Heard. Allowed.

It is correct that my statement was recorded on 16.08.2011, 26.08.2011 and 04.09.2011. It is correct that out of fear I ran away from the spot. It is correct that after sometime, I came to the spot and found police present there. It is correct that from the police I came to know that my brother in law Sahdev had expired.

It is correct that on 26.08.2011, I went to PS Gokal Puri to enquiry about the case. It is correct that when I reached inside PS, I saw a person is standing near the wall and looking towards the calender on the wall. It is correct that I identified that person as Lalit (accused present in the Court), who stabbed my brother in law Sahdev on 15.08.2011. It is correct that on 15.08.11 at about 8:30 p.m., at the time of stabbing, accused Lalit, present in the Court, told my Jija Sahdev, to hand over him all the articles which were with him. It is correct that when my brother in law has showed his reluctant, as per the instigation of accused Kalu accused Lalit stabbed my brother in law.

It is correct that on 04.09.2011, I joined the investigation with the police team and we reached near Punjab National Bank, Johripur Road. It is correct that near Johripur road, as per my pointing out accused Kalu present in the Court was apprehended. It is correct that he was arrested by arrest

memo Ex. PW1/B and his personal search was conducted vide memo Ex. PW1/C. It is correct that both the memos bears my signature at point A and signatures of Kalu, appears at point X. It is correct that accused Kalu was interrogated thoroughly and his disclosure statement was recorded vide memo Ex. PW1/D, which bears my signatures at point A and signatures of accused Kalu, at point X. It is correct that accused Kalu took the police team to his house and got recovered one knife, from the almirah, situated in the room at roof. It is correct that police prepared the sketch of the knife vide memo Ex. PW1/E, which bears my signatures at point A and signatures of accused Kalu at point X. It is correct that thereafter, the knife was kept in the cloth pulanda and sealed with the seal of KS and seized vide memo Ex. PW1/A. It is correct that accused Kalu also point out the spot i.e. the place of the incident and the IO prepared the pointing out memo Ex. PW1/F. It is correct that the IO prepared the site plan of the place of recovery of the knife vide memo Ex. PW1/G, which bears my signatures at point A and the signatures of the accused Kalu at point X.

It is correct that I can identify the knife, if shown to me.

Further examination is deferred as the case property has not received from the FSL.”

4.3 The record of cross-examination of PW-1, Satpal Singh on 22nd February, 2013, was as under:-

“XXXXXX by Sh. K.N. Sharma, Ld counsel for the accused Lalit Yadav.

I and deceased Sahdev were living in the same locality. However, we were working at different places. I was working in Shahdara and the deceased was working in village Gokalpur. On the day of incident, it was my off day. I do not know the gali number of the place of incident. However, the spot of the occurrence opposite to petrol pump

at the distance of 50 paces. The shop from where I went to purchase the gutka was situated at the distance of 30 paces from the place of occurrence. It hardly took me two minutes to purchasing the gutka. The accused persons were not know to me prior to the incident when the accused persons were giving beatings of Sahdev. I had seen one of the accused by face and the other accused from back. I had not told the occurrence to the shopkeepers, to the petrol pump occupants or to the police. However, I had made a telephone call to Rakesh, the owner of the factory namely Rakesh, where Shahdev, deceased was working there. I had knowledge about the mobile phone of Rakesh, owner of the factory. The distance between that factory and the occurrence may be about 30 paces. I made telephone call when I reached on the road near petrol pump from my mobile phone. Rakesh immediately came there and police also came there. I and Rakesh went with the police to the police station and to the hospital. I went to the PS on the same night of the occurrence and thereafter, I went to the police station on 26.08.2011 and thereafter, on 04.09.2011. I had gone to the PS to enquire about the case where I came to know about the arrest of the accused person. On that day, I went to the PS at about 12:00 noon and remained there till 4:00 p.m. I had seen the accused persons in the PS. It is wrong to suggest that the police has also given beatings to me. The IO has also prepared some documents on 26.08.2011. My statement was also recorded. I do not know about the contents of the documents. My signature was also obtained on some documents. It is wrong to suggest that I had not seen the spot and I have never accompanied Sahdev (since deceased). It is wrong to suggest that I have not seen any quarrel and I am deposing falsely in the court today.

XXXXXX by Sh. V.P. Tiwari, Ld. Counsel for the accused Kalu.

I am the real brother-in-law of the deceased Sahdev. When I reached the spot with Sahdev, there was no electricity in the

area. Vol. there was enough light to identify the human beings. No public person was passing through the spot at that time.

On 04.09.2011, I went to the PS of my own, at about 3:00 p.m. The house of the accused Kalu was situated at a distance of about 7-8 kilometers from the PS. It is wrong to suggest that I had not accompanied the Police Officials' to the residence of the accused Kalu on 04.09.2011 and no recovery was effected at his instance, in my presence. It is wrong to suggest that no seizure memo was prepared by the IO at the spot and the accused has not made any disclosure statement in my presence. It is wrong to suggest that I am deposing falsely in the court today."

4.4 The evidence of PW-5 Rakesh Kumar also deserves to be reproduced, *in extenso*, as under:

"PW-5 Statement of Rakesh Kumar, S/o Sh. Brahmpal, aged about 32 years, R/o Gali no. 3/22, Nahar Road, Village Gokal Pur, Delhi-94.

On SA

I am running a plastic factory at Gokul Pur Village, near Petrol Pump. Deceased Sahdev was employed in my factory as a labourer for last about 2 ½ years, prior to the incident. On 15.08.2011, about about 9.15-9.30 PM. I was going to my factory and I reached in Gali in front of Petrol Pump Gokul Pur going towards my factory I found 4-5 persons standing in the Gali, near my factory. The said Gali is a narrow Gali and because of those 4-5 persons there was no further space for my motorcycle to go inside the Gali and therefore, I also stopped there, near those persons and there I found the blood stained dead body of Sehdev lying in the Gali. Thereafter, I called the police on phone no. 100 from my mobile phone no. 9899233623. Within 5-7 minutes of my

call, the police reached there. The local police as well as the PCR has come on the spot. They also called the photographers and took photographs of the spot. The police officials seized the blood from the spot as well as the earthe control and blood stained earth/mud (sand) from there, vide seizure memo Ex. PW5/A, which bears my signature at point A. They also seized a lunch box from the spot vide seizure memo Ex. PW5/B, which bears my signatures at point A. The police officials also prepared a site plan at my instance, which is Ex. PW5/C, which bears my signatures at point A. They also made enquiries from me and also recorded my statement.

XXX by Sh. K.N. Sharma, Advocate from DLSA for the accused Lalit.

I had not known the persons, who were standing near the dead body. My factory is at a distance of about 50 meters from the spot, where the dead body was lying. There was no factory adjacent to the spot where the dead body was lying. The PCR van and the local police had arrived at the spot almost simultaneously. The PCR van remained at the spot for about 1 hour. The other police officials from the local police station remained at the spot, till date mid night. The dead body was shifted from the spot by the PCR Van. I do not remember whether the police officials recorded the statement of any other public persons on the spot, in my presence. The documents Ex. PW-5/A, Ex. PW5/B and Ex. PW 5/C, were prepared on the spot. It had not given any proof of employment of Sahdev in my factory, to the police. It is wrong to suggest that I had not made any call to the police from my mobile phone.

Court Ques. Whether Sh. Sat Pal, the brother in law (sala) of deceased Sehdev, had informed you about the incident on phone, prior to the time you were going to your factory?

Ans. No. I was going to my factory of my own.

Court Ques. Whether Sat Pal had met you either at the spot or immediately prior to your going to your factory?

Ans. No

It is wrong to suggest that I had not visited the spot on 15.08.2011 and I had not seen the dead body of Sehdev and I have been planted as a witness by the police officials. It is wrong to suggest that I am deposing falsely in the Court today.”

He was not cross-examined, despite grant of opportunity.

4.5 PW-6 Bhupender @ Jalim deposed, in examination-in-chief on 22nd March, 2012, that Kalu and Lalit were his friends and that, on 15th August, 2011 at about 9:30 PM., he received a telephone call, on his number 9716943654, from Kalu (who was present in court and whom he correctly identified), *who asked him to talk to Lalit* (who was also present in the court and whom he identified). He further deposed that Lalit confessed to having, with Kalu, committed murder of a person, in the *gali* near the liquor shop at village Gokulpur, and requested him to provide a place for them to hide, but that he declined and informed the police officials on 17th August, 2011.

4.6 In his cross-examination by learned counsel appearing for Lalit, PW-6 deposed, however, that his first statement was recorded by the police officials on 17th August, 2011 in the Police Station, and was voluntary, but that, after recording the said statement, he remained in

the custody of the Police, and was released only after his statement, under Section 164 of the Cr.P.C, was recorded on 24th August, 2011 (Ex PW-6/B). He, however, admitted that he had not disclosed the fact of his having been illegally detained in custody by the Police authorities, to the learned MM.

4.7 PW-7 Rajeshwari, the wife of the deceased Sahdev, confirmed, in her examination-in-chief on 22nd March, 2012, that her husband was using the mobile No. 8826275946, obtained on the identity of their neighbour Joginder, and that he was carrying the said phone with him on the date of his murder, i.e. 15th August, 2011. She was not cross-examined, despite grant of opportunity. This was corroborated by the deposition of PW-8 Joginder Singh and PW-15 R.K. Singh.

4.8 PW-10, Kapil, the son of the deceased Sahdev, confirmed, in his examination-in-chief on 30th April, 2012, that, on 15th August, 2011, his father Sahdev had left their house at about 8 PM., towards his factory, carrying, with him, a lunchbox, a passbook of the Punjab National Bank (PNB), and a mobile phone of “GILD” make, with No.8826275946, and that, at about 9:30 PM. on the same day, he came to know that his father had been stabbed and had died. He identified the lunchbox, the passbook (in the name of Kapil Kumar i.e. himself) and the mobile phone, which were shown to him. They were, accordingly, exhibited as Ex P-1, P-2 and P-3 respectively.

4.9 PW-13 ASI Braham Singh deposed, in his examination-in-chief on 29th August, 2012, that, at 12.10 AM on 16th August 2011, he had received the *rukka* from SI Ishwari Prasad (PW-25) through Const. Narender, having endorsed the same, and to having had FIR 286/11 registered on the basis thereof, after which the investigation was handed over to the IO Insp. Karan Singh Rana (PW-35).

4.10 PW-14 Dr. Nitin Chawla, Junior Resident, GTB Hospital, who had prepared the MLC of the deceased Sahdev (Ex.PW-14/A) at the time when his dead body was brought to the Hospital, confirmed that the dead body of Sahdev had been brought by Constable Rajender (PW-23) and SI Ishwari Prasad (PW-25).

4.11 PW-17 ASI Rajender Prasad confirmed, in his examination-in-chief dated 18th September, 2012, having recorded DD Entry No.22 A (Ex PW-17/A) at 09:28 PM. on 15th August, 2011, and having informed SI Ishwari Prasad (PW-25) of the contents thereof.

4.12 PW-19 SI E.S. Yadav deposed, in his cross-examination-in-chief on 16th October, 2012, that, on receiving information regarding the murder of Sahdev at about 09:45 PM. on 15th August, 2011, he, along with HC Surender Prasad and photographer Const. Shyam Lal (PW-21) reached the spot of incident, and that, though the dead body

had been removed, some blood was lying there. He confirmed having, thereupon, prepared his Visitation Report (PW-19/A) around 12:00 midnight and handed a copy thereof to IO Insp. Karan Singh Rana (PW-35). He further stated that the details regarding the name of the deceased, and the *modus operandi* adopted in the offence, had been entered by him as per the direction of the IO.

4.13 PW-20 L/Const. Kamlesh confirmed, in her examination-in-chief on 16th October, 2012, having received a call from Yogesh (9899233623) regarding the murder, and having entered the particulars in the PCR Form (Ex.PW-20/A). She was not cross-examined.

4.14 PW-22 Const. Shyam Lal of the Mobile Crime Team deposed that at 10.00 PM., on 15th August, 2011, he along with, SI E.S. Yadav (PW-19) went to the Rasoi Wali Gali, where he was met by the IO Insp. Karan Singh Rana (PW-35) and, as directed by him, took seven photographs of the spot (PW-21/1 & PW-21/7).

