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

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Judgment delivered on: 13.11.2019

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CRL.A. 68/2000

STATE OF DELHI

... Appellant

versus

MANOJ NAFRI & OTHERS

... Respondents

Advocates appeared in this case:

For the Appellant:

Mr. Ashish Bhagat, Special Public Prosecutor along with Mr. Debopriyo Pal, Advocate

For the Respondents:

Ms. Inderjeet Sidhu, Adv./ Amicus Curiae for R-1.

Mr. N. Hariharan, Sr. Adv. with Mr. Varun Deswal, Mr. Siddharth S. Yadav, Mr. Prateek Bhalla & Mr. Sharang Dhulia, Advs. for R-2.

Mr. Sidharth Luthra, Sr. Advocate with Mr. Arjun Dewan, Ms. Anupama Kumar, Mr. Abhishek Kr. Pathak & Ms. Purnima Raj, Advocates for Respondent No.3

Mr. Siddharth Aggarwal, Mr. Faraz Maqbool, Ms. Rupali Samuel and Mr. Kirat Randhawa, Advocates for complainant.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J

1. This appeal under section 378 of the Code of Criminal Procedure, 1973, impugns the judgment dated 28.01.1999, passed by The learned Additional Session Judge, New Delhi acquitting all the three respondents/accused from all the charges (i.e. under section 120-B IPC and under section 364, 302, 392, 201 all r/w 120-B IPC).

2. The case of the prosecution is that on the intervening night of 13/14.9.1990, Mr. Rohin Mehta (victim/deceased) son of Mr. Ramesh Mehta

(Complainant, PW-5) had boarded Indian Airlines flight No. IC 183 at Bombay for Delhi, from where he was supposed to leave for Moscow, the next day, for an Exhibition/Trade Fair along with his two friends viz. Jasjeet Singh (PW-28) and Anil Khanna. Smt. Rekha Mehta (PW 30, mother of the deceased Rohin Mehta) and Sandeep Mehta (cousin of the deceased) had gone with Rohin Mehta to Bombay Airport, to see him off. On 14.09.90 at about 8.00 p.m., when Smt. Rekha Mehta made a telephone call from Bombay to her husband Ramesh Mehta at Delhi, they came to know that neither had Rohin Mehta had met Ramesh Mehta in Delhi, nor did the latter have any clue as to his son's whereabouts; the father immediately rushed to Palam Airport and made enquiries about his son. He did not get any satisfactory response. Worried and concerned, as he was, he went to Police Station Palam Airport and lodged a Missing Person's Report Ex. PW-5/A, on 15.09.90 at 1 am. It was registered as DD No. 33, to the effect that on the night of 13/14-9-90, his son Rohin Mehta had flown to Delhi from Mumbai at 2.20 a.m. in Indian Airlines flight No. IC 183, that he was carrying one big briefcase, a bag and a small brief case (brown colour). The father also described the physical build of his son. On making personal inquiries the father sensed some foul play, therefore, he lodged another typed complaint (Ex. PW-5/B) on 15.09.90, in which he disclosed that his son was carrying Rs. 45,000/- in cash, besides his personal belongings and was to be received by Sumesh Tripathi (Respondent-2) from the Airport. This complaint, was registered as FIR No. 25/90 under section 364 IPC at PS Palam Airport on 15.09.90 at around 10:30 PM.

3. Meanwhile, a PCR call was received at PS Anand Vihar, on 14.09.1990 that one suitcase was lying unclaimed for the over three hours

near Friday Market, Rishabh Vihar Turn, Kiran Vihar. At 5.18 PM, DD No. 14A dated 14.09.1990 was registered and marked to ASI Om Bir Singh (PW-15). He along with Constable Sanjay Kumar (PW-37) reached the spot and seized the said suit case under Section 66 DP Act vide a Seizure Memo Ex. Pw15/A. The seizure memo indicates that the said suit case contained used gents apparels and ladies clothes including undergarments.

4. As the sequence of events unfolded, on 15.09.90 around 2.00 p.m., PW-28 Anuj Kumar, who was posted as security guard at HML, informed the police officials of PS Sadar, Gurgaon SI, Suraj Bhan (PW-31), HC Hoshiar Singh (PW-18) and Ct. Rajender, who were on VIP duty at IFFCO Chowk of a dead man's body lying near a hillock. The said police officials rushed to the spot and found a partially burnt, dead body of a man. Proceedings under section 174 Cr.P.C. were conducted, photographs of the corpse were taken and the articles lying nearby it, which included some visiting cards, a plastic rope, etc., were seized by SI Surajbhan (PW-31) vide seizure memo Ex. PW-18/A. On 15.09.90 itself the dead body was shifted to Civil Hospital Gurgaon. On 16.9.90, it was shifted to Medical College Rohtak for the purpose of post-mortem. On 17.9.90 at around 9 a.m, Dr. P.K. Paliwal (PW-38) conducted the post-mortem. Meanwhile, on 16.09.1990, on being intimated of this by incidents, PS Sadar, Gurgaon, PW-5 Ramesh Mehta, reached there and identified the body as his son's. On 17.09.1990, he received the body of the deceased, after the post-mortem had been conducted. The Post Mortem Report Ex -PW-38/A indicated the following injuries:

