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

+ **CRL.A. 1310/2014**

Decided on: 27th February, 2018

SURENDER @ DHEERAJ Appellant

Through: Mr. Bharat Sharma, Advocate.

versus

STATE Respondent

Through: Ms. Radhika Kolluru, APP for State

+ **CRL.A. 1327/2014**

SUBRAMANYAN RAJA Appellant

Through: Mr. K. Singhal, Advocate.

versus

STATE Respondent

Through: Ms. Radhika Kolluru, APP for State

+ **CRL.A. 1340/2014**

AMIT @ BUNTY Appellant

Through: Mr. Sumit Kumar, Advocate

versus

STATE Respondent

Through: Ms. Radhika Kolluru, APP for State

+ **CRL.A. 1366/2014**

NEERAJ Appellant

Through: Mr. Bharat Sharma, Advocate.

versus

STATE Respondent

Through: Ms. Radhika Kolluru, APP for State

+ **CRL.A. 1432/2014**
SHRIKANT @ APPU Appellant
Through: Ms. Bharat Sharma with Ms.Sonika,
Advocates.
versus
STATE Respondent
Through: Ms. Radhika Kolluru, APP for State

+ **CRL.A. 1437/2014**
RAJENDER PRASAD @ SHALU Appellant
Through: Ms. Narmada and Mr Anil Bhardwaj
Advocate.
versus
STATE GOVT OF NCT OF DELHI Respondent
Through: Ms. Radhika Kolluru, APP for State

+ **CRL.A. 1452/2014**
JAIDEEP Appellant
Through: Mr. Gaurav Khanna, Advocate.
versus
STATE Respondent
Through: Ms. Radhika Kolluru, APP for State

+ **CRL.A. 1453/2014**
SUNIL KUMAR Appellant
Through: Mr. Gaurav Khanna, Advocate.
versus
STATE Respondent
Through: Ms. Radhika Kolluru, APP for State

+ **CRL.A. 526/2015 & Crl. MB 963/2016**

KRISHNAMURTHY @ VICKY

..... Appellant

Through: Mr. Amit Kumar, Mr. Arun Khatri,
Mr. Himanshu, Ms Meenakshi Dutta
and Ms. Varsha Rana, Advocates

versus

STATE (GOVT. OF NCT)

..... Respondent

Through: Ms. Radhika Kolluru, APP for State

+

CRL.A. 1229/2015

SOMBIR

..... Appellant

Through: Ms. Manika Tripathy, Advocate for
DHCLSC with Mr. Ashutosh Kaushik
Ms. Raveena Tandon and Mr. Tarun
Khanna, Advocates.

versus

STATE

..... Respondent

Through: Ms. Kusum Dhalla, APP for State

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA**

JUDGMENT

Dr. S. Muralidhar, J.:

1. These ten appeals are directed against the common judgment dated 11th July 2014 passed by the learned Additional Sessions Judge-02 (North-West), Rohini Courts, Delhi in Sessions Case No.45/2013 arising out of FIR No.439/2010 registered at Police Station (PS) Saraswati Vihar, convicting the Appellants as under:

(i) Krishnamurthy @ Vicky (Accused No.1: A-1), (ii) Neeraj (A-2), (iii) Srikant @ Appu (A-3), (iv) Surender @ Dheeraj (A-4), (v) S. Raja (A-5) and (vi) Rajender Prasad (A-10) under Section 120-B read with Sections 201/395/396/397/412/467/468/471 IPC and Sections 25/27/54/59 of the

Arms Act for conspiracy to commit an armed dacoity and committing murder of Prateek Trikha (the deceased) by use of dangerous weapon/firearm; thereafter retaining and concealing the looted property of the deceased, viz., the driving license (D/L), an ABN Amro Bank ATM Card, a Shoppers' Stop Citizen First Card, Visiting Cards, a mobile set (make Sony Ericsson), Honda City Car bearing No. DL-4C-NC-1115; forging the number plates and creating forged documents of a forged number (HR-26- AK-0728) and disposing off the looted property.

(ii) A-1 Krishnamurthy was individually held guilty for the offence under Sections 395, 396 read with Section 412 and 201 IPC.

(iii) A-2 Neeraj was held individually guilty of the offences under Sections 395, 396 and 412 IPC.

(iv) A-3 Srikant @ Appu was held individually guilty of the offences under Sections 395 and 396 read with Section 397 and 201 IPC and Section 27 of the Arms Act.

(v) A-4 Surender @ Dheeraj was held individually guilty of the offence under Section 201 IPC and Sections 27/54/59 of the Arms Act.

(vi) A-5 S Raja was held individually guilty of the offences under Sections 395 and 396 of IPC.

(vii) Sombir, Sunil Kumar and Jaideep (A-7, A-8 and A-9 respectively) were

held guilty of the offence under Section 120-B read with Sections 412/471/468/201 IPC.

(viii) Amit @ Buntty (A-6) and Sombir (A-7) along with S. Raja (A-5), Srikant @ Appu (A-3) and Rajender Prasad @ Shalu (A-10) were also held guilty of the offences under Section 120-B read with Section 201/412 IPC.

(ix) Sombir, Sunil Kumar and Jaideep (A-7, A-8 and A-9 respectively) were individually held guilty of the offences under Sections 412 and 201 IPC and also under Sections 471 read with Section 468 IPC.

(x) Amit @ Buntty (A-6) was held individually guilty under Sections 201 and 412 IPC.

2. The trial Court was of the view that as far as Sombir, Sunil Kumar and Jaideep (A-7, A-8 and A-9 respectively) were concerned, the charges under Section 25/54/59 of the Arms Act a separate FIR ought to have been registered. Therefore, while acquitting them of those offences, it was observed that it was open to the investigating agency to proceed against them in accordance with law.

3. By a separate order on sentence dated 4th August 2014, which is also challenged in these appeals, each of the appellants was sentenced as under:

(A) **A-1:**

(i) For the offence under Section 120-B read with Sections 201/395/396/397/412/467/468/471 IPC and Sections 25/27/54/59 of Arms Act, he was sentenced to rigorous imprisonment (RI) for life.

(ii) For the offence under Section 395 IPC he was sentenced to RI for life and fine of Rs. 2,000/- and in default of payment of fine to undergo Simple Imprisonment (SI) for one week.

(iii) For the offence under Section 396 read with Section 412 IPC he was sentenced to RI for life with the direction that he shall not be considered for grant of remission till he undergoes an actual sentence of 20 years and fine of Rs. 1,00,000/- and in default of payment of fine to undergo SI for one year. The entire fine amount, if recovered, was directed to be given to the family of the deceased Prateek Trikha as compensation under Section 357 Cr PC.

(iv) For the offence under Section 201 IPC he was sentenced to RI for 5 years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

(B) A-2:

(i) For the offence under Section 120-B read with Sections 201/395/396/397/412/467/468/471 IPC and Sections 25/27/54/59 of Arms Act, he was sentenced to rigorous imprisonment (RI) for life.

(ii) For the offence under Section 395 IPC he was sentenced to RI for life and fine of Rs. 2,000/- and in default of payment of fine to undergo Simple Imprisonment (SI) for one week.

(iii) For the offence under Section 396 he was sentenced to RI for life with the direction that he shall not be considered for grant of remission till he undergoes an actual sentence of 20 years and fine of Rs. 1,00,000/- and in default of payment of fine to undergo SI for one year. The entire fine amount, if recovered, was directed to be given to the family of the deceased Prateek Trikha as compensation under Section 357 Cr PC.

(iv) For the offence under Section 412 IPC he was sentenced to RI for 10 years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

(C) A-5:

(i) For the offence under Section 120-B read with Sections 201/395/396/397/412/467/468/471 IPC and Sections 25/27/54/59 of Arms Act, he was sentenced to rigorous imprisonment (RI) for life.

(ii) For the offence under Section 395 IPC he was sentenced to RI for life and fine of Rs. 2,000/- and in default of payment of fine to undergo Simple Imprisonment (SI) for one week.

(iii) For the offence under Section 396 he was sentenced to RI for life with the direction that he shall not be considered for grant of remission till he undergoes an actual sentence of 20 years and fine of Rs. 1,00,000/- and in default of payment of fine to undergo SI for one year. The entire fine amount, if recovered, was directed to be given to the family of the deceased Prateek Trikha as compensation under Section 357 Cr PC.

(iv) For the offence under Section 412 IPC he was sentenced to RI for 10 years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

(D) A-3:

(i) For the offence under Section 120-B read with Sections 201/395/396/397/412/467/468/471 IPC and Sections 25/27/54/59 of Arms Act, he was sentenced to rigorous imprisonment (RI) for life.

(ii) For the offence under Section 395 IPC he was sentenced to RI for life and fine of Rs. 2,000/- and in default of payment of fine to undergo Simple Imprisonment (SI) for one week.