4.15 PW-23 Constable Rajender Prasad deposed, in his examination-in-chief on 22nd February, 2013, that consequent to the receipt by SI Ishwari Prasad (PW-25) of DD No. 22-A, he, along with SI Ishwari Prasad, reached the spot where they found the dead body of Sahdev, at 9.40 PM., and that, after having the photographs taken, had the dead

body shifted to the Hospital. He further confirmed that SI Ishwari Prasad left the hospital, leaving him to guard the dead body. He further confirmed the fact that the next day, i.e. on 16th August, 2011, the post mortem of the dead body was conducted by the doctor, who, thereafter gave the clothes of Sahdev, his viscera and a parcel containing his blood sample on a gauze, which he, in turn, handed over to the IO Insp. Karan Singh Rana (PW-35) who seized them *vide* Seizure Memo Ex PW-23/A.

4.16 The examination-in-chief and cross-examination of PW-25 SI Ishwari Prasad, may be reproduced in *extenso* as under:

“On S.A.

On 15.08.2011, I was posted at PS Gokalpuri as SI. On that day, DDA No. 22A was received to me from the duty officer, which was received at PS at about 9.28 p.m., regarding murder of Shahdev Singh aged about 35-36 years opposite village Gokalpur in front of patrol pump in gali, Loni road from phone no. 9899233623. The attested copy of DD is already Ex. PW17/A. I alongwith Ct Rajender went to the spot and there, we found one person lying in the Ishtri rasoi wali Gali. The legs of the injured were towards Eastern side and head was towards western side and the injured was lying on its right side (dahini carvat). There were two stab injuries over the abdomen and some blood was lying on the road. One lunch box was also lying near the injured. One person, namely, Rakesh, s/o Brahm Pal met to us at the spot and he identified the injured as of Shah Dev Singh S/o Panna Lal R/o Village Nagal Dharpur, Tehsil Dibai, district Buland Shahar, PS Narora having his present address D-121, Gali

No. 1, Gagan Vihar, Ghaziabad. He also told that the injured used to work at this factory. In the meanwhile, beat Ct. narender and Ct. Pramod reached there. I had called private photographer, who took the photographs of the injured. I left Ct. Narender and Ct. Pramod at the spot and I alongwith Ct. Rajender took the injured to the GTB Hospital. The doctor declared injured brought dead vide MLC No. 4729/11, which is already Ex. PW14/A and the doctor also mentioned on the MLC assault by some sharp object. I left Ct. Rajender at GTB Hospital and I came back to the place of the incident. No eye witness met to me at the spot. Therefore, I made endorsement Ex. PW25/A, on the DD No. 22A, which bears my signature at point A and gave it to Ct. narender at about 11.55 p.m. for getting the FIR registered Insp. K.S. Rana, SHO, PS Gokalpuri came at the spot and I handed over copy of MLC to him. Crime team also reached at the spot, who inspected the spot. Crime team photographer took the photographs of the spot. Insp. K.S. Rana, IO, prepared the site-plan, on my pointing out and pointing out of witness. Rakesh Kumar, which is already Ex. PW5/C, which bears my signature at point B. IO lifted the blood on gauze. He also lifted the blood stained earth and earth control and converted the same into separate pulandas and sealed with the seal of KS and seized through seizure memo, which are already Ex. PW5/A, which bears my signature at point B. the IO also seized the lunch box while preparing the seizure memo, which is already Ex. PW5/B, which bears my signature at point B. the seal after use was handed over to me. We made search for the accused person, but, in vain. On the next date morning, I returned the seal to the IO.

On 04.11.2011, IO called the draftsman, SI Mukesh Kumar Jain and I, draftsman accompanied with the IO to the place of the incident and there, draftsman took rough notes and measurements, on inspecting the scene of crime, at my pointing out. I identify the photographs, which are already Mark PW16/P-1 and PW16/p-2, which were taken at the spot and depicting the dead body. The photographs are now Ex.

PW25/B and Ex.PW25/C, which were taken by photographer Chokha singh, in my presence.

I can identify the case property, if shown to me.

At this stage, MHCM has produced one lunch box, upon which words 'Canon' and 'Pooh' are printed and there are plaster tap affixed on it bearing particulars of the present case and seal of KS on its top and bottom at two places each. The lunch box is shown to the witness, who identify the same as already Ex.P-1, which was seized by the IO at the spot."

XXXX by Sh. K.N. Sharma, Advocate for the accused Lalit Yadav @ Mental.

" The scene of crime is at a distance of around 1 to 1.5 k.m. from the PS-Gokal Puri. We reached the spot by private motorcycle within 10-20minutes after receiving instruction at around 9.25 p.m. to 9.30 p.m. from Duty Officer. No public person met us at the spot when we reached the spot. At the time when I received message from Duty Officer my location was in Gokal Puri Market. The scene of crime is at a distance of around 1 to 1.5 k.m. from the Gokal Puri Market. I alongwith Ct. Rajender took the deceased to the GTB Hospital 20-25 minutes after reaching the spot. I returned to the scene of crime from the hospital at around 11.15 p.m. I sent rukka from the spot to the police station."

"XXXX by Sh. K.N. Sharma, Advocate for the accused Lalit Yadav @ Mental.

" I had called the photographer at around 9.45 p.m.-9.50 p.m.through my mobile phone. Photographer reached at the scene of crime within 10 minutes. I do not remember the number of photographs taken by him. He remained at the spot for 5 minutes-10 minutes. After making call to photographer, I made a call to the Crime team through North East Control Room. Crime Team reached at the spot around

12.10 a.m. (mid night). I do not remember the exact time for which the Crime Team remained at the spot. Vol. Second IO Insp. K.S. Rana had taken over the investigation from me and I was assisting him at that time. In so far as I am able to recollect Insp. K.S. Rana reached at the spot at 12.05 a.m. (mid night). Vol. He had come to the spot after I had sent rukka to the police station. I had not given any information about the shifting of the injured to the hospital after reaching at the spot or that he was declared 'brought dead' to the police station. Vol. No such information is required to be given since being an I.O. I have to investigate the matter. However, I had conveyed to my senior i.e. Insp. K.S. Rana that I had reached at the spot and the facts observed at the spot. I have not stated in my statement or in my examination in chief that I had conveyed the fact of reaching at the spot and the facts observed at the site to Insp. K.S. Rana. The reason for not stating these facts is that these are not required to be stated since we remain in contact with our senior officers in discharge of our official duties. I returned the seal to the IO in the morning on 16.08.2011. when I returned from the hospital to the spot, one public person/employer of the deceased was present at the spot. There was no shop in the street where the scene of crime is located. Electric pole was at a distance of 2 to 3 meters from the body of the deceased. There was light in the electricity pole at that time. Public persons/labours were passing through the said street during that time. I made effort to get information from them but they said that they did not know about the incident and left the place. I did not record their names and addresses. I cannot say as to the scene of crime was located in a street which was thorough fare. It is not usually used by passerby beside the labour working in that street. Entrance to the street is from the Loni road side and it Proceeds towards Gokalpur.

It is wrong to suggest that I did not join the investigation of the case at any point of time. It is wrong to suggest that DD No. 22-A was never market to me. It is

wrong to suggest that I had not taken the deceased to the hospital. It is wrong to suggest that I had not sent the rukka from the spot. It is wrong to suggest that I had prepared all the documents in the police station and signed them at the instance of IO at police station. It is wrong to suggest that I am deposing falsely.”

4.17 PW-26, Const. Pramod also deposed, in his examination-in-chief, regarding having met SI Ishwari Prasad (PW-25) and Constable Narender at the Rasoi Wali Gali at 9.30 PM. on 15th August, 2011, where they found Sahdev, and regarding their having taken Sahdev to the hospital where he was declared “brought dead”. He further confirmed the apprehending of Kalu on 4th September, 2011, and also identified him in court. He further confirmed the recovery of the mobile phone from Kalu, and the recording, by the IO, of the disclosure statement of Kalu, during the course of which Kalu disclosed the fact of concealment of the knife, with which the crime had been committed, in his room, and offered to recover the same. PW-26 also testified to the fact that Kalu led the Police to the scene of the crime where he pointed out the spot where Sahdev had been stabbed (which was recorded vide Pointing Out Memo Ex PW-1/F) (which was signed by him) and thereafter, to his house where, from the cupboard (*almirah*), the knife was recovered. The knife, which had been sealed and seized, was shown to PW-26, who identified the same, as being the knife which was recovered from the house of Kalu. He further deposed that the IO had prepared the Site Plan of the spot

(Ex PW-1/G), which was signed by him. In further cross-examination, by learned counsel appearing for Kalu, PW-26 re-confirmed the fact that he had accompanied the Police personnel to the house of Kalu, wherefrom Kalu recovered the knife and handed it over to the police personnel. However, he also deposed, side by side, that he did not remember (i) the time when he reached Kalu's house, (ii) the time of recovery of the knife, (iii) the colour of the house, (iv) whether the *almirah* was made of iron or wood, (v) whether there was any other person in the house, or (vi) whether the dagger had any bloodstains on it, or not. He further confirmed that no public person had been associated with the recovery exercise.

4.18 PW-28 Dr. Meghali Kelkar, confirmed, in her examination-in-chief on 17th September, 2013, that she had, on 16th August, 2011, conducted the post-mortem examination of the dead body of Sahdev, which had been sent by the IO Insp. Karan Singh Rana (PW-35) and was brought by Constable Rajinder Prasad (PW-23), and also reconfirmed, orally, the contents of the post mortem report (Ex PW-28/A) as drawn by her. She further stated that, on 13th September, 2011, the IO sought her subsequent opinion (Ex.PW-28/M), with regard to the weapon used in the crime, and that she had opined that the knife, shown to her after opening the sealed parcel, bearing reddish-brown stains, was capable of causing the two injuries found on the body of the deceased.

4.19 PW-33 Const. Varun Kumar deposed, in his examination-in-chief on 25th October, 2013, that, on 27th August, 2011, at 9.10 AM, he took Lalit from the lock-up and produced him before the IO, whereafter they left the Police Station and reached the scene of crime, which was pointed out, to, them by Lalit, and that the IO, thereupon, prepared the Pointing Out Memo regarding the place, which was exhibited as PW-33/A. He further stated that, thereafter, they went to his house, which was opened by his mother, where from an *almirah* in his room on the first floor, he retrieved one mobile phone of “GILD” make, one PNB passbook, one LIC receipt and eight passport size photographs, which he handed over to the IO, who sealed and seized them *vide* Seizure Memos Ex.PW-33/B and PW-33/C. He correctly identified Lalit, who was present in court. He also identified the mobile phone, which already stood exhibited as Ex P-2, as well as the PNB passbook, LIC receipt and eight passport size photographs, which also stood exhibited as Ex P-3, PW-33/P-1 and PW-33/P-2 respectively. The cross-examination of PW-33 did not elicit anything substantial.

4.20 PW-34, Savitri, the learned MM, testified to recording the statement of Bhupender (PW-6) under Section 164 of the Cr.P.C.