- (i) Injury on Scalp by blunt object (ante-mortem & homicidal in nature);

- (ii) Fracture of hyoid bone (ante-mortem & homicidal in nature); and
- (ii) Burn Injuries on various parts (post-mortem post mortem), and thus opined that cause of death was injury no. 1 (caused by hard & blunt object) and injury no. 2 (caused by manual strangulation). It further indicated that the duration between postmortem and death was about 3 days.

5. On suspicion, all three respondents were called for interrogation at PS Palam Airport on 18/19.09.1990. On 20.09.1990, the IO of the case SI Inderjit (PW-43), searched for Gaurav (Respondent no. - 3) at his house. R-3, however gone to PS Palam Airport in Fiat car no. - DDC-9270. Inspector Mehtab Singh (PW-44) along with SI Om Prakash (PW-33) and R-3, took the said car to CFSL, where the car was examined by Dr. G.D. Gupta and Dr. V. K. Goel (PW-39) and upon inspection, blood stained earth was detected on the back seat of the car. The said blood stained earth, along with car and its various accessories & articles were seized by PW-44 Inspector Mehtab Singh, vide seizure memo Ex PW-33/A and Ex PW-33/B.

6. The Respondents were arrested by the police on 21.09.90 (though at different times). On the basis of the various disclosure statements given by the respondents, on 21 and 22.09.1990, the police effected various recoveries and prepared various indicative memos at the instance of respondents. Some of the aforesaid recovered articles, including the blood-stained ones, were sent to FSL for examination and a report was received.

7. Meanwhile, one Suresh Rehan (PW-10) came to PS Palam Airport on 22.09.1990, allegedly upon seeing the photograph of the deceased in a newspaper, 2-3 days after the incident. He said that on the fateful night (when deceased was to come to Delhi), he had visited Palam Airport to

collect some parcel of medicines and saw the deceased coming out from the exit gate of the airport and then saw the deceased leaving with three persons (allegedly the respondents) in Fiat Car No. - DDC 9270.

8. After investigation, charge sheet was filed against respondents Manoj Nafri, Sumesh Tripathi and Gaurav Kumar. After the committal of the case, the learned Trial Court framed charges under section under section 120-B IPC and under section 364, 302, 392, 201 all r/w 120-B IPC, against all the respondents, to which they pleaded not guilty and claimed trial.

9. To establish its case, the prosecution examined 44 witnesses; statements of the respondents were recorded under section 313 Cr.P.C. by the learned Trial Court wherein, respondents denied the purportedly incriminating evidence against them and alleged that they have been falsely implicated in the case by the police.

10. The learned Trial Court has framed the following eight circumstances, as points for determination:-

- (i) That the deceased Rohin Mehta was to go Moscow after coming to Delhi from Bombay by air.
- (ii) That the deceased Rohin Mehta, informed the accused Sumesh Tripathi on telephone from Bombay Airport to receive him from Delhi Airport, as he was carrying Rs.40,000/- and other valuable articles with him.
- (iii) That car no. DD C 9270, which was registered in the name of the father of the accused Gaurav Kumar, had been parked in the parking lot of Palam Airport on the night intervening 13/14.09.1990, when the deceased was to come to Delhi from Bombay by Air.

(iv) That PW-10 Suren Rohan had seen the accused Sumesh Tripathi and Gaurav Kumar at the parking lot of Palam Airport on the intervening on 13/14.09.1990 and he had also seen the above said car, parked in the parking lot.

(v) That all the accused persons, after their arrest, made disclosure statements confessing therein that they entered into criminal conspiracy to rob the deceased and to commit his murder.

(vi) That a rope/string was found at the spot near the dead body, it was found to be similar by CFSL to the rope/string which was got recovered through Sumesh Tripathi after his arrest, the scissors also were recovered through him.

(vii) That the blood stained earth was seized from inside the car no. DD C 9270.

(viii) That after the arrest of accused person they got the cash and other articles belongings to the deceased recovered.

11. On the appreciation of evidence, the learned Trial Court came to the conclusion that prosecution has been able to prove only the first two, of aforesaid eight circumstances. In effect the chain of proven circumstances was not complete, which could establish or conclusively point towards the guilt of the respondents. Resultantly it acquitted all the respondents of all the charges.