(iii) For the offence under Section 396 r/w 397 IPC he was sentenced to RI for life with the direction that he shall not be considered for grant of remission till he undergoes an actual sentence of 20 years and fine of Rs.1,00,000/- and in default to further undergo SI for one year. The entire fine amount, if recovered, shall be given to the family of the deceased Prateek Trikha as compensation under Section 357 Cr

PC.

(iv) For the offence under Section 201 IPC to RI for 5 years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

(v) For the offence under Section 27 Arms Act he was sentenced to RI for 5 Years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

(E) A-10:

(i) For the offence under Section 120-B read with Sections 201/395/396/397/412/467/468/471 IPC and Sections 25/27/54/59 of Arms Act, he was sentenced to rigorous imprisonment (RI) for life.

(ii) For the offence under Section 395 IPC he was sentenced to RI for life and fine of Rs. 2,000/- and in default of payment of fine to undergo Simple Imprisonment (SI) for one week.

(iii) For the offence under Section 396 IPC he was sentenced to RI for life with the direction that he shall not be considered for grant of remission till he undergoes an actual sentence of 20 years and fine of Rs.1,00,000/- and in default to further undergo SI for one year. The entire fine amount, if recovered, shall be given to the family of the deceased Prateek Trikhya as compensation under Section 357 Cr PC.

(iv) For the offence under Section 467 IPC he was sentenced to RI for 7 years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

(F) A-4:

(i) For the offence under Section 120-B read with Sections 201/395/396/397/412/467/468/471 IPC and Sections 25/27/54/59 of Arms Act, he was sentenced to rigorous imprisonment (RI) for life.

(ii) For the offence under Section 201 IPC to RI for 5 years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

(iii) For the offence under Section 25/54/59 of Arms Act he was sentenced to RI for 5 years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

(G) A-7, A-8 and A-9:

(i) For the offence under Section 120-B read with Sections 412/471/468/201 IPC they were each sentenced to RI for 10 years.

(ii) For the offence under Section 412 IPC he was sentenced to RI for 10 years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

(iii) For the offence under Section 201 IPC to RI for 5 years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

(iv) For the offence under Section 468 r/w 471 IPC he was sentenced to RI for 5 years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

(H) A-6:

(i) For the offence under Section 120-B read with Sections 412 and 201 IPC he was sentenced to RI for 5 years.

(ii) For the offence under Section 412 IPC he was sentenced to RI for 5 years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

(iii) For the offence under Section 201 IPC to RI for 5 years and fine of Rs.2,000/- and in default of payment of fine to undergo SI for one week.

4. At the outset, it must be pointed out that except for Krishnamurthy (A-1) and Sombir (A-7), all the other Appellants have been granted bail by this Court during the pendency

of the present appeals.

Case of the prosecution

5. The deceased, Prateek Trikha, was working with Steria Software Company. He was residing with his father, Suresh Kumar Trikha (PW-1), at his residence at Raj Nagar, Pitampura, Delhi. On 21st November 2010, the deceased left the house at around 8 pm in a Honda City Car bearing registration DL-4C-NC-1115, which belonged to PW-1, to attend the reception party of the marriage of the brother of his friend at Ashok Vihar.

6. It has come in the evidence of Ankur Mahajan (PW-6), a friend and colleague of the deceased, that the deceased came to the house of PW-6 in the said Honda City Car and together they went to the reception in the said car. They left the reception party at about midnight and within 10-12 minutes the deceased dropped PW-6 at his house.

7. It has come in the evidence of Damodar (PW-2), the security guard who was on duty at the gate of Raj Nagar Colony on the intervening night of 21st/22nd November 2010, that at around 12:30 am somebody knocked on the main door of the guard room saying “*Guard Kholo, Goli Maar Di Hai*”. When he opened the gate, he found that a man (Prateek Trikha) was bleeding profusely and when he asked what his house number was, the man replied, “67”. PW-2 then rushed to the said house and informed his parents who, with 3 or 4 other persons, came there and removed him to the hospital in a car.

8. Duty W/Ct. Sulochna (PW-21) who was posted in the Police Control

Room ('PCR') was informed at 12:50 am on 22nd November 2011 by Dr. Ashish Bansal that the injured Prateek Trikha had received a gunshot injury and was admitted in Maharaja Agrasen Hospital vide MLC No.965/10 (Ex.PW-16/A). The said information was then delivered to PS Saraswati Vihar where it was received by the Station House Officer ('SHO') Inspector Vipin Kumar Bhatia (PW-45) at about 1:30 am on 22nd November 2011. PW-45 along with driver Ct. Yudhvair reached the hospital where, at the same time, Sub-Inspector ('SI') Ranbir Singh (PW-10) and Ct. Baldev Raj (PW-30) reached with PW-1, the father of Prateek Trikha.

9. Thereafter, PW-45 went to the spot at Raj Nagar Colony along with PW-30 and Ct. Yudhvair while PW-10 remained at the hospital. There, PW-45 met Damodar (PW-2) and Virender Kumar Dubey (PW-5). He found a trail of blood from the main gate of Raj Nagar Colony to C-8-9, Raj Nagar, Main Road No.43 near the Ram Mandir where he found a pool of blood on the road in front of Kothi No.8 and an empty shell of a bullet in front of Kothi No.9. He requested the Crime Team to reach the spot.

10. SI Satpal Singh (PW-9), who was in charge of the Mobile Crime Team (North-west District) reached the spot along with a photographer [Ct. Parvinder (PW-23)], a fingerprint expert (Ct. Ram Kishan) and a dog squad [handled by Head Constable ('HC') Sahab Singh] at 3:00-3:45 am. Upon inspecting the crime scene, they found an empty bullet-shell lying on the road and there were also blood droplets leading from the spot, i.e. in front of the Ram Mandir, till the main gate of the Raj Nagar Colony. One Splendor motorcycle having mismatched registration plates – DL-AS-0234 on the

back and HR-15A-3 on the front (actual registration being HR-15A-3501) – was parked in front of the Ram Mandir. Near the main gate of the colony, two chairs were lying and both were blood-stained. The dogs taken there could not pick up any clue. No chance prints were found.

11. In the meantime, the SHO (PW-45) received information from PW-10 who was at the hospital that the injured Prateek Trikha had expired. Thereafter, PW-10 and PW-1 (father of the deceased) reached the residence of the deceased where PW-45 met them and recorded the statement of PW-1 (Ex.PW-1/A). The *rukka* was prepared and handed over to PW-30 at about 4:40 am for registration of the case.

12. In his statement, PW-1 stated that the deceased had left home at around 7:30 pm to attend the marriage reception of his friend's brother in a Honda City car (registration DL-4C-NC-1115) and at 12:30 am, PW-2 had come to the house and informed him that the deceased was at the gate in an injured condition having been shot. He stated that he along with certain others rushed to the gate and took the deceased to the hospital. He mentioned that the car of the deceased and his Sony Ericsson mobile phone (9999904548) were found missing. He expressed his suspicions that some person/persons had shot his son and taken away the car and the mobile phone. On this basis, FIR No. 439/2010 came to be registered at 4:50 am at PS Saraswati Vihar under Sections 302/397/34 IPC and Sections 27/29/15 Arms Act.

Medical Evidence

13. The Medico-Legal Certificate ('MLC') issued at the Maharaja Agrasen Hospital, Punjabi Bagh (Ex.PW-16/A) reveals that the deceased was brought

there at 12:45 am on 22nd November 2010 with an “alleged history of gunshot injury”. He was brought unconscious and in a gasping condition. The MLC noted one entry wound (2x2 cm approximately) present over the right deltoid region. At 2:07 am, Prateek Trikha expired. The death summary (Ex.PW-17/A) prepared in the hospital by Dr. Anupam (PW-17) shows that the gunshot injury was on the right shoulder.

14. The post-mortem examination of the deceased was performed at noon on 22nd November 2010 by Dr. Kulbhushan Goel (PW-28) who confirmed the presence of the “lacerated punctured wound (1.2 x 1 cm) with inverted margins over upper lateral front of right arm about 9.5 cm below right shoulder tip and 4 cm away from the auxiliary tip”. It was noted that “no blackening or tattooing were seen.”

15. There was a second injury, viz. an abrasion of 2x0.5 cm over the right malar region and 1x1 cm over the back of left wrist. The report notes that all injuries were ante-mortem in nature and that the first injury was caused by a firearm and was sufficient to cause death in the ordinary course of nature. The time since death was indicated as 10 hours.

Arrests of A-1 and A-2

16. It has come in the evidence of Inspector Arti Sharma (PW-47) that Additional Deputy Commissioner of Police Dr. Joy Tirkey had assigned the investigation in this case to her on 2nd December 2010 when she was posted at SIT, Crime Branch, Sector 18, Rohini, Delhi. Thereafter she assembled a team comprising SI Sharat Kohli (PW-46), HC Amit Tomar (PW-44), HC Jitender, Ct. Narender Kumar (PW-32), Ct. Sunny, Ct. Dabhu Kanwar

(PW-20) and Ct. Vikas. PW-44 informed her that he had already been working on this investigation and that an informer would contact him at around 3:30 pm at M2K Cinema, Sector 3, Rohini.