4.21 The IO Insp. Karan Singh Rana, deposing as PW-35, testified, in detail, regarding all particulars of the case. He deposed that (i) at 9.28 PM. on 15th August, 2011, SI Ishwari Prasad (PW-25) was assigned DD-22A (Ex.PW-17/A), regarding the murder of Sahdev, whereupon SI Ishwari Prasad reached the spot of occurrence along with Const. Rajinder (PW-23), (ii) at 9.45 PM., he received the information of the case through a wireless operator, (iii) at about 11.55 PM., he reached the spot, at the time when SI Ishwari Prasad was sending the *rukka* (Ex.PW-25/A) to the Police Station, on the basis whereof FIR was registered and the investigation of the case was assigned to him, (iv) at that time, the dead body was still lying on the road outside the *gali*, (v) on being summoned by SI Ishwari Prasad, the Mobile Crime Team reached the spot, under the charge of SI E.S.Yadav (PW-19), (vi) Chokha Singh (PW-16), the private photographer, also reached the spot, on being summoned by SI Ishwari Prasad, (vii) the Mobile Crime Team inspected the scene of crime and photographs were taken by the photographer of the Mobile Crime Team, (viii) Visitation Report (Ex.PW-19/A) was prepared by SI E.S.Yadav, and handed over to him, (ix) in the meanwhile, Const. Narender reached the spot, and gave him the original *rukka* and a copy of the FIR registered on the basis thereof, (x) Chokha Singh also took photographs of the spot, (xi) he inspected the spot and prepared the Site Plan (Ex.PW-20/A), at the instance of SI Ishwari Prasad and Rakesh Kumar (PW-5) whose statement he recorded, (xii) thereafter,

he prepared the inquest papers and took samples of blood of the deceased on gauze, earth control and blood stained earth which were sealed with the seal “KS” and seized *vide* Seizure Memo Ex. PW-5/A, which bore his signature, (xiii) in the meanwhile, the dead body had been sent to GTB Hospital by SI Ishwari Prasad, in the custody of Const. Rajender (PW-23), (xiv) he, too, reached the Hospital, had the dead body of the Sahdev identified by his relatives and had his postmortem conducted, whereafter the dead body was handed over to the relatives, (xv) the doctor also handed three parcels, one containing the clothes of Sahdev, the second containing his viscera and the third containing his blood sample, to Const. Rajender (PW-23), who handed them over to him, (xvi) he took the samples to the Police Station and seized them *vide* Seizure Memo Ex. PW-23/A, whereafter they were deposited in the *malkhana*, (xvii) PW-1 Satpal Singh had stated that Kalu and Lalit had purloined the mobile phone bearing no. 883627576, of Sahdev, (xviii) on collecting the CDRs of the said phone, it was revealed that the said phone had been used with the phone number 7838205464 (which was being used by Kalu), (xix) from the CDRs of No. 7838205464, the number of Bhupender 9716943654 came up, (xx) he, therefore, proceeded to interrogate Bhupender, who disclosed that he had received a call, on his mobile phone, from Lalit, who told him that he and Kalu had committed the murder of Sahdev and sought sanctuary from him, which he refused, (xxi) on 18th August, 2011, he went to the house of Sahdev, where he

met his son Kapil (PW-10), whose statement he recorded, (xxii) on 24th August, 2011, he produced Bhupender before the learned MM, who recorded his statement under Section 164 of the Cr.P.C, (xxiii) on 26th August, 2011, Lalit was produced before the learned MM and formally arrested by him *vide* Arrest Memo Ex. PW-35/A, (xxiv) he recorded the disclosure statement of Lalit (Ex.PW-35/B) in the court premises, (xxv) on 27th August, 2011, Kalu and Lalit led the police party to the spot of occurrence, in respect whereof Pointing Out Memo (Ex.PW-33/A) was prepared by him, (xxvi) thereafter, at 11.15 AM, Lalit led them to his house where his mother, sister, brother and other family members, though present, refused to affix their signature on any of the documents prepared by the IO, (xxvii) from an *almirah* on the first floor, Lalit retrieved one “GILD” make mobile phone, one PNB Pass Book, a copy of an LIC policy and an envelope containing eight photographs, all of which were exhibited, (xxviii) on 28th August, 2011, Lalit was produced before the learned MM and remanded to judicial custody, (xxix) at 6.00-6.15 PM. on 4th September, 2011, he, along with Satpal (PW-1), Const. Pramod (PW-26) and others arrived near PNB Johripur, where a secret informant pointed out Kalu, whom they apprehended and arrested and conducted his personal search, which resulted in the recovery of one black and red Samsung mobile without a SIM card, along with one Vodafone SIM card having no. 7838205464, (xxx) he, thereafter, recorded the disclosure statement of Kalu, (Ex. PW-1/D), (xxxi), Kalu then led

them to the spot of occurrence and pointed it out, which was recorded *vide* Pointing Out Memo Ex.PW-1/F, (xxxii) Kalu then took them to his house where, from a room on the first floor, he retrieved a knife, stating that the said knife was used by Lalit and himself in the commission of the murder of Sahdev, (xxxiii) his mother was present in the room at that time, (xxxiv) a sketch of the knife was prepared and knife which was sealed with the seal of “KS” and was seized *vide* Seizure Memo Ex.PW-1/A, (xxxv) he also prepared the Site Plan of the place of recovery (Ex.PW-1/G), (xxxvi) he asked Kalu’s mother, who was present in the room, to affix a signature on the Seizure Memo, but she refused, (xxxvii) he also took finger prints from the knife, before taking it into possession, but the knife was never sent to the Finger Print Bureau, (xxxviii) there were blood stains on the knife, and (xxxix) on 5th September, 2011, Kalu was produced before the learned MM and remanded to judicial custody.

4.22 PW-35 Insp. Karan Singh Rana categorically denied having confined Bhupender in police custody on 17th September, 2011. He further deposed regarding the sending of the sealed exhibits to the FSL and of the collection of the reports of the FSL with respect thereto, as also regarding collection of the copies of the CDRs relating to the various phone numbers from the concerned mobile operators.

4.23 Various witnesses testified regarding the mobile numbers being used by the various dramatis personae in the present case, and provided documents / details in respect thereof. PW-4 Anil Kumar, the proprietor of M/s. AKA Communications confirmed the purchase of SIM Card, bearing No. 7838205464, by Kalu, from him, about 10 months prior to the murder of Sahdev, being issued in the name of Mr. A.K. Azad (PW-11) who, for his part, confirmed the loss, by him, of his Voter ID Card and PAN Card on 22nd September, 2010, and the lodging of complaint, by him, with the police, on 10th October, 2010 (Ex. PW-11/A), in connection therewith. The CDRs of the said number, for the period 10th to 20th August, 2011 (Ex.PW-27/C) were provided by PW-27 Israr Ahmed, the Alternate Nodal Officer for Vodafone. Regarding the deceased Sahdev, PW-7 Rajeswari confirmed, in her examination-in-chief, the fact that he was using the Mobile No. 8826275946, and the CDRs, in respect of the said number (Ex. PW-15/B) were produced by R.K. Singh (PW-15), the Nodal Officer of M/s. Bharti Airtel Ltd. The usage, by PW-4 Bhupender, of mobile No. 9716943654, was confirmed by PW-9 Urmila, who deposed that the said SIM Card had been purchased using her ID, and the CDRs (Ex.PW-12/B), in respect of the said Mobile No. were provided by PW-12 Shishir Malhotra, the Nodal Officer of M/s. Aircel Ltd.

4.24 The remaining PWs were essentially formal witnesses, who merely bore out the events that transpired, after the discovery of the injured Sahdev on 15th June, 2011, and exhaustive reference, to their various depositions, may conveniently be obviated at this juncture.

Defence evidence

4.25 Lalit examined his brother Pawan Yadav, as DW-1, and Kalu examined his mother, Rukmani, as DW-2.

4.26 DW-1, in his examination-in-chief on 31st January, 2015, stated that, on 29th October, 2010, at about 9:00 AM, certain police officials from Police Station Gokulpuri, came to his house and forcibly tried to take away, with them, his younger brother Lalit, and that, when they put up an opposition, he, his sister, his mother and Lalit were beaten mercilessly and abused. He asserted that, on the same day, he made a written complaint to the Commissioner of Police and other senior officers, regarding the incident, of copy of which was produced and exhibited as Ex. DW-1/A. He stated that he had also taken photographs using his mobile phone, which were exhibited as Ex. DW-1/B. In cross-examination by learned counsel appearing for the State, DW-1 denied the suggestion that he had deposed wrongly in his examination-in-chief, or that Ex.DW1/A and Ex.DW1/B were fabricated by him. He denied the fact that his brother Lalit had

committed the alleged offence, of murder of Sahdev, on 15th October, 2011 in Delhi, and stated that he was at his native village in Farera, Bagpath on that day.

4.27 DW-2, Smt. Rukmani, stated in her examination-in-chief, on 26th February, 2015, that on the 5th September (she did not remember the year), at about 1:00 or 1:30 PM., police officials brought Kalu, from Muradnagar to her house, when she was not present there. She stated that she saw the police officials sitting with Kalu at the ground floor of the house, and, on her asking them the cause of their presence, being informed that her son had committed murder. She stated that, on being asked to do so, she opened the lock of her room, which was searched by the police officials, who found nothing incriminating therein. She stated that the police officials, thereafter, took Kalu with them and detained him for four days in the Gokulpuri Police Station.

4.28 In cross-examination by learned APP, DW-2 denied the suggestion that she had deposed wrongly, in her examination-in-chief, or that, on 4th September, 2011, a knife was recovered from the room on the first floor of her house, at the instance of Kalu. She re-asserted the fact that Kalu had been illegally kept in the Police Station for four days.

Statements of the appellants under Section 313 of the Cr.P.C.

4.29 The statements of Kalu and Lalit, under Section 313 of the Cr.P.C., were recorded on 14th January, 2015 and 2nd January, 2015, respectively.

4.30 Kalu, in his statement under Section 313 of the Cr.P.C., denied the entire allegation of his, and Lalit's, having accosted, or assaulted, Satpal Singh and Sahdev, or having snatched their belongings. He also denied the fact that they had fled from the spot thereafter. He further denied having been identified, by PW-1 Satpal Singh, before the court. He denied having used the "GILD" mobile phone, after having inserted, therein, his Vodafone SIM card No. 7838205464. He, however, acknowledged having used the said phone number, stating that it had been given to him by one of his friends, Deepak, with whom he used to work. He denied having made any call to PW-6 Bhupender, using the No. 7838005464, or having made Bhupender speak to Lalit. He further denied the recovery, from him, of the black and red Samsung phone, or of the Vodafone SIM Card No. 7838205464, *vide* Personal Search Memo Ex PW-1/C. He asserted, as incorrect, the allegation that he had got a knife/dagger recovered from the *almirah* in his room. Regarding the purchase, by him, of the SIM card bearing No. 7838205464, he stated that the identity proof was provided by the vendor, and denied having known A. K. Azad. He stated that he had been arrested, on 1st September, 2011, and was

brought to Loni, from where he was taken to his house and, after some time, to the Police Station, where he was beaten and the knife planted on him, which he was asked to identify. He stated that he was shown, to PW-1 Satpal, in the police lock-up, and was detained in the Police Station since 1st September, 2011. He asserted that he had been wrongly framed in the case. In response to all other queries put to him, Kalu professed complete ignorance.

4.31 Lalit, in his statement under Section 313 of the Cr.P.C., also denied the allegation that he, along with Kalu, had apprehended and intercepted Sahdev and Satpal Singh and snatched their belongings, and that he had stabbed Sahdev, at the instigation of Kalu. He also denied the fact that they had fled from the spot. He denied all recoveries stated to have been made from him, or made at his instance. He denied having spoken to PW-6 Bhupender, through the Mobile No.7838205464 of Kalu, or at any other point of time. He asserted that the CDRs were incorrect. He denied the statement of PW-6 Bhupender, under Section 164 of the Cr.P.C., asserting that it had been given under pressure. He stated that, at the time of alleged occurrence of the crime, he was not in Delhi. He denied having been identified, by PW-1 Satpal Singh, at the Police Station, as the person who had stabbed Sahdev. He admitted the fact that he had been arrested by the IO PW-35 Insp. Karan Singh Rana but denied having made any disclosure statement or having pointed out any place of

incident or, effected recovery from his house, of any items. Denying knowledge of all other allegations put to him, Lalit insisted that he was innocent and had been falsely implicated in the case.

The Impugned Judgement

5. As already noted hereinabove, the learned Additional Sessions Judge held, in the impugned judgment, the charge of committing murder of Sahdev, by the appellants Kalu and Lalit, to be proved, and accordingly convicted them under Section 302 and 392 of the IPC. *Vide* separate order dated 25th November, 2016, the learned Additional Sessions Judge sentenced Kalu to (a) imprisonment for life and fine of ₹ 10,000/–, with default simple imprisonment of 6 months, for the offence under Section 302 of the IPC, and (b) rigorous imprisonment for 3 years, with fine of ₹ 5000/–, with default simple imprisonment for 3 months, for the offence under Section 392 of the IPC, and Lalit to imprisonment for life and fine of ₹ 10,000/–, with default simple imprisonment of 6 months, for the offence under Section 302 of the IPC, (b) rigorous imprisonment for 3 years, or with fine of ₹ 5000/–, and default simple imprisonment of 3 months, for the offence under Section 392 of the IPC, (c) rigorous imprisonment for 7 years, or with fine of ₹ 5000/– and default simple imprisonment for 3 months, for the offence under Section 397 of the IPC, and (d) rigorous imprisonment for one year, or with fine of ₹

1000/–, with default simple imprisonment for 15 days, for the offence under Section 411 of the IPC, as has already been recorded in the opening para of this judgment. Inasmuch as we would, hereinafter, have occasion to address the findings of the learned ASJ in detail, we refrain from recording the same at this juncture, to avoid repetition. Suffice it to state here, that even after discarding the evidence of Satpal Singh (PW-1) as unworthy of credence, the learned ASJ, nevertheless, proceeded to hold against the appellants on the ground that the extrajudicial confession made telephonically to Bhupender (PW-6), seen in conjunction with the other available circumstantial evidence, brought the offence home to them beyond all reasonable doubt.