12. After filing of appeal by the State, notices were issued to the respondents. Respondent no. 2 Sumesh Tripathi and respondent no. 3 Manoj Nafri appeared and filed their Written Submissions. However, on various notices issued to respondent no. 1, a report was received to the effect that the he had left his address in India and was residing in the United States of

America. Efforts were made by this court to ensure his presence by issuing non-bailable warrants of arrest through Ministry of Home Affairs, Government of India, but the efforts could not fructify and NBW's could not be executed. This court declared R-1 as proclaimed offender by order dated 18.12.2008. Subsequent to this also, various efforts were still made to trace the whereabouts of R-1, but he remained untraceable. Finally, an *Amicus Curiae* was appointed to represent R-1 in this appeal.

13. We have heard the arguments and perused entire records. The appellant State has assailed the impugned judgment, inter-alia on the grounds, (i) that learned Trial Court has erred in appreciating the evidence on record properly; it has wrongly rejected the evidence of PW-10 Suren Rehan as being doubtful, whereas his testimony was cogent and reliable; the Trial Court has not considered in proper light the most important piece of "last seen" evidence, tendered by prosecution, (ii) that the Trial Court has erred in not appreciating the flip-flop testimony of the hostile witness PW-22 Vinay Kumar properly and erred in discarding the parking ticket Ex.PW-9/A, on the ground that a handwriting expert had not been produced, whereas the original receipt Ex.PW-9/A is itself clearly legible and establishes that the car no. DDC 9270 (owned by father of R-3) was parked at the parking of Palam Airport on the fateful night; that this piece of evidence coupled with the last seen evidence of PW-10 Suresh Rehan, clearly establishes the fact that the deceased was last seen in the company of respondents and had left the airport with them in car no.DD C 9270, thus establishing the link, that deceased was killed by the respondents in the morning hours of 14.09.1990; (iii) that the Trial Court also erred in rejecting the otherwise cogent evidence, regarding discovery of various facts, in

pursuance of the disclosure statements made by respondents, primarily on the ground that no independent public witness was joined by investigating officer, at the time of recovery of articles whereas in *State Vs. Sunil (2001) 1 SCC 652*, the Supreme Court has clearly held that presence of independent witnesses at the time of recovery is not a requirement of law. The learned Trial Court also erred in doubting some of the recoveries/pointing out memos, by observing that the places from where the articles were recovered were open and accessible places or the police had already visited the places. It did not however, advert to the position in law that while such recoveries or pointing out memos are relevant under section 27, so is the conduct of respondents under section 8 of the Indian Evidence Act, as held in *Charandas Swami Vs. State Of Gujarat & Anr. (2017) 7 SCC 177*. The learned counsel for the State submitted that the prosecution had been able to prove the entire chain of circumstances, led to only conclusion i.e. the guilt of respondents in killing the deceased by hatching a criminal conspiracy, for the purpose of looting monies from him. It is argued for that the trial court finding are liable to be reversed and respondents be convicted for the offences charged and be punished accordingly.

14. On the other hand, the learned counsel for the respondents contended that Trial Court has rightly appreciated the evidence. They argue that findings on above mentioned last six circumstances make it evident that prosecution has failed to establish even the first two circumstances framed by the Trial Court. The evidence on record did not add-up to the prosecution's hypothesis because the testimony of PW-5 Ramesh Mehta and PW-30 Rekha Mehta in this regard is quite unreliable, as PW-5 has made lots of improvement in his testimony and the statement of PW-30 was

recorded almost after two months of the said incident; it was just an after-thought by the police to fill the lacunae. They have further submitted that the testimony of these two witnesses is totally false, when seen in the light of oral testimony of PW-3 C. L. Sharma (ACM of Indian Airlines) and the clear documentary evidence in the form of the Passenger Manifest Ex.PW-3/B proved by PW-3. They therefore argue that the finding of the learned Trial Court, on the first two circumstances are perverse and should be reversed by this court. However, they have simultaneously, supported the findings on last six circumstances and have argued that the Trial Court had rightly rejected the last seen evidence given by PW-10 Suren, as the same is unbelievable on the face of it. They submitted that the learned Trial Court was correct in rejecting the various recoveries, as all of them were defective, no reliance could have been placed upon such recoveries to incriminate the respondents in the alleged crime. They sought dismissal of the appeal.

15. Before coming to discussion on facts, the legal position apropos scope of appreciation of evidence and role of appellate court in the appeals against acquittal needs to be addressed. The primary submission on behalf of respondents is that, in criminal appeals against acquittal, the first appellate court does not sit as a Trial Court so as to re-appreciate each and every minute fact; the appellate court is to only identify and correct an error of law or fact, which is significant enough to necessitate overturning the verdict of the Trial Court, and just because two views are possible on the re-appreciation of evidence, the appellate court should not over turn the findings of the Trial Court. In support of this contention they relied on judgment of the Supreme Court in *Shyamal Saha & Anr. Vs State of W.B.* (2014) 12 SCC 321.