17. The police team then left the office of PW-47 on 2nd December 2010 at around 1:30 pm and reached Main Road No.43, Raj Nagar, near the Ram Mandir, to inspect the spot and make some local enquiries. They could not gather too many details. They reached M2K Cinema, Rohini at 3:30 pm and shortly thereafter, at 3:45 pm, a secret informer is said to have met PW-44 to inform him that five persons were involved in the incident, out of which three were from Shakurpur, one from Rohini and one from Inderpuri. He was informed that two of the said persons would be coming on a red-coloured Pulsar motorcycle from Mangolpuri via Shamshan Ghat Road and would go to Vijay Vihar Lal Quarters to meet someone there between 5 and 6 pm. PW-44 is said to have produced a secret informer before PW-47, who then verified the information and conveyed the secret information to her senior officers who directed her to take appropriate action.

18. According to PW-47, she then requested 4-5 passers-by to join the police party but none agreed. They then reached the T-point at Shamshan Ghat Road near Vijay Vihar around 5 pm. While the police party split up and took positions on either side of the road, at around 5:25 pm, two men came down the road riding a red-coloured Pulsar motorcycle from Mangolpuri. The secret informer pointed them out as two out of the five persons who were involved in the incident. When the police party tried to stop the two boys, they tried to flee. But the bike slipped and both of them fell on the

ground. They were apprehended by PW-44 and PW-20 as well as PW-46 and Ct. Sunny (not examined). One of the men was Neeraj (A-2) and the other was Krishnamurthy (A-1). Both were arrested on 2nd December 2010 itself.

Disclosures of A-1 and A-2

19. A formal search of A-2 is said to have been conducted then and there and the D/L of the deceased was stated to have been recovered from his right-sided back pocket. According to the prosecution, A-2 then informed the police that five persons were involved in the incident on the intervening night of 21st/22nd November 2010, i.e. A-1, A-2, A-3, A-5 and A-10.

20. A-2 is supposed to have disclosed that on the intervening night of 21st/22nd November 2010, the five of them were in the Raj Nagar area near the Ram Mandir where they found one boy smoking a cigarette while standing by his car. When they tried to snatch the Honda City car, he resisted whereupon A-3 shot the deceased with his firearm at the instance of A-5. A-2 is further supposed to have disclosed that thereafter A-3, A-5 and A-10 took the vehicle and went away. A-2 claims to have followed them on his motorcycle while A-1 followed them on the motorcycle of A-3. According to A-2, some documents including the D/L, ABN-AMRO ATM Card, Debit Gold Card, Shopper's Stop card and three visiting cards were kept in the dash board of the vehicle which were removed by A-1 at Avantika. Among these documents was the D/L of the deceased. Since A-2 did not have any D/L, A-1 handed over the said D/L to A-2.

21. As far as A-1 is concerned, apart from making disclosures along the

same lines, he stated that the five of them were on three motorcycles. The first was driven by A-3 with A-5 riding pillion. The second motorbike was driven by A-2 with A-10 riding pillion and the third was driven by A-1 himself which happened to be stolen. A-1 is stated to have disclosed that, on the directions of A-3, he left the stolen motorcycle at the spot and instead took the motorcycle of A-3 in order to flee. He too stated that the stolen car was driven by A-5 with A-3 and A-10 as passengers. According to A-1, A-3 had directed him to leave A-3's motorcycle at the residence of A-3 at Sector-3, Rohini and to give the keys of the said motorcycle to his sister, Sona, which A-1 complied with.

Recoveries at the instance of A-1 and A-2

22. A-1 is then supposed to have led the police party to a room on the top floor of F-22/1 Sector 3, Rohini. There, the police party met the landlord Ghanshyam (PW-13) on the ground floor. PW-13 joined them in the investigation. They went to the first floor where they met James Lakyal and Kapil Nayyar (father and son respectively and neither of whom was examined as a witness). Kapil is stated to have informed the police party that A-1 was the elder brother of his friend, Karan, and that Karan had approached Kapil for a room and that is how A-1 was permitted to reside in the room on the top floor in the month of January 2011.

23. When they went to the said room, A-1 is stated to have opened the lock on the door and removed a pant hanging on a nail on the wall. From the right-side pocket of that pant, A-1 is supposed to have taken out the ABN-AMRO ATM card, a Citizen First Shopper's Stop Card and three visiting

cards, all in the name of the deceased, and handed them over to the police. These were then seized under a seizure memo (Ex.PW-13/A). The site-plan of the place of recovery was also drawn up (Ex.PW-13/B).

24. Both A-1 and A-2 then took the police party to the house of A-3 at Sector-3, Rohini. Outside the house was a motorcycle having registration DL-8SAU-6461. There, they met Sona, the sister of A-3, who disclosed that A-1 had handed over the keys to her. She told the police that A-3 had not come home for the last 4-5 days. The motorcycle was then seized (Ex.PW-44/K).

Arrest and disclosure of A-3

25. On 24th January 2011, A-3 is supposed to have surrendered in the Court of the learned Metropolitan Magistrate ('MM'). With the permission of the learned MM, the police team interrogated him. During the search of A-3 conducted by PW-46, it was revealed that there were superficial blade injuries on his stomach and head which were brought to the notice of the learned MM who proceeded to record this fact in the proceeding sheet. A personal search was undertaken of A-3 (Ex.PW-46/B) and his disclosure statement was recorded (Ex.PW-46/C). He was then taken to the BSA Hospital for treatment for his self-inflicted injuries.

26. A-3 is stated to have taken the police party to the spot on 25th January 2011 and pointed out the place of the incident. A-3 is stated to have made a disclosure that he had taken a country-made pistol with four live cartridges on hire from Surender @ Dheeraj (A-4), resident of D-413, Avantika, Rohini, Sector-1 for Rs.2,000/-. According to A-3, after the

incident, he returned the said pistol to A-4.

Arrest of A-4 and recovery of the pistol

27. On 28th January 2011, A-3 is supposed to have taken the police party to the residence of A-4. When they rang the bell, A-4 himself is stated to have opened the door and his wife was also present. Initially, A-4 is stated to have refused having given any pistol to A-3 and, therefore, the police party returned to their office along with A-4. After being interrogated at length, A-4 disclosed that he had kept the pistol in his house. Therefore, the police party again took A-4 to his house.

28. The son of the landlord, Rupesh Kumar (PW-12), consented to being a part of the police team. From a single bed in a room on the ground floor, A-4 is stated to have taken out the pistol and handed it over to PW-47. The pistol was of “steel *numa* metal had a plastic design on the same”. The pistol was then seized (Ex.PW-12/D). A-4 was arrested on 28th January 2011. The exhibits were deposited in the FSL, Rohini on 16th February 2011.

Events of 25th February 2011

29. Hawa Singh (DW-6), the father of A-2, is stated to have joined the investigations on 25th February 2011 and handed over the Registration Certificate (‘RC’) of the recovered motorcycle bearing registration DL-8SAW-2410, i.e. the motorcycle on which A-1 and A-2 were apprehended on 2nd December 2010.

30. On 25th February 2011, PW-1, the father of the deceased, handed over to PW-47 the original bill of the deceased’s Sony Ericsson Xperia mobile

phone. He also handed over to PW-47 a photocopy of the RC of the Honda City Car. This was taken into possession by a seizure memo (Ex.PW-47/B).

Arrest and disclosure of A-5

31. On the same date, i.e. 25th February 2011, PW-47 is stated to have received secret information about S. Raja (A-5) through HC Shyam Lal. She then went to Inderpuri along with a police team where the secret informer met HC Shyam Lal and informed him that S. Raja (A-5) had left his house and would return as his mother was not keeping well. Accordingly, they laid a trap at his house, i.e. E-399, JJ Colony, Inderpuri. After some time, the secret informer pointed out a person who was entering the *gali* and identified him as A-5. Consequently, he was arrested (Ex.PW-35/A) and then interrogated.

32. He made a disclosure statement (Ex.PW-35/C) confessing to his involvement in the incident. However, nothing was recovered from his personal search. He was then remanded in police custody for seven days after being produced before the *illaka* magistrate.

33. On 27th February 2011, in pursuance of the disclosure statement made by A-5, the police team along with him went to Bhiwani in search of Sombir (A-7). The SHO of PS City Bhiwani is stated to have been joined in the investigations. A-5 took them to Balmiki Basti at Bhiwani and pointed out the house of A-7 where he had visited along with Appu (A-3) on 2-3 occasions previously. They could not find A-7 in the house. The father of A-7, who was at the house, informed them that A-7 had not returned home for

the last 4-5 days.

34. When A-5 was again interrogated in the office by PW-47, he is stated to have further disclosed that the mobile phone which had been robbed from the victim had been given to Amit @ Bunty (A-6), a friend of A-7. He disclosed that it was A-7, a friend of A-3, who took A-10 and himself to A-6 for changing the IMEI number because it was an expensive mobile phone and they had decided to use it themselves. According to A-5, when the mobile phone was handed over to A-6, A-10 was also present.