Submissions of learned counsel before this Court

6. Mr. Sumeet Verma , arguing on behalf of of Kalu before us, advanced the following submissions:

- (i) Recovery of the knife, with which the murder of the deceased Sahdev was supposedly committed, was alleged to have been effected at the instance of Kalu, whereas the allegation of using the dagger was not against Kalu, but against Lalit.
- (ii) It was unrealistic to believe that anyone would commit murder merely to steal a mobile phone, Rs. 400/-, one pass

book belonging to someone else, LIC papers and 8 photographs.

(iii) The learned ASJ had himself held PW-1 Satpal Singh, to be an unreliable witness, and that his very presence, at the scene of crime, when it took place, was doubtful.

(iv) The knife (Ex P-1) was recovered, from Kalu, two weeks after the incident, but was not bloodstained, as was also established by the report of the FSL, dated 28 April, 2012 (Ex PW-35/C). The “subsequent opinion”, dated 13th September, 2011, of PW-28 (Ex PW-28/M) merely opined that the injuries, on the body of the deceased Sahdev “can be caused with the recovered knife”. The sole witnesses, to the recovery of the knife at the instance of Kalu, were Const. Pramod (PW-26) and Satpal Singh (PW-1), of which Satpal Singh was disbelieved by the learned ASJ, and, regarding PW-26 Const. Pramod, the learned ASJ held that he was evasive and was not answering questions put to him. As such, there was no reliable evidence to support the allegation of recovery of the knife, with which the crime had supposedly been committed, at the instance of Kalu.

(v) The CDR of the mobile No. 7838205464, which was being used by Kalu, indicated his presence, around the site of the crime, at 8:32 PM., which was more than an hour prior to commission of the crime.

(vi) In his statement under Section 164 of the Cr.P.C., PW-6 Bhupender deposed that Kalu had called him and given the phone to Lalit, who made an extrajudicial confession. PW 6 did not implicate Kalu in the said statement.

(vii) The allegation was that Kalu's SIM card had been used, in the handset recovered from Lalit, on 17th to 18th August, 2011. Lalit was, however, arrested, in another case, on 18th August, 2011, in which connection he was remanded, to judicial custody, on 26th August, 2011. The handset was, however, in the possession of Lalit, as it had been recovered from him, and at his instance. It was alleged that, between 17th and 18th August, 2011, approximately five calls had been made from Kalu's phone, by Lalit, to PW-6 Bhupender. This was unbelievable, as PW-6 was in police custody from 17th to 24th August, 2011.

(viii) Of the said five calls, the CDR of Mobile No 7838205464 revealed that the calls had been made at 8:51 AM and 10:31 AM on 17th August, 2011, and at 10:32 AM, 11:20 AM and 11:49 AM on 18th August, 2011. Of these, the calls at 8:51 AM and 10:31 AM on 17th August, 2011 and at 10:32 AM on 18th August, 2011, were made within range of Tower ID 5361, i.e., within the range of the tower at Khasra 34/1 and 34/2, Village Johripur, whereas the last two calls, at 11:20 AM and 11:49 AM on 18th August, 2011, were made within the

range of Tower ID 2398, i.e. the tower at C-14, Gokulpur Village. In fact, the calls made by Kalu to PW-6 Bhupender were reciprocal in nature, in response to the calls which PW-6 Bhupender had made to Kalu. To buttress this submission, a juxtaposed reading of the CDR of the phone numbers of Kalu and Bhupender was attempted.

(ix) In his statement under Section 313 of the Cr.P.C., Kalu had explained the calls made from his mobile No. 7838205464, from 03.58.57 hours on 17th August, 2011 to 11.49.44 hours on 18th August, 2011, by submitting that the SIM had been given to him by his friend Deepak , with whom he worked as a helper on a commercial vehicle which used to transport goods from Delhi to Guwahati. He submitted that the said number was, in fact, being used by Deepak, as he could not afford roaming charges. It was sought to be submitted that, had Deepak been examined, this fact would have been clarified.

(x) There was no other circumstance, to inculcate Kalu in the alleged offence. As such, it was submitted that Kalu had been unnecessarily dragged into the affair, and it was prayed that he be acquitted of the charge against him.

7. Appearing for Lalit, Mr. Ashok Kumar Sharma, Advocate urged, before us, as under:

(i) There being no reliable eyewitness to the incident, the case was one of circumstantial evidence. There were only three circumstances, against Lalit, i.e. (a) the alleged extra-judicial confession made by him to Bhupender (PW-6), (b) the alleged recovery of the mobile handset, belonging to the deceased Sahdev, from his house, and (c) the absence, on his part, of any explanation therefor.

(ii) The credibility of the statement of PW-6 Bhupender, recorded under Section 164 of the Cr.P.C. (PW-6/A and PW-6/B) was doubtful, as he had, prior to recording of the said statement on 24th August, 2011, being confined in illegal custody, by the Police, from 17th August, 2011 to 24th August, 2011, as was disclosed, by him, in his examination-in-chief on 22nd March, 2012. He also admitted, in his cross-examination by the counsel for Lalit, that he had not disclosed, to the learned MM, the fact of his having been illegally kept in custody, by the Police officials, since 17th August, 2011.

(iii) Lalit, for his part, categorically denied having spoken to PW-6 Bhupender, in his statement recorded under Section 313 of the Cr.P.C.

(iv) The reliance on the CDRs was misplaced, as the CDRs could not give the location of the person, but only the location of the phone. There was, therefore, nothing

to indicate that Lalit and Kalu were together, at the same time and at the same place.

(v) There was no material on the basis of which it could be presumed that Lalit was a friend of PW-6 Bhupender.

(vi) There was, in fact, nothing to indicate that the person, who had supposedly spoken to PW 6-Bhupender at 9:30 PM. on 15th August, 2011, from Kalu's mobile phone, was Lalit. Even as per the statement, of Bhupender (PW-6) under Section 164 of the Cr.P.C., it was only Kalu who told him that Lalit would speak to him.

Discussion and Analysis - The Events and the Evidence

8. The prosecution, in this case, pegged its charge, against the appellants Kalu and Lalit, on

- (i) the “eyewitness evidence” of PW-1 Satpal Singh,
- (ii) the “extra-judicial confession”, of Kalu and/or Lalit, allegedly made telephonically to PW-6 Bhupender and
- (i) the other circumstances of the case, notably the recovery of incriminating articles, including the alleged weapon of offence, at the instance of Kalu and Lalit.

9. As is apparent from the recital hereinabove, the learned ASJ has, while rejecting the eyewitness evidence of PW-1 Satpal as unworthy of credence, held the charges against them, to have been brought home to Kalu and Lalit, on the basis of the other two pillars, on which the edifice of the prosecution's case rested, i.e. the extra-judicial confession allegedly made by Kalu and Lalit to PW-6 Bhupender and the other circumstances of the case. The learned ASJ has voiced the opinion, in the impugned judgement, that these two factors, seen by themselves and in conjunction with each other, were sufficient to warrant conviction of Kalu and Lalit, for committing the murder of Sahdev.

10. We proceed, therefore, to test the strength of each of these pillars, of the prosecution's case-edifice, *seriatim*.

11. The alleged "eyewitness evidence" of PW-1 Satpal Singh:

11.1 Eye-witness evidence, if believable and credible, is unquestionably the best evidence, for the simple reason that the eyes never deceive, even if the interpretation, placed by the intellect on what the eyes see may, at times, be misleading or even incorrect. That drawback can, however, be overcome by a judicious comprehension, by the court analyzing the evidence, of what the eye saw – provided in

every case, that the eye witness is thoroughly believable, credible and his evidence unimpeachable. We would do well, however, to bear in mind Mark Twain's famous aphorism, while analysing eyewitness evidence - "you can't depend on your eyes when your imagination is out of focus."

11.2 This Court has, in its recent decision in *Mobin vs. State, 2018 SCC Online Del 399*, noted as under, with respect to eye-witness evidence:

"14. In evidence jurisprudence, an eyewitness to a crime is a curious creature, to be handled with kid gloves. This is for the simple reason that, if a reliable eyewitness, to a crime, is found, matters may end with him, and his evidence. It needs no detailed reference to classical legal treatises, to discern that eyewitness evidence is the best evidence, as, at its highest, circumstantial evidence could only bring the crime home, to the perpetrator thereof, "beyond all reasonable doubt", whereas the evidence of a credible and reliable eyewitness would establish, fully and finally, the fact of the crime having been perpetrated by him, and him alone. For the accused in such a case, the evidence of the eyewitness is damning; ergo, the court is required to be cautious and circumspect in conferring, on a witness, eyewitness stature, as, once such stature is conferred, the well-recognised indicia, governing appreciation of circumstantial evidence, stand immediately and irrevocably dispensed with.

15. In *Shrishail Nageshi Pare vs State of Maharashtra, (1985) 2 SCC 341*, it was observed as under:

"The evidence of the eyewitness, if accepted, is sufficient to warrant conviction *though in appropriate*

cases the Court may as a measure of caution seek some confirming circumstances from other sources. But ordinarily, the evidence of a truthful eyewitness is sufficient without anything more, to warrant a conviction and cannot, for instance, be made to depend for its acceptance on the truthfulness of other items of evidence such as recovery of weapons etc. at the instance of the accused by the police.”

(Emphasis supplied)

16. As regards the effect of discrepancies in the evidence of the witnesses, the principles applicable to eyewitness evidence are the same as those that apply to any other kind of ocular evidence, viz. that (i) material discrepancies would corrode the credibility of the evidence, whereas normal discrepancies would not and (ii) “material discrepancies” are those which are not normal, and not expected of a normal person. [*Kulesh Mondal vs State of West Bengal, (2007) 8 SCC 578*]

17. The importance required to be attached to credible eyewitness evidence is underscored in several decisions. In *Sambhu Das vs State of Assam, (2010) 10 SCC 374*, the case of the prosecution rested solely on the evidence of the wife of the deceased – who, therefore, was undoubtedly an interested eyewitness. She stated, in her evidence, that, on being alerted by one Upendra Das, she rushed home, to find her husband being assaulted by the accused, who were many in number. Upendra Das was not cross-examined and, therefore, the Supreme Court opined that the evidence of the wife of the deceased would have to be eschewed to that extent. It was also seen that, in the evidence subsequently tendered by the wife of the deceased in court, she named several persons, as being amongst those who had assaulted her husband, whose names did not figure in her initial statement to the Police. Despite these circumstances, the Supreme Court held that, the remainder of the evidence of the wife of the deceased in that

case being credible, the conviction of the accused, solely on the basis of her statement, could not be faulted.

18. Woodroffe and Amirali's Law of Evidence culls out the following three important guiding principles, regarding evaluation of the evidence of eyewitnesses, on the basis of various judicial pronouncements:

- (i) whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them,
- (ii) whether there is anything inherently improbable or unreliable in their evidence, and
- (iii) whether they are interested witnesses; if the answer is in the negative, the evidence of the eyewitnesses would *prima facie* be reliable.

19. In the above context, it is important to bear in mind the following note of caution, sounded by Y.V. Chandrachud, J. (as he then was) in ***Hallu vs State of MP, (1974) 4 SCC 300*** (as contained in para 12 of the report):

“There is only one more observation which we would like to make about the judgment of the High Court. The High Court has observed in its judgment at more than one place that Musammat Dev Kunwar and Musammat Mahatrin were “implicitly reliable”. *It is generally not easy to find witnesses on whose testimony implicit reliance can be placed. It is always advisable to test the evidence of witnesses on the anvil of objective circumstances in the case.* Not only did the High Court not do that but by persuading itself to the view that the two eyewitnesses were implicitly reliable it denied to itself the benefit of a judicial consideration of the infirmities to which we have briefly *referred*.”

(Emphasis supplied)

20. If, therefore, eyewitness evidence is supported by circumstantial evidence, its credibility and significance multiplies manifold. Given the crucial, and critical, character of eyewitness evidence, it would always be wise to examine whether support, for the evidence of the eyewitness, is forthcoming in the attendant circumstances available in the case.”

11.3 The above observations have to guide us in the present case as well, when assessing the credibility and reliability of PW-1 Satpal Singh, as an eye-witness to the killing of Sahdev.

11.4 Vacillation, prevarication and inconsistency altogether erode the evidence, of the professed eyewitness, of its evidentiary value. Thus tested, we are in agreement with the learned ASJ that PW-1 Satpal Singh does not inspire confidence as a reliable eye-witness in the present case. We say so for the following reasons:

(i) In his examination in chief, Satpal Singh stated that he had called Rakesh (PW-5) when he reached the road near the petrol pump. In cross-examination he deposed, *per contra*, that he called Rakesh after reaching home. Rakesh, on the other hand, squarely denied having been called by Satpal Singh at all. It may also be noted that the CDRs of neither, Rakesh (PW-5)

nor Satpal Singh (PW-1) were called for to ascertain the actual position.