16. On the other hand, the learned counsel for the appellant/State has submitted that an appellate court has full powers to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded; there is no limitation, restriction or condition on exercise of such power, and an appellate court may, on the evidence before it, reach its own conclusion, both on questions of fact and of law. He placed reliance upon the legal principles laid down in this regard in *Chandrappa Vs State of Karnataka* (2007) 4 SCC 415.

17. We are of the view that *Shyamal Saha & Anr. Vs State of W.B.* (2014) 12 SCC 321 (*relied upon by counsels for the respondents*) clarifies the legal principles laid down in the earlier judgment *Chandrappa Vs State of Karnataka* (2007) 4 SCC 415, relied upon by appellant/State on this point. The relevant portions of the judgement in *Shyamal Saha* case (*supra*) are reproduced as under:

“..... 20. The entire case law on the subject was discussed in *Chandrappa v. State of Karnataka* beginning with perhaps the first case decided by this Court on the subject being *Prandas v. State*. It was held in *Chandrappa* as follows:

“(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, ‘substantial and compelling reasons’, ‘good and sufficient grounds’, ‘very strong circumstances’, ‘distorted conclusions’, ‘glaring mistakes’, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of ‘flourishes of

language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the Trial Court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the Trial Court."

21. The principles laid down in Chandrappa were generally reiterated but mainly reformulated in Ganpat v. State of Haryana though without reference to Chandrappa and by referring to decisions not considered therein. The reformulation of the principles in Ganpat is as follows:

"(i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the Trial Court's conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(v) When the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision

of the Trial Court depending on the materials placed. (Vide Madan Lal v. State of J&K, Ghurey Lal v. State of U.P., Chandra Mohan Tiwari v. State of M.P. and Jaswant Singh v. State of Haryana.)

22. Undoubtedly, we are suffering from an overdose of precedents but be that as it may, from the principles laid down, it appears at first blush that the High Court is entitled to virtually step into the shoes of the Trial Court hearing submissions of learned counsel and then decide the case as a court of first instance. Perhaps this is not what is intended, notwithstanding the broad language used in Chandrappa and Ganpat. Otherwise, the decision of the Trial Court would be a meaningless exercise and this Court would become a first appellate court from a decision of the High Court in a case of acquittal by the Trial Court. Realistically speaking, although the principles stated are broad, it is the obligation of the High Court to consider and identify the error in the decision of the Trial Court and then decide whether the error is gross enough to warrant interference. The High Court is not expected to merely substitute its opinion for that of the Trial Court only because the first two principles in Chandrappa and Ganpat permit it to do so and because it has the power to do so – it has to correct an error of law or fact significant enough to necessitate overturning the verdict of the Trial Court. This is where the High Court has to exercise its discretion very cautiously, keeping in mind the acquittal of the accused and the rights of the victim (who may or may not be before it). This is also where the fifth principle laid down in Chandrappa and Ganpat comes into operation....”

18. Therefore, in *Shyamal Case* (supra), the Supreme Court has largely agreed with the legal principles laid down in *Chandrappa* (supra). The latter case recognising the wide powers of appellate court to review and re-appreciate the evidence independently, to reach its own conclusion by laying down first three principles (supra), while simultaneously putting some

restriction on these powers by laying down a rule of prudence and caution in the last two principles. But at the same time *Shyamal* (supra), has leaned more in favour of last two principles enunciated in *Chandrappa* (supra) and laid down that in appeal against acquittal, the appellate court should exercise its discretion cautiously, to review and re-appraise the entire evidence, while keeping in mind the acquittal of the accused and rights of the victim. This rule of prudence and caution, over the wide powers of an appellate court, while deciding an appeal against acquittal, in our view, clarifies the legal position in this regard. Therefore, if the facts and circumstances of a case indicate that the view taken by the learned Trial Court on a substantial point is not sustainable on the basis of evidence of record and legal position in this regard, then nothing bars the appellate court from reversing the same, after carrying out thorough review or re-appraisal of evidence. However, so as to not render the decision of the Trial Court a meaningless exercise, the appellate court should otherwise, be slow in overturning the finding of acquittal passed in favour of accused by the Trial Court.

20. This case is about the murder of Mr. Rohin Mehta. The question is whether the evidence on record proves that the respondents killed him. The Post-Mortem Report (PMR) Ex PW-38/A, and evidence of PW-38 Dr. P. K. Paliwal, in this regard has gone un rebutted. They mentions the following injuries on the body of the deceased:

- (i) A lacerated wound on the left side of scalp in coronal bylone and a depressed fracture of scalp in parietal reason (ante-mortem & homicidal in nature).
- (ii) There was a fracture of greater corner of hyoid bone at the right

side with infiltration of blood (ante-mortem & homicidal in nature).

(iii) Both forearms and legs and toes were having burns (post-mortem in nature).