Arrest and disclosure of A-6

35. After this disclosure, A-5 is stated to have taken the police to the shop of A-6 at WZ-1621, Multani Mohalla, Rani Bagh where the younger brother of A-6 was sitting in the shop. He informed the police that A-6 had gone to Rohtak 2-3 days ago but had not returned since. They also met the father of A-6 before returning to their office.

36. On 2nd March 2011, they again went to the shop of A-6 and this time they found him present. They interrogated and then arrested him (Ex.PW-44/P-1). At that stage, there was no recovery made at the instance of A-6.

Recovery of mobile phone from A-6

37. On the same date, i.e. 2nd March 2011, at the instance of A-6, the police team went to a Hotspot Spice Mobile shop at Daryaganj as A-6 had disclosed that he had given the mobile stolen from the deceased to the said shop for repairs. One Vishal Atwal (PW-43), who was working in the said

shop, identified A-6 and stated that A-6 had given them the Xperia mobile phone through his friend Varun (PW-36) who was running a shop under the name and style of Nice Communications in Rani Bagh market. PW-43 further stated that after repair, the mobile phone was handed back to PW-36. PW-43 is stated to have checked his records and informed the police that the IMEI number of the mobile phone of the deceased was running with Vivek Vats (PW-38), a resident of Mumbai.

38. PW-47 then spoke to the senior officers and on their directions, accompanied by SI Sharat Kohli (PW-46) and HC Amit Tomar (PW-44), decided to go to Mumbai to recover the said mobile phone.

39. PW-36 was contacted and he informed the police that after receiving the mobile phone he had handed it back to the A-6. Thereafter, PW-47 along with team members again went to mobile shop of A-6 at Rani Bagh. This time A-6 took out a key hidden in the drawer and opened another drawer and took out the robbed mobile phone of the deceased and handed it back to PW-47. The mobile phone was then seized (Ex.PW-35/E).

Seizure of two other mobile phones

40. During the course of investigation, it was revealed that the IMEI number of the recovered mobile phone did not match with the repaired phone's IMEI number as intimated by PW-43. When PW-47 again went to Hotspot Spice Mobile shop at Darya Ganj, PW-43 informed her that the repaired IMEI was interchanged with the IMEI of one Balram, a resident of Gurgaon.

41. At this stage, it is necessary to note that according to the prosecution, the

last four digits of the IMEI number of the mobile phone of the deceased was 8392. The IMEI of the mobile phone that was seized from A-6 was 3067. It has come in the evidence of Uma Shankar (PW-33) who was working as a Senior Manager in Run Service Infocare Pvt. Limited, Chennai that, on 13th December 2010, they received one Sony Ericsson mobile phone, model 'X-10 I', bearing an IMEI number the last four digits of which were 8392 from the Hotspot Spice Mobile shop at Daryaganj, Delhi with the complaint that the said set "was having on/off problem and turn off randomly and remain in poor network". According to PW-33, he repaired the said mobile phone with changed mother board and sent it to the Mumbai Centre to be delivered to another customer. He states that they sent the mobile phone of the Delhi customer with a changed motherboard and therefore, the IMEI numbers of both mobile phones were changed and the new IMEI number of the Delhi customer's phone was ending with 3086.

42. It transpired that in the present case, the police recovered three mobile phones in all. One was recovered from A-6, with the last four digits of the IMEI number being 3067; the second was recovered from Balram (PW-39), a resident of Gurgaon, the IMEI number of which ended in 3086; and the third was recovered from Vivek Vats (PW-38) from Bombay, the last four digits of the IMEI number of which was 8392.

43. It is necessary to note at this stage that till 25th February 2011, the police had only the mobile phone of the deceased and the registration number of the car. They never obtained CDRs of the mobile number of the deceased. The invoice of the mobile phone which contained the IMEI number was

made available only on 25th February 2011. The RC of the stolen car was also only provided to the police only on that date. Why such basic information pertaining to these two main stolen articles was only obtained four months after the date of the incident has not been adequately explained by the prosecution. How they hoped to trace either of these objects without this vital information is beyond comprehension.

Arrest and of A-10 and recovery

44. On 23rd March 2011, the police party was again assembled by PW-47 and they reached Rani Bagh market where again a secret informer met her and told her that A-10, who was wanted in the present case, had been roaming around in the market. On pointing out by the secret informer, the police party apprehended A-10.

45. Upon a casual search of his person, PW-46 found and seized (Ex.PW-44/T) the following documents:

- (i) RC of the Honda City having registration HR-26-AK-0728;
- (ii) Insurance certificate of the said vehicle; and
- (iii) Pollution Control Certificate of the said vehicle.

46. When A-10 was asked about the said documents, he is supposed to have disclosed that A-7 had got prepared those documents and handed it over to him and asked him to sell the Honda City car bearing that registration number on the basis of those documents. A-10 was then arrested (Ex.PW-44/U-1) and a personal search was conducted (Ex.PW-44/U-2). A-10 is supposed to have led the party to the same spot of the incident at Raj Nagar

and a pointing out a memo was drawn up (Ex.PW-44/V).

47. When A-10 was brought to the office and interrogated he is supposed to have disclosed to PW-47 regarding his involvement not only in the present case but also in other cases of robbery where he had allegedly stolen gold chains. Certain recoveries were stated to have then been effected on that basis, which are not relevant in the present case.

48. With A-1 to A-6 and A-10 having been arrested and interrogated, PW-47 prepared the first charge sheet against A-1, A-2, A-3, and A-4 on 27th February 2011. On 8th April 2011, certain exhibits were sent to the FSL, Rohini. Upon receipt of the report of FSL, Rohini dated 4th May 2011, PW-47 prepared a supplementary charge sheet after all arrests were made.

Arrest of A-7 to A-9

49. At this stage, it is necessary to refer to the circumstances under which A-7 to A-9 were arrested which have been spoken to in the deposition of PW-46. He states that on 17th March 2011, he reached the Tikri Border accompanied by HC Amit Tomar (PW-44), ASI Sudesh, HC Shyam Lal, Ct. Narender (PW-32), Ct. Dabbu (PW-20), Ct. Vikas and Ct. Sunny where PW-44 met a secret informer at around 3 pm. The secret informer informed PW-44 that the Honda City car of the deceased that had been stolen was available with A-7 who, along with his associates, was coming from Haryana towards Rani Bagh for committing some incident/*vardat* between 5 and 6 pm and would be carrying arms and ammunitions. The secret informer is also stated to have told PW-44 that a fake number plate of HR-26-AK-

0728 would be present on the vehicle in place of the actual number plate.

50. The secret informer was presented before PW-46 who questioned him in detail. Again, PW-46 is stated to have asked 4-5 passers-by to join the investigation but they declined. Without wasting any further time, the police party reached Rani Bagh at 4:40 pm and laid a trap at the T-point, Rani Bagh market on the road going towards M2K Cinema. Here again, 4-5 public persons were asked to join the police party but all refused.

Recovery of the car

51. At about 5:20 pm, according to PW-46, one golden-coloured Honda City car bearing registration HR-26-AK-0728 approached from the direction of Rani Bagh market and, on the pointing out of the secret informer, the police stopped the car. The three occupants in the car, who came out, started running in different directions when they were informed by PW-46 that he was a police officer. PW-46 along with PW-44 chased the person (A-7) who was driving the car and apprehended him. The person sitting in the passenger's seat was chased and apprehended by HC Shyam Lal. He turned out to be A-8. The third (A-9) was sitting in the rear and was chased by Ct. Narender (PW-32) and apprehended.

52. From the personal search of A-7, the police recovered a pistol of 7.65 mm from the left side of his dub. It was found to contain three live cartridges. It is stated that on checking the engine and chassis number of the Honda Car that had been stopped, it was found to correspond with the numbers of the stolen vehicle belonging to the deceased. The forged number

plates with the 'HR' registration were found on the said Honda City car. Those forged number plates were seized under seizure memo (Ex.PW-32/F). The said car was separately seized under seizure memo (Ex.PW-32/G). The weapons recovered from A-7 and A-8 were seized.

53. A-7 is supposed to have disclosed about the theft of another Hyundai Accent car from the Rani Bagh area. That car too bore a fake registration plate and was recovered.

Framing of charges and subsequent convictions

54. After completion of the investigations, a final charge sheet was filed. The learned ASJ by order dated 26th July 2011 framed the charges against the accused as under:

(i) A-1, A-2, A-3, A-5 and A-10 were charged with the offences under Sections 395 and 396 IPC and, in the alternative, under Section 302 IPC. A-4, A-7, A-8 and A-9 were charged with the offences under Sections 25/54/59 Arms Act.

(ii) A-3 was separately charged for the offence under Section 397 IPC. A-7, A-8, and A-9 were charged with the offences under Sections 412/34 IPC, 471/34 IPC and 468/34 IPC.

(iii) A-6 was charged with the offence under Section 412 IPC. A-10 was separately charged for an offence under Section 467 IPC.