(ii) Further, as regards his movements on the said day, Satpal Singh deposed, in his examination-in-chief on 19th March, 2012, thus:

“I reached my house at about 9:30 p.m. and gave the information about the crime to location at about 10 p.m.. *Rakesh called me near the Petrol Pump at about 10 p.m.. I had reached the petrol pump again at about 10 p.m.....* Thereafter, *I along with Rakesh and the police officials went to the police station.* Police has not asked anything from me and thereafter, I went back to my house. On the next day, I along with my other relatives again went to the police station in the morning.”

(Emphasis supplied)

In cross-examination, however, Satpal Singh stated thus:

“I made a telephone call when I reached on the road near petrol pump from my mobile phone. *Rakesh immediately came there and police also came there. I and Rakesh went with the police to the police station and to the hospital.*”

(Emphasis supplied)

There are too many contradictions, in the two statements of PW-1 Satpal Singh, as extracted hereinabove, to ignore. In his examination-in-chief, he deposed as that it was Rakesh who, answering his telephonic call after reaching home, asked him to reach the Petrol Pump at 10 PM., which he did. In cross-

examination, however, PW-1 deposed that he called Rakesh from the road outside the petrol pump and that, answering the said call, Rakesh immediately reached the spot, without making any reference to Rakesh having asked him to reach there at 10 PM., or his reaching the Petrol Pump at 10 PM. in deference to the said request. Again, while, in his examination-in-chief, Satpal Singh deposed that he, and Rakesh, had proceeded to the Police Station, from where he went home, in his cross-examination, he deposed that, from the Police Station he, and Rakesh, proceeded to the Hospital.

(iii) Again, while deposing, in examination-in-chief, that, when he reached the Police Station on 26th August, 2011, he found Lalit being interrogated by the police officials, Satpal Singh, in his cross examination, stated that he had found Lalit standing near the wall looking towards the calendar.

(iv) Similarly, regarding 4th September, 2011, PW-1 Satpal Singh, while deposing, in his examination-in-chief, that he “was”, on the said day, “again called to PS”, chose to state, in his cross examination, that, “on 04/09/2011, (he) had gone to the PS to enquire about the case where (he) came to know about the arrest of the accused persons.”

(v) Even as regards the time of the said visit to the Police Station, PW-1 stated, in his examination-in-chief, that he had gone to the Police Station at 12 noon on being called by the police and in his cross examination, that he had gone to the Police Station at 3 P.M., of his own accord.

(vi) The conduct and behaviour, of Satpal Singh, on 15th August, 2011, was also correctly characterised, by the learned ASJ, as highly unusual. Despite being the brother-in-law of Sahdev, he neither, apparently, attempted to save him, or defend him from the assault by Kalu and Lalit, nor raised any alarm, so as to alert any possible onlooker. We also agree with the observation of the learned ASJ, that, even if the failure, on the part of Satpal Singh, to raise an alarm, at the time of the assault on Sahdev, could be attributed to panic, there is no explanation for his failing to alert anybody, even after the assailants had fled from the spot. Neither is there any explanation as to why he did not call the police, or alert any other person about the incident that had taken place and, instead, preferred to reach his house and alert Rakesh Kumar (PW-5), thereafter, at 10 P.M.

11.5 The pronounced vacillation exhibited, by PW-1 Satpal Singh, in his deposition during trial, renders his evidence extremely suspect.

When seen in conjunction with the fact that *there was no other witness to the incident, who could vouchsafe either the happening of the incident, or the presence of PW-1 Satpal Singh on the occasion*, we are convinced that it would not be safe to rely on PW-1 as a sole eyewitness to the stabbing and killing of Sahdev, or to arrive at any conclusion, even tentative, regarding the culpability of the appellants Kalu and Lalit, on the basis of the testimony of PW-1.

11.6 We, therefore, concur with, and endorse, the finding, of the learned ASJ, that the “eyewitness evidence” of PW-1 Satpal Singh, is neither credible nor reliable.

12 The alleged extra-judicial confession made to PW-6 Bhupender:

12.1 Judicial proceedings inherently frown on anything “extra-judicial”, and “extra-judicial confessions” are no exception to the rule. The only redeeming feature, of “extra-judicial confessions”, is their “confessional” nature. Extra-judicial confessions are statements made in the private domain, without the sanctity of legal process or procedure, and without, equally, any guarantee regarding either their voluntary nature or, for that matter, their truthfulness. An extra-judicial confession made telephonically, rather than face to face, is even more unsafe, as evidence against an accused, as telephonic

communication is, by its very nature, beset by several imponderables. The provocation for the confession, the extent to which it may be said to be voluntary, the circumstances in which it is made, the state of mind of the “confessor” – all of which are significant and important indicia on which the acceptability of an extra-judicial confession is to be assessed and tested – remain entirely within the realm of conjecture and surmise, where the “confession” is telephonic. As such, it is only in the most exceptional cases that conviction can be based on such an extra-judicial confession, and even in such cases, support, for such extra-judicial confession, must be forthcoming in the form of corroborative circumstantial evidence.

12.2 An extra-judicial confession, it is trite, constitutes weak evidence. There are judgements galore, on the principles relating to the appreciation to the evidentiary value of extra-judicial confessions. It would not be necessary for us to burden this judgment by exhaustive reference to such authorities; suffice it to state that the principles obtaining in this regard stand authoritatively delineated by the Surpeme Court (speaking through Swatanter Kumar, J.) in the well known decision in *Sahdevan v. State of Tamil Nadu, (2012) 6 SCC 403*, paras 14 to 16 of which merit reproduction, *in extenso*, as under:

“14. It is a settled principle of criminal jurisprudence that *extra-judicial confession is a weak piece of evidence. Wherever the court, upon due appreciation of the entire*

prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.

15. Now, we may examine some judgments of this Court dealing with this aspect.

15.1. In *Balwinder Singh v. State of Punjab* [1995 Supp (4) SCC 259 : 1996 SCC (Cri) 59] this Court stated the principle that: (SCC p. 265, para 10)

“10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.”

15.2. In *Pakkirisamy v. State of T.N.* [(1997) 8 SCC 158 : 1997 SCC (Cri) 1249] the Court held that: (SCC p. 162, para 8)

“8. ... It is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession.”

15.3. Again in *Kavita v. State of T.N.* [(1998) 6 SCC 108 : 1998 SCC (Cri) 1421] the Court stated the dictum that: (SCC p. 109, para 4)

“4. There is no doubt that convictions can be based on extra-judicial confession but *it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon the veracity of the [witnesses] to whom it is made.*”

15.4. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in *State of Rajasthan v. Raja Ram [(2003) 8 SCC 180 : 2003 SCC (Cri) 1965]* stated the principle that: (SCC p. 192, para 19)

“19. *An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made.*”

The Court further expressed the view that: (SCC p. 192, para 19)

“19. ... *Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused....*”

15.5. In *Aloke Nath Dutta v. State of W.B. [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264]* the Court, while holding the placing of reliance on extra-judicial confession by the lower courts in absence of other corroborating material as unjustified, observed: (SCC pp. 265-66, paras 87 & 89)

“87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. *It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; and (iii) corroboration.*

89. *A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof.”*

15.6. Accepting the admissibility of the extra-judicial confession, the Court in ***Sansar Chand v. State of Rajasthan [(2010) 10 SCC 604 : (2011) 1 SCC (Cri) 79]*** held that: (SCC p. 611, paras 29-30)

“29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although *ordinarily an extra-judicial confession should be corroborated by some other material.* [Vide ***Thimma and Thimma Raju v. State of Mysore [(1970) 2 SCC 105:1970 SCC (Cri) 320]***, ***Mulk Raj v. State of U.P. [AIR 1959 SC 902 : 1959 Cri LJ 1219]***, ***Sivakumar v. State [(2006) 1 SCC 714 : (2006) 1 SCC (Cri) 470]*** (SCC paras 40 and 41 : AIR paras 41 and 42), ***Shiva Karam Payaswami Tewari v. State of Maharashtra [(2009) 11 SCC 262 : (2009) 3 SCC (Cri) 1320]*** and ***Mohd. Azad v. State of W.B. [(2008) 15 SCC 449 : (2009) 3 SCC (Cri) 1082]***]

30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, *and it has been corroborated by the other material on record*. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872.”

15.7. Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Court in ***Rameshbhai Chandubhai Rathod v. State of Gujarat [(2009) 5 SCC 740 : (2009) 2 SCC (Cri) 881]*** held as under: (SCC pp. 772-73, para 53)

“53. It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true.”

15.8. Extra-judicial confession *must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime.* The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. *The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it.* (Ref. ***Sk. Yusuf v. State of W.B. [(2011) 11 SCC 754 : (2011) 3 SCC (Cri) 620]*** and ***Pancho v. State of Haryana [(2011) 10 SCC 165 : (2012) 1 SCC (Cri) 223]*** .)

The principles

16. *Upon a proper analysis of the abovereferred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:*

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.”

(Emphasis supplied)

12.3 So instructively, indeed, does *Sahadevan (supra)* enunciate the law relating to the admissibility and reliability, of extra-judicial confessions, while assessing the guilt, or innocence, of the accused, that we can do no better than respectfully follow the same, and we, accordingly, do so.

12.4 According to the statement of PW-6 Bhupender, recorded under Section 164 of the Cr.P.C. (Ex. PW-6/B), he received a call, from the mobile number of Kalu (7838205464) on his mobile number 9716943654, at 9.15 PM. on 15th August, 2011. He stated that Kalu had requested him to speak to Lalit, who confessed to having committing the crime of a killing of Sahdev, along with Kalu, and sought his help in obtaining shelter, for them to hide, which he declined. During trial, PW-6 Bhupender deposed, in his examination-in-chief, that he had, in fact disclosed the above facts, to the police officials, on 17th August, 2011, itself. He further stated that, after having made the said statements, he was illegally detained in custody by the police from 17th to 24th August, 2011, and was released only after his statement has been recorded, by the learned MM under Section 164 of the Cr.P.C, on 24th May, 2011. He, however, admitted the fact that he had not disclosed, to the learned MM, the fact that he had been illegally detained in custody by the police, from 17th to 24th August, 2011. The fact of recording of the said statement stands

proved by the learned MM, Savitri, who deposed as PW-34 on 26th November, 2013.

12.5 We may say, at once, that we are not convinced that Bhupender was actually illegally incarcerated, by the police authorities from 17th to 24th August, 2011. The attendant circumstances militate against the said assertion. There is no reference, by Bhupender, in his statement recorded under Section 164 of the Cr.P.C., to any such illegal detention – which would, in the normal course of circumstances be the first reaction of a person so illegally detained. Neither did PW-6 Bhupender make any such complaint to the learned MM, or to any other official higher in the echelons of the police hierarchy, complaining of any such illegal detention. He did not seek any judicial redress, in this regard either. It was for the first time, in his evidence, during trial, that PW-6 made a reference to such illegal detention. We do not find any evidence of PW-6 Bhupender having subjected to any form of pressure, coercion or other illegal treatment, during such alleged period of incarceration. The IO Insp. Karan Singh Rana (PW-35), when queried, categorically denied having ever illegally incarcerated Bhupender. We are, therefore, of the view that the entire story, of the alleged illegal incarceration of Bhupender, from 17th to 24th August, 2011, was a last-minute improvisation, during the course of trial. This assertion, of PW-6 Bhupender would, even by itself, be

sufficient to justify acceptance of his evidence with the proverbial pinch of salt.

12.6 Adverting now, to the contents of the phone call stated, to have been received, by Bhupender, from the mobile phone of Kalu at 9.30 PM. on 15th August, 2011, we find that, in his statement under Section 161 of the Cr.P.C, PW-6 Bhupender stated that *he had spoken to Kalu and Lalit, during the said call*, whereas in his statement under Section 164 of the Cr.P.C. *he made no reference to having spoken to Kalu at all, stating, rather, that it was Lalit who spoke to him from the mobile phone which was being used by Kalu*, and, in his deposition during trial, he stated that *Kalu had initially spoken to him and told him to speak to Lalit*. Moreover, PW-6 Bhupender was not even cross examined to ascertain whether he could actually recognize Lalit's voice. Given the fact that Kalu and Lalit were each being tried for murder, under Section 302 of the IPC, these inconsistencies, it can hardly be denied, are significant. Rather, we find that in fact, a suggestion, of such a conversation never having taken place was put to Bhupender during cross-examination.