21. PW-38, who conducted the PMR of the deceased, opined that the cause of death was the injuries described at no. 1 & no. 2; the injury no.1 was caused by hard and blunt object and injury no.2 by manual strangulation. PMR was conducted on 17.09.1990 at around 9 a.m and the expert opinion of PW-38 recorded, the duration between death and post-mortem examination as about 3 days, which goes to show that deceased Rohin Mehta was killed somewhere in the morning hours of 14.09.1990.

22. It is also not in dispute that this is case of blind murder, as there is no eye-witness to the incident of killing of the deceased and the case of prosecution is entirely based upon circumstantial evidence. In the present case, the prosecution has tried to establish its case mainly on the following four evidences/circumstances:-

(i) Last seen evidence

(ii) Discovery of various relevant facts on account of various recoveries effected at the instance of respondents, in pursuance to their disclosure statements to the police.

(iii) Motive

(iv) Conspiracy amongst respondents to kill the deceased.

23. Before discussing the relevant evidence on these circumstances, it is pertinent to mention the five conditions, reiterated by the Supreme Court in *Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116, which are required to be satisfied in any case based upon circumstantial

evidence (also referred by Supreme Court as the five golden principles apropos proof of the case based upon circumstantial evidence). These are:

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

(b) 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,

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

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

(e) 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.

24. Now we shall discuss the evidence in the light of aforesaid legal principles.

(I) Last Seen Evidence-

25. The Trial Court discussed the evidence in the first four circumstances framed by it. The same are reproduced here under with slight reframing of the same:-

(a) Travel by Rohin Mehta by air on the intervening night of

13/14.09.1990.

(b) Knowledge of respondent no. 2 Sumesh Tripathi, about the travel of deceased to Delhi from Bombay by air, on the relevant day i.e. 13.09.1990.

(c) Fact of Car no. DD C 9270, registered in the name of father of R-3, being parked at the car parking of Palam Airport on the intervening night of 13/14.09.1990.

(d) Deceased leaving with respondents from airport in the said car, allegedly seen by PW-10 Suren Rehan.

26. As far as evidence led by prosecution to prove point 14(a) above is concerned, then PW-30 Rekha Mehta (mother of the deceased) has clearly stated in her evidence that in September, 1990, she and Sandeep Mehta (cousin brother of the deceased) had gone with the deceased to Bombay airport to see him off as Rohin Mehta was to leave for Delhi in Flight No. IC 83. PW-29. Nitin Mehta (brother of the deceased) has also deposed about Rohin Mehta leaving for Delhi on 13.09.1990. This evidence coupled with the statement of PW-5 Brig. Ramesh Mehta, and copy of his report Ex PW-5/A regarding Rohin Mehta leaving by flight for Delhi on the intervening night of 13/14.09.1990 has remained unrebutted. The evidence of PW-3 C. L. Sharma is to the effect that had handed over the passenger manifest Ex.PW-3/A regarding flight no. IC 83 to the police and stated that the said passenger manifest discloses that one Rohin Mehta was allotted seat no.10G in the said flight from Bombay to Delhi.

27. In this regard, the learned Counsel for the respondents have argued that the said manifest Ex.PW-3/A shows that the flight was to depart on 14.09.1990 at 08.50 PM and therefore, it cannot be said that the deceased

traveled to Delhi from Bombay by air on 13.09.1990. They submit that the Trial Court in its finding (while dealing with Circumstance 2), has relied upon the testimony of PW-5, PW-30, while simultaneously relying upon the testimony of PW-3 as also the said manifest, to conclude that the deceased traveled on 13.09.1990. But from the facts indicated above, it is clear that, either the testimony of PW-5 and PW-30 is correct or the passenger manifest Ex.PW-3/A is correct and both cannot be relied upon at the same time and hence, the findings of the Trial Court is perverse on this aspect.

28. On the other hand, the learned counsel for the appellant State has argued that since the flight was delayed and took off from Bombay after midnight, therefore, the date of departure of the flight, as appearing on the passenger manifest Ex.PW-3/A, is noted as 14.09.1990 and the said manifest itself demonstrates that the flight was delayed, because it places the suffix 'D' after the flight number. In rebuttal, the respondents contend that the stand taken by the counsel for the State is not supported by the testimony of PW-3, who in his examination in chief, has very clearly stated that the flight reached at Delhi according to schedule therefore, the interpretation of Mark 'D' on the manifest, now sought to be given on behalf of appellant/State, can't be accepted, because the aforesaid witness was never re-examined by the State on this aspect. It is argued that 'D' can be read as 'Delay' as well as 'Diverted', hence the argument of appellant is misplaced.