Impugned judgment of the trial Court

54. In the impugned judgment, the trial Court held that the prosecution had been able to prove beyond reasonable doubt each of the circumstances against the Appellants and proceeded to convict them for the offences as noted earlier. The trial Court in the impugned judgment observed that all the accused, whom it described as 'professionals', had planned a 'perfect crime' and yet howsoever smart the criminals might be they "were sure to leave clues which give away their game."

55. By a separate order on sentence, the trial court awarded each of the Appellants sentences as noted earlier. In this order the trial court placed on record its 'special appreciation' for the members of the SIT Crime Branch "for the manner in which they were able to professionally crack this so-called perfect crime."

56. The Court has heard the submissions of Mr. Bharat Sharma, Mr. K. Singhal, Mr. Sumit Kumar, Ms. Narmada Bhardwaj, Mr. Gaurav Khanna, Mr. Amit Kumar and Ms. Manika Tripathy on behalf of the Appellants. Ms. Radhika Kolluru, learned APP, has advanced arguments on behalf of the State.

Appellants convicted for more serious offences without charge

57. A serious objection has been raised by counsel for the Appellants that the trial Court proceeded to convict the accused persons for offences with which they were not charged.

58. They point out that A-1, A-2, A-3, A-5 and A-10 were charged with the

offences under Section 395, 396 and 302/34 IPC. They were convicted not only for the said offences but for the offences under Section 120B IPC read with Section 201, 395, 396, 397, 412, 467, 468, 471 IPC and under Section 25/27/54/59 IPC.

59. A-7, A-8 and A-9, were not charged with the offence under Section 120B IPC and yet they were convicted for that offence. As far as A-6 along with A-5, A-3 and A-10 are concerned, none of them were charged for the offence under Section 120B read with Section 201 IPC, but were convicted for those offences.

60. The trial Court has, in paragraph 284 of the impugned judgment referred to Section 221(2) Cr PC and observed that it is settled law that if an accused is charged with one offence and it appears in evidence that he committed a offence different from that for which he might have been charged, he may still be convicted for the offence which was shown to have been committed, although he was not charged for that offence.

61. What the trial Court appears to have completely overlooked is the legal position regarding more severe and less severe offences. Take, for instance, if an accused is charged with the offence of committing a theft and during investigation it is found that he committed a murder, without framing a charge for the more serious offence of having committed a murder, he simply cannot be convicted for the more severe offence. In the present case, the charge of criminal conspiracy under Section 120B read with the offences under Sections 395, 396, etc. is certainly a more serious charge which was

not framed against any of the accused and yet the trial Court proceeded to convict the accused for that offence overlooking the settled legal position. None of the accused was charged with an offence under Section 201 IPC and some of the accused were charged only with offences under the Arms Act.

62. In *Willie (William) Slaney v. State of Madhya Pradesh AIR 1956 SC 116* although on the facts of that case held that no prejudice was caused to the accused for the failure to frame a specific charge for the offence they were found guilty of and therefore there was no illegality, the Supreme Court explained:

"The Code requires that there should be a charge and it should be in writing. A deliberate breach of this basic requirement cannot be cured by the assertion that everything was orally explained to the accused and the assessors or jurors, and there was no possible or probable prejudice. (b) Where the conviction is for a totally different offence from the one charged and not covered by sections 236 and 237 of the Code. On a charge for a minor offence, there can be no conviction for a major offence, e.g., grievous hurt or rioting and murder. The omission to frame a separate and- specific charge in such cases will be an incurable irregularity amounting to an illegality."

63. In *A.S. Krishnan v. State of Kerala (2004) 11 SCC 576*, the Supreme Court was dealing with a case wherein a charge relating to criminal breach of trust was framed along with the charge of conspiracy. The Supreme Court has held that conviction simpliciter for criminal breach of trust would not be valid. The Supreme Court appeared to have disagreed with the view taken by the High Court that "if the charge of conspiracy is followed by substantive charge of another offence, there is nothing to prevent the Court

convicting an accused for the substantive charge even if the prosecution had failed to establish conspiracy".

64. The settled legal position appears to be that the failure to frame charges for the offence for which the accused is found guilty must have resulted in prejudice to the accused. Where no prejudice is shown, like for e.g., all the ingredients of the offence have already been made known, then the accused may not be held to have been prejudiced. Ultimately, the Court has to be satisfied that the failure to frame a charge for the offence has resulted in a failure of justice. Again as explained in *Dalbir Singh v. State of U.P. AIR 2004 SC 1990*, "in order to judge whether there is a failure of justice, the Court has to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself".

65. In the present case, the trial Court completely overlooked the above legal position and proceeded to convict the Appellant for the offence under Section 120-B IPC which is a substantive and serious offence of criminal conspiracy without, at any stage of the trial, framing a charge to that effect. Again, Section 201 IPC is a substantive offence and yet no charge was framed at any stage of the trial. The ingredients of these offences were not made known to the accused in the charge sheet, the charges framed or at any time thereafter. The prejudice to the accused was therefore apparent. This was not a mere irregularity that was curable. It was an illegality that vitiated the conviction of the accused for those offences. Undoubtedly, it has

resulted in a failure of justice.

66. As rightly pointed out by Mr. K. Singhal, learned counsel for the Appellants, Section 221 Cr PC comes into play when it is doubtful in terms of Section 221 (1) Cr PC, “which of several offences the facts which can be proved will constitute” and it is only in such a case that an accused will be convicted for an offence which he is shown to have committed although he is not charged for that offence. Otherwise, Section 216 Cr PC governs the issue of a Court adding or altering any charge at any time before the judgment is pronounced. Under Section 216 (4) Cr PC, if the alterations or additions are such that proceeding immediately with the trial will prejudice the accused, the Court may either direct a new trial or adjourn the trial. In other words, the accused cannot be surprised with a conviction for an offence for which a charge has not been framed and he is not put on notice by the Court for that eventuality.

67. The learned APP is unable to explain how the trial Court could have proceeded to convict the accused persons for the offences with which they were not charged. This, therefore, in itself constitutes a ground for setting aside the convictions of A-1, A-2, A-3, A-4, A-5 and A-10 for the offence under Section 120B read with Sections 201/395/397/412/467/468/471 IPC and Sections 25/27/54/59 Arms Act. Likewise, the conviction of A-7, A-8 and A-9 for the offences under Sections 120B read with Section 412, 471, 468/201 IPC and A-3, A-5, A-6, A-7, A-10 for the offence under Section 120B read with Section 201/412 IPC is also unsustainable in law and is hereby set aside.

68. Likewise, a separate conviction of A-7, A-8 and A-9 for the offence under Section 201 IPC, with which they were not charged, is also unsustainable. On the same reason, the conviction of A1 for the offences under Sections 412 and 201 IPC; A-2 for the offence under Section 412 IPC; A-3 for the offence under Section 201 IPC; A-4 for the offence under Section 201 IPC are also unsustainable in law. The conviction of A-6 under Section 201 IPC also cannot be sustained in law.

Law relating to circumstantial evidence

69. This is a case of circumstantial evidence. The legal position as regards circumstantial evidence is well settled and has been explained in a large number of decision. Illustratively reference may be made to the decision in ***Kishore Chand v. State of H.P. (1991) 1 SCC 286*** where it was held:

"In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. All the facts so established should be consistent only with the hypothesis of the guilt of the accused. The proved circumstances should be of a conclusive nature and definite tendency, unerringly pointing towards the guilt of the accused. They should be such as to exclude every hypothesis but the one proposed to be proved. The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. It is not necessary that each circumstances by itself be conclusive but cumulatively must form unbroken chain of events leading to the proof of the guilt of the accused. If those circumstances or some of them can be explained by any of the reasonable hypothesis then the accused must have the benefit of that hypothesis."

70. Further in ***Nizam v. State of Rajasthan AIR 2015 SC 3430*** it was

explained:

"In a case based on circumstantial evidence, settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused totally inconsistent with his evidence."

Circumstances put forth by the prosecution

71. To recall the story of prosecution:

(i) A3 first approached A4 to hire a firearm for Rs. 2,000/-.

(ii) A3 along with A1, A2, A5 and A10 are supposed to have reached the spot at Raj Nagar past midnight on 22nd November, 2010 on 3 motorcycles . A1 reached the spot on a stolen motorcycle having registration number HR-15A-3501. A10 and A5 reached the spot on a motorcycle of A3. A-2 came on his own motorcycle.

(iii) The third circumstance is that the five accused found the deceased was standing beside his Honda City car bearing registration DL-4C-NC-1115 near the gate of the Raj Nagar Colony smoking a cigarette. When the deceased resisted their attempts to snatch his car, A-3 is stated to have shot him with his illegal firearm on the exhortation of A-5.

(iv) Thereafter, while A-1 abandoned the stolen motorcycle at the spot, he took the motor cycle of A-3 and pursued the car which was driven away by

A-5 along with A-3 and A-10. A-2 also pursued them on his motorcycle.