12.7 We have also gone through the CDRs relating to the phone number of Bhupender and mobile number being used by Kalu (7838205464) and we find that there were frequent telephonic interactions, both ways, between 10th and 17th August, 2011. No

reference was made, to any of the said calls in the depositions of PW-6 Bhupender, whether under Section 161 or Section 164 of the Cr.P.C., or during trial, which made it appear that the call, at 9.30 PM. from the phone number of Kalu, was not an isolated incident. As such, there is substance, in the contention of learned counsel for the appellants, to the effect that the conversations between the phone number of Kalu and phone number of Bhupender were frequent and reciprocal in nature and it was not as though, after committing the murder of Sahdev, an isolated call was placed by Kalu to Bhupender, during the course of which Kalu and/or Lalit confessed to having committed the said murder. The absence of any reference, in any of the statements of Bhupender, to the frequent telephonic interactions between Kalu and himself, also serves to substantially erode the credibility of the said statements.

12.8 We are also fortified, in our reluctance, to rely on the evidence of PW-6 Bhupender, by the fact that, shortly before 9.30 PM. on 15th August, 2011, there were as many as *three* calls, made to his number, from the mobile number being used by Kalu, at 8.33 PM., 9.05 PM. and 9.08 PM., which lasted 96 seconds, 26 seconds and 13 seconds respectively. Even at 9.38 PM., we find two calls, one at 21:38:03 hours and second at 21:38:47, lasting 26 seconds and 30 seconds respectively. It is obvious, therefore, that these calls, which took place around the same time, one of which lasted as long as 96 seconds, were

inter connected with each other, which also gives the lie to the notion that at 9.30 PM., Bhupender had received a call from the mobile number of Kalu, during which, Kalu and/or Lalit confessed to the murder of Sahdev.

12.9 Seen in the light of the fact that *there is no other material, on the basis whereof it could be safely concluded that the call, at 9.30 PM., from Mobile No.7838205464, being used by Kalu, to Mobile No.9716943654 being used by Bhupender, was in the nature of a confession to the commission of the murder of Sahdev*, we are hesitant to accept the sole evidence of Bhupender, as proof of any extra-judicial confession having been made, to him, by Kalu and/or Lalit, with regard to the commission of the said crime, especially as both Kalu and Lalit, in their statements under Section 313, Cr.P.C., categorically denied having had any such conversation.

12.10 Resultantly, the second pillar, on which the prosecution has sought to rest the edifice of its case against the appellants Kalu and Lalit, also crumbles.

13 Accompanying circumstantial evidence:

13.1 A reconnoitering of the happenings in this case, as they emerge from the evidence on record, is necessary at this juncture.

13.2 On 10th October, 2010, FIR (Ex PW-11/A) was lodged, by PW-11 A.K. Azad, regarding loss of his ID card and PAN card. Deposing in examination-in-chief as PW-11, A. K. Azad confirmed the fact that, on 22nd September, 2010, he had lost his voter ID card and PAN card, in respect of which he lodged the FIR Ex. PW-11/A with Police Station Gokul Puri on 10th October, 2010.

13.3 On 3rd April, 2011, an application for a pre-paid Aircel connection, was made (Ex PW-4/B), using the aforementioned ID card (Ex PW-4/A) of A. K. Azad. This fact was also acknowledged by Anil Kumar (PW-4) who was running the shop M/s. A.K.A. Communications, in his examination-in-chief on 20th March, 2012, when he stated that Kalu (whom he identified in court by pointing at him) had purchased the SIM Card for the No. 7838205464, from him, about 10 months earlier, in the name of Mr. AK Azad, against the photo copy of the ID card and application form filled in the name of the said Mr. AK Azad. He was not cross-examined. The fact that Kalu had purchased the SIM Card with no. 7838205464, therefore, stands proved.

13.4 According to PW-10 Kapil, the son of the deceased Sahdev, his father left the house, at about 8 PM., to go to his factory, carrying with him a lunchbox, a “GILD” make mobile phone with No. 8826275946,

and a passbook of the Punjab National Bank. He identified the lunchbox, mobile phone and passbook, which were shown to him during his examination-in-chief, which were, therefore, exhibited as Ex.P-1, P-2 and P-3 respectively. He stood by the said statement in cross-examination.

13.5 PW-7 Rajeshwari, the wife of the deceased Sahdev, confirmed, in her examination-in-chief on 22nd March, 2012, that the SIM card in the mobile phone being used by her husband had been issued in the name of their neighbour Jogender, and that it was the said mobile phone which Sahdev was carrying with him on the date of his murder, i.e. 15th August, 2011. She confirmed that the phone was operating under No. 8826275946. The fact of the SIM card No. 8826275946 having been purchased, by the deceased Sahdev, in the name of Jogender Singh, was also confirmed by Jogender Singh, as PW-8, in his examination-in-chief on 22nd March, 2012. The suggestion, to the contrary, was denied, by him, in cross-examination.

13.6 The fact that Sahdev left home at 8 PM. on 15th August, 2011, carrying a “GILD” make mobile phone with number 7838005464, a lunch box, a PNB pass book, an LIC policy and eight passport size photographs, stands conclusively established.

13.7 PW-5 Rakesh Kumar, who ran a plastic factory in which the deceased Sahdev had been employed, deposed, in his examination-in-chief on 22nd March, 2012, that he reached the spot of incident at about 9.15 – 9.30 PM., when he found four to five persons standing in the *Gali*, near his factory. He stated that, on seeing the said persons, he stopped there, whereupon he found the bloodstained dead body of Sahdev lying in the *gali*, on seeing which he called “100”, using his mobile phone, so as to alert the Police. In cross-examination, Rakesh Kumar denied the suggestion that he had not made any call to the police from his mobile phone.

13.8 On receipt of the above call from Rakesh Kumar (PW-5), DD Entry No 22A (PW-17/A) was made, at 9:28 PM., by ASI Rajender Prasad (PW-17), to the effect that someone had murdered Sahdev Singh, aged 35 to 36 years, in the *gali* in front of the Petrol Pump at village Gokul Puri and that, on receipt of the said information, entry was made in the *roznamcha* and SI Ishwari Prasad (PW-25) was deputed to look into the matter. This fact was confirmed by ASI Rajender Prasad, PW-17, in his examination-in-chief, dated 18th September, 2012. The suggestion that the DD Entry No 22A was ante-dated, was denied by him.

13.9 At about 9:45 PM., SI E.S. Yadav (PW-19) received a call, regarding the murder of Sahdev, whereupon he, along with SI Ishwari

Prasad and the photographer Const. Shyam Lal (PW-21) reached the spot. They found that the dead body had already been removed, but that some blood was still lying there. In the meantime, Insp. Karan Singh Rana (PW-35) also reached the spot, and recorded the statement of SI E.S. Yadav (PW-19). These facts were stated by PW-19 SI E.S. Yadav in his examination-in-chief on 16th October, 2012. In his cross-examination, PW-19 further confirmed that he had prepared his report at 12 midnight and handed it over to Insp. Karan Singh Rana. These facts were also confirmed by PW-21 Const. Shyam Lal, in his deposition on 13th December, 2012, who also clarified that they had reached the spot of the crime at about 10 P.M., and remained there for about half an hour. Interestingly, the IO Insp. Karan Singh Rana (PW-35), in his cross-examination on 11th July, 2014, deposed that, after receiving information of the case at about 9:45 P.M. on 15th August, 2011, he reached the spot “first time at 11:55 P.M. on the same day” and that, when he reached the spot, the “dead body was lying”, whereafter SI Ishwari Prasad (PW-25) removed the dead body, from the said spot, to the Hospital. These timings are, obviously, not acceptable, as, according to the MLC as well as the statement of PW-14 Dr Nitin Chawla, the dead body of Sahdev reached the GTB Hospital at 10:58 P.M. on 15th August, 2011. The other timings, mentioned in the cross-examination of PW-35 (the IO Insp. Karan Singh Rana), however, correspond with the statements of other witnesses.

13.10 The noting, in the PCR Record (PW-20/A), prepared on the said occasion by Const. Kamlesh (PW-20), notes that, at 10.05 P.M., information was received, from Rakesh Kumar (PW-5), that Sahdev Singh, his employee, had been stabbed and killed. The noting further observes that the local police reached the spot at 10.36 P.M. and that the Station House Officer (SHO) of the Gokul Puri Police Station opined that the murder had been committed elsewhere and the body had been dumped in the *Gali*. Const. Kamlesh (PW-20) confirmed having entered the above-mentioned particulars in the PCR form, in her examination-in-chief on 16th October, 2012. She was not cross-examined, despite grant of opportunity.

13.11 The body of the deceased Sahdev Singh was, thereafter, taken, by SI Ishwari Prasad (PW-25) and Const. Rajender (PW-23) to the GTB Hospital, where MLC (PW-14/A) was prepared by Dr. Nitin Chawla (PW-14). Dr. Chawla proved the MLC, in his examination-in-chief as PW-14, on 29th August, 2012, and was not cross-examined, despite grant of opportunity. The MLC notes that the body was received at 10:58 P.M., and that it had been brought dead. It was, therefore, sent to the mortuary for post-mortem.

13.12 The *rukka* (Ex. PW-13/B), drawn up by SI Ishwari Prasad (PW-25) on the body of the DD, stated that the body of the deceased

Sahdev, as found by him, and Const. Rajender (PW-23), bore two stab injuries in its stomach, and that there was a small amount of blood on the road. He further stated that, after the MLC had been prepared by Dr. Nitin Chawla and GTB hospital, he, i.e. ASI Ishwari Prasad returned to the site of occurrence, where they could not find any eyewitness to the crime. The entry was completed at 12:10 AM on 16th August, 2011.

13.13 On 16th August, 2011, at 12:10 AM, the above mentioned *rukka* was received by PW-13 ASI Braham Singh, from SI Ishwari Prasad (PW-25), through Const. Narinder. ASI Braham Singh prepared, on the basis of the said *rukka*, the register FIR No 286/11 (Ex. PW-13/A). He also endorsed the *rukka*, during his examination-in-chief on 29th August, 2012, and the endorsement was exhibited as Ex. PW-13/B. After registration of FIR, investigation was marked to Insp. Karan Singh Rana (PW-35), who was SHO, Police Station Gokul Puri at the time. In cross-examination, PW-13 ASI Braham Singh categorically denied the suggestion that the FIR was antedated. PW-30 Const. Jai Prakash also confirmed, in his examination-in-chief on 25th October, 2013, that, at 12:30 AM on 16th December, 2012 (corrected, in cross-examination, to 16th August, 2011), envelopes, containing copies of the *rukka* and FIR, in the present case, were handed over, to him, by the duty officer, and that he delivered the said

envelopes at the residences of the ACP, the DCP and the area Magistrate.

13.14 On the same day, i.e. 16th August, 2011, the IO Karan Singh Rana (PW-35) recovered, from the scene of crime, a lunchbox, a gauze piece with a sample of blood from the crime scene, and some earth and earth control, which were sealed and seized. The seizure memos of the lunchbox, and of the gauze piece, earth and earth control, were exhibited as Ex PW-5/B and PW-5/A respectively. The said Recovery Memos were witnessed by Rakesh Kumar (PW-5) and SI Ishwari Prasad (PW-25), and were signed by the IO Karan Singh Rana (PW-35).

13.15 On the same day, i.e. 16th August, 2011, the dead body of the deceased Sahdev Singh was identified by Panna Lal (PW-2) (the father of the deceased Sahdev, as admitted by him in his examination-in-chief on 19th March, 2012 as well) and by PW-3 Kirpal Singh (as admitted by him in his examination-in-chief on 19th March, 2012), at the mortuary of the GTB hospital, as belonging to Sahdev (*vide* Identification Memos Ex PW-2/A and Ex PW-3/A respectively). The identification Memos were signed by the IO Karan Singh Rana (PW-35).

13.16 The post-mortem report of the deceased Sahdev (Ex. PW-28/A) was, thereafter, prepared by Dr. Meghali Kelkar (PW-28), Senior Demonstrator in the Department of Forensic Medicine, UCMS and GTB Hospital. The Post-mortem Report indicates that autopsy of the body commenced at 11:45 AM and concluded at 1:15 PM.. The report read as under:

“General Observation: Dead body of an adult male. Wearing (1) cream-coloured striped full-screen shirt, (2) sky blue baniyan, (3) grey underwear, (4) blue track pants and wrapped in a white sheet. Eyes and mouth partially open, bloodstains present on shirt and Bunyan. Black coloured fluid coming out of nostrils. Intestinal loops, omentum and soft tissues protruding out of the injuries present on abdomen. Bluish ink stains present on both thumbs. Rigor mortis present in developed states in upper limbs. Post mortem staining present over the back and fixed. No sign of decomposition scene. Cut marks present to a No. on front of (L) side of abdomen of Bunyan surrounded by bloodstains. To cut marks on (L) side of abdomen of shirt. The cut marks were labelled, signed and surrounded by bloodstains.