29. In the light of aforesaid arguments, this court is of the view that the details given in the manifest Ex.PW-3/A regarding date and time of departure of the flight requires some clarification and the prosecution should have sought clarification in this regard at the time of recording of evidence. This court is not persuaded by the assumptions, now sought to be raised by

the counsel in appeal, that the flight was only delayed and that it departed from Bombay airport only after midnight. Nevertheless, the court is also not inclined to discard the clear testimony of PW-30, PW-29 and PW-5 and by merely relying upon Ex.PW-3/A, we are not inclined to hold that the deceased departed at 08.50 p.m on 14.09.1990 by the aforesaid flight for Delhi, instead of 13.09.1990. Another reason not to hold that the deceased departed from Mumbai at 08.50 p.m. on 14.09.1990 by the aforesaid flight is that, apart from the testimony of PW-5 and PW-30, in this regard (as discussed above), the post-mortem report of deceased also points towards the time of death of deceased as somewhere in the morning hours of 14.09.1990 and therefore, it is not possible that the deceased departed at 08.50 p.m on 14.09.1990 from Bombay for Delhi by flight.

30. Accordingly, in the facts and circumstances of the case, this court concurs with the finding of learned Trial Court in this regard (given by the trial court while dealing with Circumstance 2) that the deceased Rohin Mehta had traveled to Delhi from Bombay by Air on the intervening night of 13/14.09.1990, though, on the basis of evidence on record, it cannot be concluded that at what time the flight actually landed in Delhi.

31. Apropos to point no.23 (b) , the learned Trial Court has concluded that respondent no. 2 had the knowledge that deceased Rohin Mehta was to come to Delhi by flight, as deceased himself informed R-2 over telephone from Bombay Airport and asked the said respondent to receive him at Delhi Airport. For this finding, the Trial Court has relied upon the statements of PW-5 Ramesh Mehta and PW-30 Rekha Mehta. It noted that PW-30 Rekha Mehta has clearly stated in her evidence that when she had gone to the Bombay Airpot to see off the deceased, the deceased had a conversation

with R-2 on telephone from Bombay Airport and requested R-2 to arrive at Delhi airport to receive him, as the deceased was in possession of cash and other goods. The learned Trial Court further noted that similar statement was made by PW-5 Ramesh Mehta, who stated that his wife (PW-30) had told him on telephone that the accused no.2 was to receive their son Rohin Mehta at Delhi Airport. The Trial Court further noted that the complainant PW-5, in his complaint Ex.PW-5/B lodged on 15.09.1990 had categorically stated, that according to his information, his son Rohin Mehta was to be received by Sumesh Tripathi . Though, the Trial Court noticed various improvements in the testimony of PW-5 Ramesh Mehta in this regard, but concluded that since, PW-5 Ramesh Mehta and PW-30 Rekha Mehta, who are father and mother of the deceased respectively, and were not having any sort of animosity with the respondent, they were not to gain anything by deposing falsely against the said respondent.

32. The respondents have tried to assail the aforesaid finding of the Trial Court by arguing (i) that Trial Court has erred in placing reliance upon the testimony of the aforesaid witness to conclude that deceased made a call from Bombay Airport to R2, because PW-30 Rekha Mehta at best could have been the witness of the fact that deceased was talking with somebody over the phone, but she could never have known or deposed as witness that the person on the other end of the phone call was respondent-Sumesh Tripathi only; (ii) That during investigation, the police neither collected the call detail records of telephone booth located at Bombay Airport from which the deceased had allegedly made the call to R2 nor did the police collect details of the phone installed at Sumesh Tripathi's residence; (iii) The prosecution did not make the cousin of deceased a witness in this case, who

allegedly had accompanied the deceased to Bombay Airport to see him off, as he could have deposed about the fact of a telephonic conversation of the deceased with the respondents; (iv) The evidence of PW-5 Ramesh Mehta regarding the fact that deceased had a conversation with Sumesh Tripathi over phone from Bombay airport is merely hearsay, as he himself admitted that his wife Rekha Mehta PW-30 told him about this fact. Whereas the statement of PW-30 Rekha Mehta in this regard has been recorded by the investigating officer as late as 05.12.1990 so as to create the evidence at later stage, despite the fact that PW-30 in her evidence has clearly stated that she stayed in her parents' house situated at Defence Colony, Delhi for almost two months after the demise of her son, and during this period police used to regularly visit their house in respect to this case; (v) that the testimony of PW-5 further reveals that the maternal grand parents and paternal uncle of the deceased used to stay in Delhi at the relevant time, therefore, the deceased could very well have called them to receive him from Delhi airport and there was no need for him to call Sumesh for this purpose.