(v) At one spot near Avantika, certain documents in the glove compartment of the car, viz., the ATM card, the D/L, the Shopper's Stop card and three visiting cards of the deceased were taken by A-1. Of these, he gave the D/L to A-2 because A-2 did not have a D/L.

(vi) Thereafter, A-1 dropped off A-3's motorcycle at the house of PW-29 and handed over the keys to Sona, the sister of A-3.

(vii) A-3 returned the pistol to A-4 after its use. A-4 kept it hidden in his house.

(viii) The stolen Honda City car was given to A-7 to A-9 who in turn approached A-10 to help them sell it with a fake number plate of HR-26-AK-0728.

(ix) The accused decided to retain and use the Sony Eriksson mobile phone, which was new, and on the advice of A-7 approached A-6. The motherboard of the mobile phone was deliberately tampered by A-6 so that when he gave it for repairs the IMEI number would be changed. This would help avoid detection. After the change of the IMEI number A-6 kept the mobile phone with him. Upon his arrest, the phone was recovered from his possession.

(x) When A-7 to A-9 came to Rani Bagh M2K Cinema in the stolen car with the fake number plate HR-26-AK-0728 affixed thereon, they were

apprehended. The stolen car was identified by checking its chassis number and engine number and on finding it was the same car that was stolen it was recovered from their possession. The car was later released on *superdari* to PW-1, the father of the deceased.

(xi) A-10 was arrested on the information provided by a secret informer. He was found in possession of the fake documents pertaining to HR-26-AK-0728.

72. The Court now proceeds to discuss each of the above circumstances which according to the prosecution form a complete chain and point unerringly to the guilt of the Appellants.

Arrests of the accused

73. The arrest of each of the accused is purportedly based on the information provided to the police by secret informers, who have remained unnamed and whose evidence is not available to be tested. Although the incident happened on the intervening night of 21st/22nd November 2010, it was not till 2nd December 2010 that anything concrete happened in the investigation. The first arrests were of A1 and A2 on that date. The secret information was allegedly provided by a secret informer to PW44.

74. At this juncture, it must be noted that when PW44 was examined in the Court, he was actually in judicial custody. The noting by the trial Court in the transcript of his deposition in cross-examination on 17th December 2013 shows:

“HC Amit Tomar – presently lodged at Tihar Jail and produced through video conferencing (Recalled for cross-examination from 14.10.2013 onwards).”

75. On that day, the video linkage was poor and therefore it was directed to produce PW-44 in the Court on the following day. It is pointed out by the learned counsel for the Appellants, and not disputed by the learned APP, that PW-44 is himself facing trial for grave offences, including that of extortion. The IO who is present in the Court and instructing the learned APP does not dispute this fact. Yet PW44 is invariably the same police official in the present case to whom every secret informer has at every stage disclosed information of the involvement of the accused, their descriptions, their whereabouts, etc.

76. The arrests of the accused were all in public places and yet none of the arrests were in the presence of independent public witnesses. Parrot-like statements to the effect that passersby were asked but declined to join are given by the IOs in the present case. This does not convince the Court. In ***Kehar Singh v. State AIR 1988 SC 1883*** one of the accused, Balbir Singh, was arrested at the bus stand at Najafgarh, which was a public place but there were no independent public witnesses to the arrest. It was argued by the State that there was no such requirement in the Cr PC. Repelling this contention, the Supreme Court observed:

"It may be as technically argued by the learned Additional Solicitor General that the presence of public witness under the scheme of Code of Criminal Procedure is required when there is search and seizure from the house or property of the accused but not when a

person is arrested and something is recovered from the personal Search. But it is well-known that in all matters where the police wants that the story should be believed they always get an independent witness of the locality so that that evidence may lend support to what is alleged by the police officers. Admittedly for this arrest at Najafgarh and for the seizure of the articles from the person of this accused is no other evidence except the evidence of police officers. Independent witness in this case would be all the more necessary especially in view of what has been found above as his release after the earlier arrest is not established, and his abscondence is not proved. In such a controversial situation the presence of an independent witness from the public, if not of the locality, would have lent some support to the case of the prosecution."

77. In the present case every arrest is on the basis of both information provided by and identification by a secret informer who is not produced as a PW. Most arrests have taken place from open public places and during times when there is a lot of movement of the public. It is therefore difficult to accept that in every such instance, no independent witness was available. The circumstance of arrest has not been convincingly proved by the prosecution.

Recovery of the weapon of offence

78. In order to prove the first link, i.e. of the firearm having been taken on hire by A-3 from A-4, the prosecution relies on the arrest of A-3, his disclosure leading to his taking the police party to the house of A-4 and getting recovered from the house of A-4 the firearm that he returned to A-4 after the incident. Therefore, the recovery of the firearm from the house of A-4 becomes a very important circumstance as far as this link in the chain is concerned.

79. Unfortunately for the prosecution, the independent witness to that recovery viz., Rupesh Kumar (PW-12), turned hostile. PW-12 was running a *dhaba* at Avantika. He was residing at the first floor of D-413, Avantika, Sector-1, Rohini. The ground floor was let out to A-4, who was residing there with his wife.

80. PW-12 states that on 28th January 2011, at 5 pm, he received a call from his sister that some persons were knocking the door of A-4's home and asked him to reach there immediately. When PW-12 reached home, he saw that one person was holding a pistol and there were some others standing next to him. When he wanted to find out who they were, they in turn asked for his identity. They then asked him whether he knew the person who was with them. He identified that person as A-4. The persons who were with A-4 then told PW-12 that "the pistol was recovered from the bed of the room of accused Dhiru". They showed him the pistol and he states that a fish shape was engraved thereupon. He states that the police personnel then prepared the cloth *pullanda* and put the pistol in the *pullanda* and obtained his signature on it.

81. Clearly, therefore, this witness was not actually a witness to the recovery of the pistol at all. He actually turned hostile and, therefore, did not support the prosecution. He clearly stated that nothing was recovered in his presence. He was cross-examined by the learned APP for the State. He again clearly stated, "None of the accused present in the Court today were having any pistol in their hands when I reached my house. One person was

having a pistol in his hands and I asked him as to who he was, then he told that he is a police official”. He denied the suggestion that in his presence A-4 “went inside the inner room of his house, opened the lid/cap of box of the single bed and took out the pistol from the clothes and told that it is the same pistol which had been given to the accused Appu by him and after commission of the crime, he returned the same to him”. When the learned Addl. PP pointed out A-3 to this witness in the Court, he stated that A-3 was not with the police at that time.

82. Therefore, the very first link in the entire chain of circumstances sought to be proved by the prosecution lacks substantive corroboration. The strange part of the trial Court judgment is that it has treated that portion of the disclosure statement of A-4 about his being able to get recovered the pistol from his house as admissible in evidence.

83. At this point, it should be noticed that in para 235 of the judgment, the trial Court has, in a tabular form, set out four columns - serial number, name of the accused, their “disclosure made by the accused admissible in evidence under Section 27 of the Evidence Act and not hit by Section 25 of the Evidence Act” and lastly, “discoveries/recoveries (witness to the same)”.

84. Against the name of A-4, the trial Court has in the third column set out virtually the entire statement of A-4 including “the accused disclosed that he had given the pistol and four live cartridges to Shrikant @ Appu on hire for 15 days for Rs.2,000/-....” and “Appu had returned the pistol and informed him that he had shot a fire from this pistol and robbed a Honda City Car

from the victim” and further about the accused having disclosed that A-3 “informed him about the incident of having shot the victim”. In fact, none of these statements as set out by the trial Court is admissible in evidence. It is surprising that the actual admissible portion of his disclosure, viz., that he could take the police party to the place where he had kept the pistol and would have helped them recover the pistol has not even been set out in the third column. This is too glaring an error to be overlooked. It is such a basic and fundamental error that this Court is inclined to term it as a perverse conclusion reached by the trial Court that the disclosure statement of A-4 as extracted by the trial Court in para 235 of the impugned judgment is admissible in evidence and that could form the basis for holding that the very first link in the chain of circumstances regarding A-3 having taken a pistol from A-4 on payment of Rs.2,000/- for the purposes of commission of the crime, and his returning the pistol thereafter to A-4, stood proved.

85. In the trial Court’s analysis of the evidence, there is strikingly no discussion about PW-12 having turned hostile. The deposition of PW-12, in fact, completely demolishes the case of the prosecution as regards this particular circumstance.

86. With regard to the weapon of offence, the prosecution also places reliance on the medical and ballistic evidence. There was a bullet inside the body that was recovered as per the medical evidence and that fact has not been seriously challenged by anyone. The trial Court appears to have proceeded on the basis that “the forensic evidence on record confirms the

use of this firearm Ex.PW12/2 to the crime (i.e. bullet inside the body of the deceased and cartridge case recovered from the spot)”).

87. It requires to be noticed that the FSL report (Ex.PW 31/A) shows that the bullet recovered from the body could not be matched as the bullet was deformed and “the individual characteristics of striations present on the deformed bullet” were “insufficient for examination and comparison to opine whether it has been discharged through the improvised pistol of 7.65 mm calibre marked exhibit ‘F1’ or not”. This crucial fact has again been overlooked by the trial Court.