Details of External injuries:

(1) Incised stab wound measuring 5.0 x 0.4 cm present on left side of abdomen, vertically placed lower end 19 cm above the pubic symphysis and 2 cm left of midline. The upper end is acute and Laurentiis blunt. The intestinal loops are protruding out of the wound. The injuries have 106 cm above heel. The track of the wound is directed downwards, backwards and medially cutting through skin, subcutaneous tissue and muscles of abdominal wall, cutting omentum through and through the anterior-posterior wall of stomach near greater curvature of left lobe of liver and blood vessels. Extravasation of blood seen in the soft tissues around the

injuries. The wound is 11 cm deep. Corresponding cut mark present on shirt and Bunyan.

(2) Incised stab wound measuring 5 in 20.4 centimetres present on left side of abdomen, obliquely placed, upper medial and is acute and lower lateral and this blunt. The lower lateral and 6 cm left of immediate midline and 16.5 cm above pubic symphysis and 104 cm above heel. The track of the wound is directed downwards, backwards and medially cutting through skin, subcutaneous tissues and muscles of abdominal walls, cutting omentum, through and through jejunal loops, essentially an mesenteric blood vessels. Extravasation of blood seen in the soft tissues around the injuries. The wound is 15 cm deep. Corresponding cut mark present on shirt and Bunyan.

Scalp – NAD

Skull – NAD

Brain – 1178 g. NAD

Neck – Trachea contain blackish fluid. Walls NAD.

Rib Cage – NAD

Lungs – (R) 275G, (L) 260 g
pale bronchi NAD

Heart – 225G. NAD

Abdomen and others:

Stomach contained 200 ML blackish thick fluid. Walls as mentioned in injury No. Intestine is as mentioned in injuries. Extra position of blood seen in the soft tissues, less entry and Intestinal loops, omentum around the injuries. About 2 L of blood present in

abdominal cavity. Liver – 1135G. Pale. God Bladder contained 10 ML pile. As mentioned in injury No (1).

Spleen – 102 g pale.

Kidneys – (R) 85 g
(L) 100 g
Pale

Pelvis and Vertebrae – NAD.

Urinary bladder empty.

Opinion:

Time since death – About 12 hours. Cause of death – Shock as a result of antemortem injuries of internal abdominal organs and blood vessels produced by sharp edged weapon. Injury No (1) and (2) are sufficient to cause death in ordinary course of nature, independently and collectively.”

13.17 On 26th August, 2011, the samples of the viscera of the deceased Sahdev, the bloodstained gauze and his clothes, were collected, from the hospital, by the IO Karan Singh Rana (PW-35) and Const. Rajender Prasad (PW-27). The Seizure Memo, prepared on the said occasion, was exhibited as Ex. PW-23/A.

13.18 Ignoring a few minor inconsistencies here and there, it may, on a holistic appreciation of the above evidence, be reasonably said that the facts relating to the recovery of the dead body of Sahdev, the taking of photographs of the site and preparation of the Site Plan, the

conveying of the body to the Hospital and its being declared “brought dead”, the preparation of the MLC and registration of FIR, the postmortem report prepared by Dr. Meghali Kelkar and the contents thereof, and the subsequent handing over of the body of Sahdev to his relatives, stand established and satisfactorily proved.

13.19 These circumstances, however, provide no assistance in fastening the liability, for the killing of Sahdev, on Kalu or Lalit or, for that matter, on anyone else.

13.20 The circumstances which, in the estimation of the learned ASJ, serve to bring home, to Kalu and Lalit, the offence of commission of the murder of Sahdev (apart from their alleged extra-judicial confession), as reflected in the impugned judgement, were the following:

(i) The CDRs of mobile No. 7838205464 indicated that, around the time when the incident of stabbing of Sahdev took place, Kalu was within range of the tower installed in Gokul Puri village.

(ii) Correlation, using the IMEI No. of the “GILD” make mobile phone, which was being used by Sahdev, indicated that the said mobile phone had been used, with SIM card bearing

No. 7838205464 (i.e., the SIM card being used by Kalu), from 03.58.57 hours on 17th August, 2011 to 11:49:44 hours on 18th August, 2011, during which period the said Mobile No. was within the range of the towers installed at Village Gokul Puri, Loni border and Johripur Extension, Ghaziabad. Further, the said mobile handset, of Sahdev, recovered from Lalit he had no explanation for being in possession thereof.

(iii) The disclosure statement of Lalit (Ex. PW-35/B), the identification, of the said mobile phone, by Kapil (PW-10), as belonging to his father, the identification of the said mobile phone by the IO Insp. Karan Singh Rana (PW-35), and the tallying, of the IMEI No. of the said phone, with the IMEI No. mentioned in the CDR relating to a mobile No. 8826275946, it was held, established the fact of recovery, of the “GILD” phone, being used by the deceased Sahdev, from the house of Lalit. This was regarded as a circumstance which probably incriminated Lalit.

(ii) The fact that the knife, with which Sahdev had been stabbed and killed, was recovered, at the instance of Kalu, from his residence, stood proved by the following:

(a) Lalit, in his disclosure statement dated 26th August, 2011 (Ex. PW-35/B), disclosed that he had given the knife, used in committing the offence of murder of Sahdev, to Kalu.

(b) Kalu, in his disclosure statement (Ex. PW-1/D), disclosed that he could get the knife, used in commission of the said offence, recovered and, pursuant thereto, led the IO, Insp. Karan Singh Rana (PW-35), to his house, where, from an *almirah*, he retrieved the knife. The said recovery was proved by the IO Insp. Karan Singh Rana, Const. Pramod (PW-26) and Satpal Singh (PW-1).

(c) There was nothing to indicate that the said knife had been tampered with, before it was produced in court.

(d) Dr. Meghali Kelkar (PW-28), in her “subsequent opinion” (Ex. PW-28/M), opined that the injuries, on the upper part of the body of the deceased Sahdev, could have been caused by the said knife Ex. P-1. She also identified the knife as the one which was sent to the FSL examination, when produced before her in court.

(e) The post-mortem report (Ex. PW-28/A) proved the fact of two injuries having been inflicted, on the upper part of the body of the deceased Sahdev. Correlation of the dimensions of the injuries, as noted in the said report, with the dimensions of the knife, as recorded in the sketch (Ex. PW-1/3), read with the opinion of Dr. Meghali Kelkar, showed that the dimensions of the knife matched the stab wounds found on the body of the deceased Sahdev.

(iii) The alibis, sought to be set up by the appellants Kalu and Lalit, through their defence witnesses, rested only on the statements of the said witnesses, without any corroborative evidence whatsoever. They are not, therefore, to be believed.

These circumstances, opined by the learned ASJ in the impugned judgement, formed a complete and unbroken chain, which inexorably implicates Kalu and Lalit, in the murder of Sahdev.

13.21 The “gold standard”, in examining and assessing whether the available circumstances prove the guilt of an accused to a crime is, undoubtedly, whether the said circumstances, seen cumulatively and as a whole, are capable of one, and only one explanation, being that the crime has been committed by the accused, and by no one else. The

highest standard of proof, beyond all reasonable doubt, is required to be established in such cases; the possibility of another explanation which would “fit in” with the circumstances, by itself, is sufficient to demolish the case of the prosecution. The fact that the circumstances, seen as a whole, create a strong suspicion regarding culpability of the accused in the crime concerned, is totally insufficient, to maintain a conviction. Suspicion, howsoever strong, can never substitute proof, and can never be a foundation for an order of conviction against the accused.

13.22 The *locus classicus*, on the law relating to circumstantial evidence and its appreciation is, unquestionably, ***Sharad Birdhichand Sarda vs State of Maharashtra, (1984) 4 SCC 116***, which postulated the following “*panchsheel*” principles, to guide appreciation of circumstantial evidence, in paras 153 and 154 of the report, thus:

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

- (1) the circumstances from which the conclusion of guilt is to be drawn *should be fully established*.

It may be noted here that this Court indicated that *the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri)*

1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(2) the facts so established *should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be *a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused* and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the *panchsheel* of the proof of a case based on circumstantial evidence.”

13.23 Applying the above *panchsheel* principles, how sound is the reasoning of the learned ASJ, and his conclusion, therefrom, that Kalu and Lalit were guilty of committing the murder of Sahdev?

13.24 The answer to this question would depend, to a large extent, on the conclusions which could be drawn from the alleged recoveries, effected from Kalu and Lalit, and the forensic analysis of the articles so recovered and exhibited.

13.25 Putting, as it were, the cart before the horse, we would first like to deal with the analysis, of the exhibits submitted to the FSL by the prosecution. The exhibits, as submitted to the FSL, were numbered thus, in the FSL Report (Ex. PW/35-C):

“Exhibit ‘1’: Cotton wool swab having brown stains, described as ‘Blood on gauze’.

Exhibit ‘2’: One sealed cloth parcel sealed with the seal of “KS” containing exhibit ‘2’, kept in a plastic container.

Exhibit ‘3’: Earth material described as ‘Earth control’.

Exhibit ‘4a’: One dirty shirt having brown stains.

Exhibit ‘4b’: One dirty banyan having brown stains.

Exhibit ‘4c’: One pants having muddy stains on lower part of pants.

Exhibit ‘4d’: One dirty underwear.

Exhibit ‘5’: One knife made up of metallic blade and wooden handle.

Exhibit ‘6’: Brown cloth piece described as ‘Blood on gauze’.”

Of these, the FSL reported that blood was detected on exhibits '1', '2', '4a', '4b', '4c', '4d' and '6', and was not detected on exhibits '3' and '5'. *No blood was, therefore, found on the knife which was alleged to be the weapon of offence.* The serological report (Ex. PW-35/D), annexed thereto, found the blood, on exhibits '1', '4a', '4b', '4c', '4d' and '5' to be of 'A' group, which was the group of the deceased Sahdev.

13.26 It is obvious that the analysis of the exhibits, by the FSL, serological or otherwise, does not take us anywhere. In the first place, no blood was found on the knife, which was alleged to be the weapon of offence. The blood found on the other exhibits, and the serological analysis thereof, are of no consequence, as the said exhibits were the clothes of Sahdev, and the gauze pieces containing his blood samples, and the samples of earth picked up from the spot where he had fallen, it was but natural, therefore, that the blood, on these exhibits, would be that of Sahdev.

13.27 While the aforementioned abortive forensic analysis, by the FSL, of the exhibits submitted to it, serves to knock out much of the wind from the sails of the case of the prosecution, we proceed,

nevertheless, to address, first-hand, the issue of the recoveries stated to have been effected from Kalu and Lalit.

13.28 We are unable to arrive at any convincing conclusion, that the knife (Ex. PW-1/E), stated to have been recovered at the instance of Kalu, from a room on the first floor of his house, was the weapon of offence. The circumstances surrounding the alleged recovery are, to our mind, extremely suspicious. According to the statement of the IO Insp. Karan Singh Rana (PW-35), Kalu's mother was present in the room, when the said recovery took place and he, in fact, asked her to affix her signature on the seizure memo, but she refused to do so. We find, however, that Kalu's mother has neither been arraigned as a witness, nor is there any other evidence to show that she was present in the room, or that she was asked to be a witness to the Seizure Memo. Const. Pramod (PW-26), who allegedly accompanied the IO, as per his statement, makes no reference to the presence of Kalu's mother on the said occasion. Equally strangely, the IO deposed that he had taken finger prints from the knife, before taking it into possession, but admitted that the said finger prints were never sent for testing to the Finger Print Bureau. This, in our view, is an important circumstance as, if finger prints were indeed retrieved, from the knife, by the Investigating Officer, there is no plausible explanation for the absence of submission, thereof, to the Finger Print Bureau. Such a startling lacuna, we must state, imperils the case of the prosecution to

a considerable extent. As against this, Const. Pramod (PW-26), in his deposition during trial, flatly denied any memory of the time when they reached Kalu's house, the time of recovery of knife, the colour of the house, the material with which the *almirah* was constructed, the presence or absence of any other person in the house and whether the knife had any blood stains, on it, or not. We are unable to uphold the explanation proffered, by the learned ASJ, for the mysterious absence of any bloodstain on the knife at the time of its analysis by the FSL, on the ground that the bloodstains could have been "washed away", or might have "disappeared naturally". All witnesses, who handled the exhibits, and in whose custody they remained, till they were submitted to the FSL, have testified, on oath, that the exhibits were never tampered with, till their submission at the FSL. The said testimony was never questioned or doubted, even in cross-examination. There is no question, therefore, of the blood, which is stated to have been present on the knife at the time of its seizure from Kalu, having been "washed away" or of its having "disappeared naturally", by the time it was submitted to the FSL for analysis. In any event, if the stains had, in fact, been "washed away", or had "disappeared naturally", any presumption that they were bloodstains, at all, would be purely conjectural. Significantly, the learned ASJ himself notes, while recording the evidence of PW-26 Const. Pramod during trial, that he was prevaricating and giving evasive replies. Both the Insp. Karan Singh Rana (PW-35) and Const. Pramod (PW-26), however, were *ad*

idem on the fact that no public person was associated with the said recovery.