33. On the basis of evidence on record and in the light of aforesaid arguments, the court is of the view that the only witness examined by prosecution to establish that the deceased did make a call to accused Sumesh Tripathi from Bombay airport and requested the respondent to receive him, is PW-30 Rekha Mehta, who has deposed about this fact. PW-5 Ramesh Mehta also deposed that his wife told him over the phone, that R-2 was to receive the deceased from Delhi airport. Though, the police has recorded the statement of PW-30 belatedly, this information about receiving of deceased by R-2, was given in writing by PW-5 to police as early as 15.09.1990, through his complaint Ex.PW-5/B, and the only source of this information

with PW-5 to get it so recorded was information given to him by PW-30 over phone. Also, as rightly recorded by the learned Trial Court that the parents of the deceased i.e. PW-5 and PW-30 were not having any animosity with the R2 to falsely implicate him in this case and therefore, the recording of this fact in Ex. PW-5/B in his written complaint lodged with the police on 15.05.1990 renders credence to the testimony of PW-30 and PW-5 in this regard. Though there is force in the aforesaid submissions made by the learned counsel on the behalf of respondents and the court is of the view, that the investigating officer could have collected the relevant call details records and could also have examined the cousin of the deceased to further confirm this fact. However, in view of the aforesaid discussion apropos the testimony of PW-5 and PW-30, the court is not inclined to disturb the finding of the learned Trial Court and holds that the respondent Sumesh Tripathi did have knowledge of coming of deceased to Delhi by flight, on the relevant date.

34. On point no.14 (c) above, the learned Trial Court has given its findings in negative, by holding that prosecution could not prove beyond reasonable doubt that car no.DD C 9270 was parked at the parking of Delhi Airport on the intervening night of 13/14.09.1990. To reach the aforesaid findings, the Trial Court has indicated that the main witness PW-22 Vinay Kumar, parking attendant at the relevant time, has not supported the case of prosecution. Moreover, though the specimen handwriting of this witness was obtained during his evidence, but the prosecution has failed to examine any handwriting expert on that aspect and therefore, adverse inference has to be drawn on this count. Further, on its own examination, the Trial Court found that car no. ADI 9240 has been written on the counter foil receipt Ex.PW-

9/A, instead of DDC 9270.

35. The learned Counsel for the appellant/state submitted that the aforesaid finding of Trial Court is perverse by arguing that the Trial Court has erred in applying the legal principles for appreciating the testimony of a hostile witness, whereas the said witness has clearly accepted in his testimony, that in his statement recorded under Section 164 Cr.P.C., car number is indicated as DDC 9270. He further submitted that there was no need to examine any handwriting expert in this case, because the issue was not whether the said relevant counter foil Ex.PW-9/A is in the handwriting of PW-22 or not, as PW-22 himself admitted, that the car number written on Ex.PW-9/A is in his own handwriting only. Moreover, it is also submitted that a mere look at the aforesaid counter foil Ex.PW-9/A indicates very clearly that car no.DDC 9270 has been written on it, instead of ADI 9240 and Trial Court wrongly opined that it is ADI 9240. The Trial Court did not make an endeavour to compare the handwriting on Ex. PW-9/A with the specimen writing Ex. PW-22/C of PW-22, as taken during evidence of PW-22.

36. On the other hand, the learned Counsel for the respondents has submitted that the finding of the Trial Court on the aforesaid aspect is correct and does not require any interference by this court.

37. In this regard, court has examined the evidence of PW-22 Vinay Kumar (parking attendant at the relevant time and who admittedly issued the disputed counter foil receipt Ex.PW-9/A), PW-9 Satya Prakash (Parking Supervisor at the relevant time and from the possession of whose the counter foil ticket book Ex.P-20 having in it the counter foil receipt number C-327029 Ex.PW-9/A was seized), PW-34 Vinod Kumar (Employee in RTO)

and also the counter foil receipt Ex.PW-9/A. There is no dispute over the finding that Car no. DDC 9270, Fiat car belonged at the relevant time, to Dr. Padam Singh, the father of R-3.

38. Regarding the fact of parking of the said car on the intervening night of 13/14.09.1990 at Palam Airport, PW-9 Satya Prakash in his testimony, has clearly deposed about handing over of the counter foil ticket book Ex.P-20 and the said counter foil receipt Ex.PW-9/A to the police and has also stated that there are instructions, that after 12.00 o'clock in the night, the date is to be changed and hence the date 13.09.1990 has been changed to 14.09.1990, because as per counter foil Ex. PW-9/A, the car had come in the parking at 01.50 a.m. Though, PW-22 Vinay Kumar has turned hostile in his testimony before the court. However, on the cross examination on behalf of State, he admitted that *'it is correct that I had stated in my statement before the magistrate that car no. DDC 9270 had arrived in the parking lot about 01.50 AM and I had issued a parking ticket.'* Even the Trial Court at para 13, page 19 of its impugned judgment has noted *"however, this witness (PW-22) further admitted that he has stated before the magistrate that car no.DDC 9270 had arrived in the parking lot at about 1.50 AM and he had issued the parking ticket"*; but then recorded its inference from this statement as - *"In this manner, this witness has only admitted that he had made this statement before the The learned Magistrate. However, this witness has nowhere admitted that as a matter of fact car no.DDC 9720 was parked in the parking of Palam Airport on that night"*. But in view of this court, once the Trial Court acted upon this admission of PW-22, that he had stated before the magistrate that car no. DDC 9270 had arrived in the parking lot at about 1.50 a.m. and he had issued the parking ticket, the only logical conclusion

from the aforesaid fact is that the car was actually parked at Palam Airport on that night. Because it is quite improbable that one would come in the car parking with a car and after taking the parking ticket, he will leave the place without parking the car in the parking.