88. Therefore, no part of the first link in the chain of circumstances, viz. the taking of the firearm by A-3 from A-4, its use and thereafter it being returned to A-4 can be said to have been proved by the prosecution.

Recovery of motorcycle used by the accused

89. As regards the use of three motorcycles to reach the spot, the prosecution examined PW-29 in regard to the motorcycle used by Sonu. It is strange that PW-29 has, in fact, not supported the prosecution and yet he was not declared hostile by the Addl. PP for State. He clearly stated that he never used to give the motorcycle to any other person. He categorically stated that, “on the intervening night of 21-22/11/10 the said motor cycle was with me at my home”. In a statement further damaging the prosecution case, he further states as under:

“Some police officials from crime branch took me and my motorcycle to police station at Sector 18 and they kept my motorcycle and released me after three days of detention.

Police also called my family members in police station. Thereafter I was released but I do not remember the date when I was arrested and released by crime branch. My wife called at 100 number when I was taken by crime branch.”

90. For some reason, the learned Addl. PP for the State did not apply to get the witness declared hostile and for that matter did not even re-examine the said witness. With the above evidence going unchallenged by the prosecution, the circumstance of A-3 having come to the spot on this particular motorcycle cannot be said to have been proved by the prosecution.

Unsubstantiated recovery of Honda City car

91. The next important circumstance is regarding the recoveries made at the instance of each of the accused of articles that are said to have belonged to the deceased. As already noticed, the most valuable article that was allegedly stolen by the accused was the Honda City car.

92. Although the photocopy of the RC of the said Car was provided by PW-1 to the police for the first time on 25th February 2011 and seized under a seizure memo (Ex.PW-47/B), for some reason, the said RC was never exhibited in the trial. There is no satisfactory explanation for this serious lapse by the prosecution. It is this RC which contained the chassis number of the vehicle and, therefore, without this RC it would not have been possible for the police to know if the car that was ultimately allegedly seized from the possession of A-7 to A-9 was the same car. This, therefore, became a very critical fact to the entire case. As already noticed, why this information which was fundamental to the investigation was not gathered by the police till 25th February 2011, four months after the date of the incident, is not

explained. In the meantime, arrests and disclosures by the accused persons had already taken place. Therefore, all the recoveries made thereafter would considerably weaken the case of the prosecution.

93. The car was ultimately supposedly recovered from the possession of A-7 to A-9 outside M2K Cinema in Rani Bagh on 17th March 2011. It is stated in the evidence of SI Sharat Kohli (PW-46) that at 5:20 pm, they noticed a Honda City car “of golden colour bearing No. Plate HR 26 AK 0728 which was coming from Rani Bagh Market side and on pointing out of secret informer we stopped the car”.

94. There is no photograph of the golden coloured Honda City car with the number plate of HR-26-AK-0728. HC Narendra Kumar (PW-32) was part of the raiding party that was assembled by PW-47 for the arrest and recovery of the Honda City car from A-7 to A-9. In his examination-in-chief, he states as under:

“I can identify the Honda City car recovered from the possession of the accused. At this stage four photographs on the judicial records of the Honda City car bearing number plate DL 4C NC 1115 are taken out and shown to the witness who identifies the Honda City car in the photographs but at the time of recovery the fake number plate was affixed on the Honda City car. The photographs are Ex.PW-32/J-1 to Ex.PW32/J-4. The Honda City car is already exhibited as Ex.P-6.

95. The Court has seen the photographs which are exhibited as Ex.PW-32/J1-J4. Two of those photographs have the front and rear number plates of the car affixed on them, both of which show the number DL-4C-NC-1115. Clearly, therefore, there is no photograph of the Honda

City car with the so-called fake number plate of HR-26-AK-0728.

96. It was submitted by the learned APP for the State that while this witness identifies the car in the photograph, he is careful to add: "But at the time of recovery the fake number plate was affixed on the Honda City car." She further points out that the fake number plates were separately seized and a separate seizure memo was prepared for those fake number plates and, therefore, it could not be said that there were no fake number plates on the Honda City car.

97. In this context, it requires to be noticed that after its seizure, the car was released to PW-1 on *superdari*. In his cross-examination, PW-1 was pointedly asked by the learned counsel for A-9 about this car and he stated as under:-

"I do not remember the date, on which, I received the information that the car has been recovered, but I received the same after about 3 or 3 ½ months of the incident. A police officer came from the PS Saraswati Vihar to inform me about the recovery of car. Next day morning, I went to PS Saraswati Vihar to see the car. Car was in accidental condition. Vol. Photographs of the car were also taken. There was no number plate on the car, when I saw it in the PS."

98. Although the witness states that the photographs were taken at the time of its release on *superdari*, such photograph has not been placed on record. Learned APP for State seeks to explain this away as a lapse of the investigating agency. Significantly, PW-1 says that "there was no number plate on the car, when I saw it in the PS". The explanation that the number plate, namely the fake number plate, was already removed and separately

seized is not very convincing to the Court.

99. If there was any one article in this entire case that was most critical it was the car with the fake number plate. The entire case of the prosecution turned around showing that the accused wanted to sell the Honda City car that they had stolen by using a fake number plate so that the theft could go undetected. If that was the case, there was no purpose at all in removing the fake number plates and treating them as separate seized articles. The least that the police should have done was to have a photograph taken of the car with the fake number plate affixed thereon and this photograph should have been taken at the time of its seizure with the date and time stamp on the photographs. There could have been no better proof of the fact that from the possession of A-7 to A-9 they, in fact, recovered the stolen car with fake number plates. Despite the police being in a position to do so, they have miserably failed to prove this very important circumstance.

100. Also, at the time of releasing of the car on *superdari*, the photographs ought to have been taken. The Court is informed that, in fact, there have been specific instructions in that regard and yet those instructions do not appear to have been followed. With PW-1 stating that the car was released to him in an accidental condition, it was all the more important to have those photographs, if taken, placed on record.

101. Consequently, the important circumstance of the stolen car being attempted to be sold by the accused with the help of A-7 to A-9 by affixing fake number plates has not been proved by the prosecution.

Doubts regarding the arrests of A-7 to A-9

102. A curious part of the entire exercise is the arrests of A-7 to A-9. It is the case of A-7 to A-9 that they were not arrested outside M2K Cinema at all and that each of them were arrested from their respective houses in Bhiwani, Haryana. In order to prove this plea of *alibi*, they have examined Dinesh Kumar (DW-1) and Azad Singh (DW-2).

103. Dinesh Kumar (DW-1) was working at the Jat Dharamshala in Bhiwani. He speaks to PW-46 coming there with eight other persons, including A-7 to A-9 who, according to him, were brought there handcuffed. The police party is stated to have arrived there on 15th March 2011 at 11:00 pm and remained there till 3:50 am on 16th March 2011. They were allotted dormitory room Nos.13 and 14. DW-1 brought the register and the relevant entries were marked as Ex.DW-1/A.

104. The cross-examination of this witness was minimal. Learned APP pointed out that this witness appeared to be of doubtful integrity because he could not have known the names of the three accused at the time they arrived at the Dharamshala. However, the fact remains that the prosecution has not been able to counter the fact that, in the register maintained, the arrival of PW-46 with eight other persons is clearly noted, since in the relevant column, the total number of persons is shown as 'nine (9)'. The only suggestion given to this witness is that he has fabricated the number 'one' as 'nine'. This suggestion is contrary to what PW-46 himself stated in his deposition, viz., that he went to Bhiwani along with seven other policemen on the night of 15th March 2011. Clearly, therefore, the

prosecution has not been able to explain the evidence of DW-1 which does not support the circumstance regarding the arrest of A-7, A-8 and A-9.

105. Apart from this, we have the evidence of Azad Singh (DW-2), who was running a *dhaba* and he again was witness to A-7 to A-9 being brought along with the police officials to the *dhaba* for lunch on 15th March 2011. Although, in his cross-examination, he stated that he had come to depose on the request of A-8, when his deposition is read along with the deposition of PW-46, the fact of A-7 to A-9 having been picked up much before 17th March 2011 does become probable. Therefore, their arrest outside M2K Cinema in Rani Bagh on that date seems extremely doubtful.

106. The trial Court paraphrases the depositions of the DWs 1 and 2 but fails to discuss their evidence hereafter. Further in para 243 of the impugned judgment, the trial Court erroneously notes:

"All the accused have pleaded alibi as their defence but in order to establish the, same they have failed to bring on record independent reliable witnesses, electronic record or authentic documentary evidence to defeat the case of the prosecution."

107. This is a sweeping generalisation, ignoring the fact that the defence has examined six witnesses and at least DWs 1 and 2 were examined to prove that A-7 to A-9 were picked up from Bhiwani. The failure to discuss the defence evidence is a major error in the impugned judgment.