13.29 The only witnesses, to the recoveries purportedly effected from the residence of Kalu i.e. Ex. PW-1/A to Ex. PW-1/G are the IO Insp. Karan Singh Rana, Const. Pramod and PW-1 Satpal Singh. We have already indicated, hereinabove, that the evidence of PW-1 Satpal Singh does not inspire confidence. Const. Pramod remained ambivalent, regarding the recovery in question and claimed that he was unable to remember any of the details relating thereto, including the time when they reached the house of Kalu. His evidence has also been noted, by the learned ASJ himself as being unreliable. We are not able therefore, to hold either the recovery of the dagger from the premises of Kalu, or its use to stab and kill Sahdev, as having been conclusively proved beyond reasonable doubt.

13.30 Significantly, the evidence of PW-28 (Dr. Meghali Kelkar) in her subsequent opinion (Ex. PW-28/M) was also inconclusive as she only opined that the injuries on the body of the deceased Sahdev *could have been caused* by the knife.

13.31 We are equally unconvinced regarding the recoveries stated to have been effected from the premises of Lalit. We find from the evidence of PW-35 IO Insp. Karan Singh Rana that, in the house of

Lalit, his mother, sister, brother and other family members were allegedly present, but refused to sign the documents prepared on the occasion. None of the said family members has been included as witnesses by the prosecution. It is admitted that no independent witness or neighbour, was called to witness the recovery proceedings. Both Kalu and Lalit have, in their statements under Section 313 of the Cr.P.C., denied the factum of the said recoveries.

13.32 As regards the “disclosure statements” stated to have been given by Kalu and Lalit, Section 27 of the Indian Evidence Act, 1872, categorically ordains thus:

“27. How much of the information received from accused may be proved. – Provided that, when any fact is deposed to do as *discovered in consequence of information received* from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

(Emphasis supplied)

13.33 *Mohd Inayatullah vs State of Maharashtra, (1976) 1 SCC 828* authoritatively delineates the principles governing Section 27 of the Evidence Act. In that case, the accused-appellant made the following statement:

“I will tell the place of deposit of the three chemical drums which I took out from the Haji Bunder on first August.”

Following on the said statement, the accused-appellant led the police officer and the *panchas* to a *musafirkhana* in Crawford Market and pointed out three drums lying there, which were, thereafter, identified by the prosecution witness, in the case, as those which had been stolen. The courts below concurrently found, *inter alia*, the following facts:

- “1. That these drums were discovered in consequence of the information (vide Ex. C) given by the accused whilst in police custody.
2. That such information, as admissible under Section 27, Evidence Act, *showed that the accused was admittedly in possession of these stolen drums on September 26, 1968 and therefore, under illustration (a) of Section 114, Evidence Act, he would be presumed to be the thief.*”

Objecting strongly to the conclusion, of the courts below, as conveyed by the italicized portion of the extract hereinabove, the counsel appearing for the accused-appellant in that case contended that, in arriving at such a conclusion, the courts had used more of the “disclosure statement” of the accused-appellant, then was permissible under Section 27 of the Evidence Act and that, properly read, the admissible portion of the statement did not warrant any inference to the effect that the accused-appellant was the receiver of stolen property.

13.34 The Supreme Court held thus, in passages which may be regarded as an object-lesson on the scope and ambit of Section 27 of the Evidence Act:

“11. Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases is not always free from difficulty. It will therefore be worthwhile at the outset, to have a short and swift glance at the section and be reminded of its requirements. The section says:

“Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.”

12. The expression “provided that” together with the phrase “whether it amounts to a confession or not” show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. *It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only “so much of the information” as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word “distinctly” means “directly”, “indubitably”, “strictly”, “unmistakably”. The word has been advisedly used to limit and define the scope of the provable information. The phrase “distinctly relates to the*

fact thereby discovered” is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.

13. At one time it was held that the expression “fact discovered” in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see *Sukhan v. Crown* [AIR 1929 Lah 344 : ILR 10 Lah 283 (FB)] ; *Rex v. Ganee* [AIR 1932 Bom 286 : ILR 56 Bom 172 : 33 Cri LJ 396]). Now it is fairly settled that the expression “fact discovered” includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see *Palukuri Kotayya v. Emperor* [AIR 1947 PC 67 : 74 IA 65 : 48 Cri LJ 533] ; *Udai Bhan v. State of Uttar Pradesh* [AIR 1962 SC 1116 : 1962 Supp (2) SCR 830 : (1962) 2 Cri LJ 251]).

14. Before proceeding further, it is necessary to be clear about the precise statement which had been made by the appellant to the police officer. This statement finds incorporation in the panchanama, Ext. C, and we have reproduced an English rendering of the same earlier in this judgment. While considering this statement, the High Court observed that the accused had stated that “he had kept them (drums) there”. We have perused the original record of the statement which is in Hindi, and we are of opinion that by no stretching of the words this statement can be so read or construed as has been done by the High Court. The copy Ext.

C of the panchanama, in the paperbook contains a correct English rendering of the same. What the accused had stated was: "I will tell the place of deposit of the three chemical drums which I took out from the Haji Bunder on first August". It will be seen that he never said that it was *he* who had deposited the drums at the place from which they were produced. It seems the latter part of the statement which was an outright confession of the theft, was not completely ruled out of evidence and something of it was imported into and superimposed on the first part of the statement so as to fix the responsibility for deposit and possession of the stolen drums there, on the accused.

15. Having cleared the ground, we will now consider, in the light of the principles clarified above, the application of Section 27 to this statement of the accused. The first step in the process was to pinpoint the fact discovered in consequence of this statement. Obviously, in the present case, the threefold fact discovered was: (a) the chemical drums in question, (b) the place i.e. the musafirkhana, Crawford Market, wherein they lay deposited, and (c) the accused's knowledge of such deposit. The next step would be to split up the statement into its components and to separate the admissible from the inadmissible portion or portions. Only those components or portions which were the immediate cause of the discovery would be legal evidence and not the rest which must be excised and rejected. Thus processed, in the instant case, only the first part of the statement viz. "I will tell the place of deposit of the three chemical drums" was the immediate and direct cause of the fact discovered. Therefore, this portion only was admissible under Section 27. The rest of the statement, namely, "which I took out from the Haji Bunder on first August", constituted only the past history of the drums or their theft by the accused; it was not the distinct and proximate cause of the discovery and had to be ruled out of evidence altogether.

16. After culling out and rejecting the inadmissible portion, it was to be considered further whether the admissible portion of the information taken in conjunction with the facts discovered was sufficient to draw the presumption that the accused was the thief or receiver of stolen property knowing it to be stolen. The answer to this question, in the circumstances of the case, had to be in the negative. The drums in question were found in the compound or yard of a musafirkhana which was a place of rest and waiting for musafirs (travellers). It was not alleged by the prosecution — much less proved — that the drums were lying concealed, or that the compound was under the lock and key of the accused. There is not even an oblique hint that the place of the deposit of the drums was in any way under the control or occupation of the accused. The place being a musafirkhana, was from its very nature accessible to all and sundry.”

(Italics supplied)

13.35 It is only, therefore, *that part* of the alleged “disclosure statement”, made by an accused while in the custody of the police, *as relates distinctly to a fact which is discovered in consequence of the information provided by the said statement*, which can be treated as admissible in evidence and, consequently, proved. In the present case, inasmuch as we have already held the fact of recovery, from the appellant’s Kalu and Lalit, of the articles which were being carried by the deceased Sahdev, and of the knife with which his murder was alleged to have been committed, not to have been conclusively proved, there can be no question of placing any reliance on the alleged “disclosure statements” given by them.

13.36 This last pillar, on which the case of the prosecution rests has also, therefore, to collapse.

13.37 We are constrained to observe, therefore, that the prosecution has been unable, in the present case, to substantiate its charge, of commission of the murder of Sahdev by Kalu and Lalit.

13.38 Additionally, we are also unable to find any reason or motive for Kalu and Lalit to commit the murder of Sahdev. It is nobody's case that Sahdev was earlier acquainted with Kalu and Lalit, or that there was any pre-existing animosity between them; indeed, the evidence emerged on the record indicates otherwise. It is an admitted position that Sahdev was carrying with him only one "GILD" mobile phone, one lunch box, one LIC policy, one PNB pass book, eight passport size photographs and ₹ 400/-. It is difficult to accept that the motive to purloin these items could drive one to murder. Equally difficult is it, to accept that, having stolen such items, the thief would take the trouble to safely conceal them in an *almirah* in his house. The items were of little or no value to any third party, and the reason for Lalit to conceal the said items in his *almirah* is unfathomable.

13.39 Having said that, it may not be possible for us to exonerate the appellants entirely of all culpability in view of the one severely

incriminating circumstance, i.e. that, by correlating the IMEI number of the “GILD” Mobile Phone which was being carried by Sahdev, at the time of his murder, with the call detail records of the mobile number of Kalu 7838205464, it was found that from 03:58:57 hours on 17th August, 2011, to 11:49:44 hours on 18th August, 2011, the mobile number of Kalu was operated using the said handset of the deceased Sahdev. On this point being brought to the notice of Kalu, while recording his statement under Section 313 of the Cr.P.C, Kalu had no explanation to offer except bald denial of the same. Section 106 of the Evidence Act, mandates that any fact, which is especially within the knowledge of any person, has to be proved by that person. In other words, it was for Kalu to explain, how his mobile number was being operated using the handset of deceased Sahdev, and, in the absence of any reasonable explanation in this regard, we are constrained to hold that Kalu was in possession of the property of Sahdev in full awareness of the fact that the said property did not belong to him. We cannot, however, extrapolate this single circumstance to the extent of inculcating either Kalu or Lalit, on the basis thereof, in the murder of Sahdev, as the mere factum of possession, by Kalu, of the mobile handset of Sahdev cannot lead to a definite conclusion that Kalu must have murdered Sahdev, or even that Kalu had stolen the phone from Sahdev. We may draw an analogy, in this regard, from the judgment of the Supreme Court in

Mohd Inayatullah (supra), to which we have already made reference hereinabove.

13.40 Inasmuch as possession of stolen property, in unlawful possession of another, knowing it to belong to such other person, is an independent offence under Section 411 of the IPC, we are constrained to hold Kalu guilty under the said provision and convict him accordingly. However, this would not entail any additional punishment on Kalu, as the maximum punishment prescribed under Section 411 of the IPC is only three years, whereas the record of the case reveals that Kalu and Lalit have both been incarcerated for over 6 years and 8 months as on date.

Conclusion

14. Viewed any which way, therefore, we are unable to sustain the decision of the learned ASJ to Kalu and Lalit of the offence of committing the murder of Sahdev, even if the facts as alleged, and the evidence that has emerged, may engender suspicions regarding their culpability. No suspicion, however, can substitute proof, whatever be its weight. In our considered opinion, therefore, the appellants Kalu and Lalit are entitled to be granted the benefit of doubt, and acquitted of the charges against them.

15. We, however, convict Kalu of the offence of dishonestly receiving and retaining an apparently stolen mobile phone belonging to Sahdev and convict him, accordingly, under Section 411 of the IPC. As already noted hereinabove, this would not entail any additional punishment on Kalu.

16. Subject to the modification, regarding the conviction of Kalu, as set out in para 15 hereinabove, the impugned judgement and order on sentence, passed by the learned ASJ, are quashed and set aside. The appellants, who are in custody, shall be released forthwith, if not required to be detained in any other matter.

17. Trial Court record be sent back with a copy of this judgement. Intimation to be sent to the Superintendent Jail.

**C.HARI SHANKAR
(JUDGE)**

**S. P. GARG
(JUDGE)**

**May 09, 2018
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