Doubts regarding the arrest of and recoveries from A-10

108. To begin with, the so-called three forged documents recovered from

A-10's possession which pertained to the Honda City car with the fake registration number of HR-26-AK-0728 were themselves not marked as exhibits. They were made part of the seizure memo which was marked as exhibit, but the very documents themselves which constitute the basis for the offences under Sections 467/468/471 IPC were not produced. This is again a very serious lapse in the investigation. It is also not known whether any attempt was made to verify from the Haryana Road Transport Department whether such documents pertained to a real registration or a fake registration. No evidence was led in that regard.

109. As regards A-10, he examined himself as a defence witness, i.e. DW-4. He tendered certified copies of the statements of Hari Krishan and Amit Soni, recorded in FIR No.341/2010, registered at Police Station K.N. Katju Marg, before the Metropolitan Magistrate ('MM') where the details of his having been picked up on 19th March 2011 itself have been set out. Again, he was sought to be implicated in several cases of chain snatching and the learned counsel appearing on his behalf states that he has been acquitted in all those cases. His cross-examination by the learned APP was cursory.

110. Consequently, the Court is not satisfied that the circumstance of arrest of A-10 and the recovery from his personal search of the so-called forged documents has been proved by the prosecution. Again the trial Court fails to discuss the evidence of DW-4 and the documents produced by him. This is yet another major flaw in the impugned judgment.

Doubts regarding the recovery of mobile phone of the deceased

111. The recovery of the mobile phone from the possession of A-6 is

another circumstance relied upon by the prosecution. Here, the discussion has to begin with the observation that although the police was given the mobile number of the deceased, they never made an attempt to obtain the CDRs pertaining to the said number. What is most curious is that in his cross-examination during the trial, PW-1 states:

“We paid the bills for 3 or 4 months of the mobile phone of Prateek Trikha after his death”

112. The case of the prosecution is that having stolen the mobile phone which was kept in the dash board of the stolen car, the accused decided that they would use the mobile phone themselves as it was an expensive model. Further, according to the prosecution, they decided that they would take the help of A-6, who was known to A-7, in tampering with the mother board of that mobile phone in such a manner that when given for repair its IMEI number would be changed.

113. It is on this basis that the police went pursuing this mobile phone which was supposed to have been handed over by A-6 first to PW-36 and then to PW-43 who then handed it over to Vineet Sharma (PW-40) and Sanjeev (PW-41) who sent the said phone for repair to a service centre in Chennai run by PW-33.

114. The collective reading of the evidence of PW-36, PW-43 and PW-33 reveals that the problem with the motherboards of Sony Ericsson mobile phones was perhaps not an unusual feature. It appears that the IMEI numbers of the mobile phones were being routinely changed by Sony Ericsson service centres if they found the motherboard to be defective. They

also appeared to have been swapping phones. For instance, the phone stolen from the deceased was, after change of the mother-board, given to one Balram (PW-39) of Gurgaon. Likewise, Vivek Vats (PW-38) was given the phone which ultimately had the mother-board of the phone of the deceased. All this only resulted in a lot of confusion with the police trying desperately to prove that the mobile phone they ultimately seized from A-6 was in fact the mobile phone which belonged to the deceased.

115. The Court is not convinced at all with this evidence for the simple reason that, to begin with, in order to show that the mobile phone was being used by the deceased the police ought to have obtained the CDR which would have revealed its IMEI number. Secondly, it is impossible that even after the phone is stolen, the father of PW-1 would keep paying the bills of the mobile phone for 3-4 months thereafter. This is simply unbelievable. Thirdly, the manner of recovery of the mobile phone from A-6 after the arrest of A-1 to A-4 makes such recovery doubtful. Importantly, A-6 himself runs a mobile phone repair shop. Whether he was aware that the very phone that was entrusted to him for repairs was stolen from the deceased seems doubtful. The discussion by the Trial Court of this evidence is most unsatisfactory.

116. The Court finds that the Trial Court has given a judgment of 430 pages, but the analysis of the evidence leaves much to be desired. That appears to be a parrot like repetition of the prosecution case and then a conclusion that its case has been proved. There is no discussion of the arguments of defence and what has emerged in the cross-examination of the witnesses which

throw considerable doubt on the prosecution case. Therefore, the circumstance of recovery of the mobile phone from A-6 cannot be said to have been proved by the prosecution beyond reasonable doubt.

No convincing evidence qua A-1 and A-2

117. As regards the role of A-1, the only evidence to connect him with the crime are the recoveries of the ABN Amro ATM Card, the visiting cards of the deceased and a Shopper's Stop Citizen First card. Why would someone who is touted to be a professional thief like A- want to retain an ATM card without knowing its PIN and which is of no real use to him? Why would he preserve in his pant pocket the visiting cards of the deceased? These questions have no answer from the prosecution. It is not possible to conclude that the recoveries of this nature connect A-1 to the crime when none of the other circumstances have been satisfactorily proved by the prosecution.

118. As far as A-2 Neeraj is concerned, the only document that is supposed to connect him with the crime is a retention by him of the D/L of the deceased. Neeraj was riding motor bike and it is not understood as to why D/L pertaining to a car with the photograph of the deceased would in any manner benefit Neeraj. Consequently, the Court is not satisfied that this lone circumstance of the D/L of the deceased being recovered from the A-2 connects him with the crime.

Strange manner of conducting the trial

119. There are certain features of this case which call for comments on the

manner of conducting of the trial by the learned Judge. First, the lengthy examination-in-chief of two important PWs viz., PW-46 and PW-47 was done on 14th October 2013, which was a day, as noted by the learned Judge herself, when the Advocates were on strike. Why the learned Judge had to proceed to record evidence of such important PWs in this manner, cannot be understood.

120. The other feature is that there were as many as 10 accused in the present case. There is one omnibus recording of the cross-examination by learned counsel for all the accused by putting their names right in the beginning of the cross-examination. This does not, therefore, tell the reviewing Court what question was posed to the PW by a counsel for the particular accused. This manner of recording the cross-examination is not a satisfactory way of recording evidence.

121. The Court has already adverted to the trial Court extracting the complete disclosure statements, including the inadmissible portions and treating them as admissible under Section 27 of the Evidence Act.

122. The Court has already adverted to the inexcusable error of the trial Court in convicting the accused in the present case for the substantive offences under Sections 120-B and 201 IPC without framing a charge in that regard at any time prior to the conclusion of the trial which has resulted in a failure of justice.

123. The Court finds that the trial Court got carried away when it came to

the question of sentencing. The trial Court has chosen to give the maximum sentences for each of the offences. For instance, the trial Court has said that each of the accused who have been found guilty for the offence under Sections 395/396 IPC should be sentenced to RI for life and they will not be considered for grant of remission till each undergoes an actual imprisonment of 20 years in prison. After the judgment of the Constitution Bench in *V. Sriharan v. Union of India (2014) 4 SCC 242*, such directions by trial Courts cannot be sustained in law. In any event, under Cr PC a trial Court cannot, except where a particular provision in the penal statute so provides, order that a convict who is sentenced to life imprisonment is not entitled to remission unless he actually serves a minimum term of 20 years.

124. The other feature of the order on sentence is that the learned trial Judge has combined a severe sentence of imprisonment with an unconscionably high sum of fine for e.g. fine of Rs. 1 lakh. This is despite noting that many of the accused were young and belonged to an economically weaker section of society. As explained by the Supreme Court in *Shahejadhkhan Mahebubkhan Pathan v. State of Gujarat (2013) 1 SCC 570*:

"It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance,

we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. **We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases.**" (emphasis supplied)

125. Lastly, the impugned judgment of the trial Court running into 430 pages and order on sentence running into 47 pages is needlessly prolix, adding little to no clarity. Despite its length, what is missing is a proper analysis of the evidence and application of the law to the facts. Rhetoric appears to substitute reasoning. Although seemingly well-intentioned, judicial vigilantism that is unrestrained by the limits placed by the Constitution of India, the Cr PC, the Evidence Act and the IPC does not augur well for the functioning of the criminal Courts in accordance with law.

Conclusion

126. For all of the afore-mentioned reasons, the Court grants the benefit of doubt to the Appellants and acquits them of the offences with which they were charged. The impugned judgment dated 11th July 2014 and the order on sentence dated 4th August 2014 of the trial Court are hereby set aside.

127. The bail bonds and surety bonds furnished by the Appellants [except Krishnamurthy (A-1) and Sombir (A-7)] stand discharged. As far as Appellants Krishnamurthy (A-1) and Sombir (A-7) are concerned, they shall

be released forthwith unless wanted in any other case. All the Appellants will fulfil the requirement of Section 437-A Cr PC to the satisfaction of the trial Court at the earliest.

128. The appeals are allowed and the application is disposed of in the above terms. The trial Court record be returned forthwith along with a certified copy of this judgment. A certified copy of this judgment be also sent to Superintendent, Tihar Jail.

S.MURALIDHAR, J.

I.S.MEHTA, J.

FEBRUARY 27, 2018

Dc/Rm/nd