39. Therefore, the Trial Court has failed to appreciate the evidence on this aspect properly. Though, the witness PW-22 Vinay Kumar has turned hostile, but it is also the settled position of law that the testimony of the hostile witness cannot be disregarded in totality and the part of his testimony, which is corroborated by other prosecution evidence on record can be considered. PW-22 has clearly admitted the correctness of his statement under Section 164 Cr.P.C. given to the Magistrate, wherein he has stated that car no.DDC 9270 arrived in the parking lot at about 01.50 a.m. and he had issued the parking ticket.

40. Further, this court has also independently examined the disputed counter foil receipt Ex.PW-9/A and is of the opinion that DDC 9270 is written on it instead of ADI 9240 (differing with the observation of the Trial Court in this regard). We have even compared the specimen handwriting Ex. PW-22/C of PW-22 (wherein PW-22 was made to write DDC 9270 several time during evidence before the Trial Court) with the handwriting in Ex. PW-9/A. In our opinion, the shapes of letters 'DDC 9270' written in row number 4 of Ex. PW-22/C is quite similar to the car number written on Ex. PW-9/A. In Ex. PW-22/C the perpendicular line of the numeral '7' has a hash sign across it.

41. The learned counsel for the respondents have submitted that there is a cutting in Ex.PW-9/A and by this cut date 13/09 has been replaced by a new date 14/9 and though, PW-22 has admitted the number of car written on this

counter foil as his own handwriting, but he has denied this cutting being done by him and therefore, only to falsely implicate the respondents, the police had tried to create false evidence against them, therefore, this evidence cannot be relied upon. This Court is not persuaded by this argument, because as indicated above, in his testimony, PW-9 Satya Prakash has clarified about this cutting by deposing that there were instructions, whereunder after midnight, the date is required to be changed. Thus, 13/9 has been cut to make it 14/09 because entered the parking at 01.50 a.m.

42. In view of the testimony of PW-9 and PW-22 and on the careful examination of Ex.PW-9/A on its own and also comparing it with the specimen handwriting Ex. PW-22/C, this court is of the view that car no.DDC 9270, which belonged to the father of R-3, had been parked in the parking of palam airport on 14.09.1990 at about 01.50 a.m. Therefore, we reverse the finding of the The learned Trial Court on this aspect as being contrary to record.

43. As regard point no.14 (d), the learned Trial Court has given its finding in the negative.

44. The learned Counsel for the appellant state has assailed the finding of learned Trial Court on this point by arguing that the court erred in not appreciating the testimony of PW-10 Suresh Rehan on this point, in the right perspective. The learned Trial Court rejected his testimony merely by holding this witness as a chance witness, who had approached the police very late to give his statement, and also doubting the testimony of this witness, by saying that no Test Identification Parade was conducted by the police during investigation. However, as per the appellant, this witness was not a chance witness, as he has explained his presence at the airport very

clearly. He further submits that, just because Test Identification Parade was not conducted, it cannot be taken as a ground to reject the credible testimony of this witness, because TIP is essentially an investigating device and identification made by the witness in court, is a substantial piece of evidence. The learned counsel further submitted that the witness has also explained the delay in approaching police for recording of his statement by saying that he was fearful of danger to his life, and the said fact was also got recorded by him in his statement under section 164 Cr.P.C. given to the learned Magistrate.

45. On the other hand, the learned Counsels for the respondents have supported the finding of the Trial Court and submitted that no fault can be found with the said finding as the entire testimony of PW-10 only reveals, that there are various loopholes in his testimony and he could not explain his presence on the airport on the relevant date at all and he is just an implanted witness on behalf of the police, so as to falsely implicate the respondents. It has been further submitted that even going by the version of this witness, he could not be said to have any opportunity to see the respondents at that time and also submitted that the conduct of witness in remembering the full registration number of a car with which he had no concern, but at the same time, not remembering the full registration of any other vehicle, itself raises lots of doubt over the credit-worthiness of this witness.

46. In his testimony, PW-10 Suren Rohan had deposed that he deals in the medicine wholesale and retail business and on 15.09.1990. (Though, in leading questions put by APP to this witness with the permission of the court, he clarified that the statement made by him before the Magistrate that he went to the Palam Airport in the intervening night of 13/14.09.1990, is

correct and attributed this mistake on account of memory lapse due to passage of time), he went to take a parcel of medicines, which was to come by flight no.IC183. He further stated that the flight was delayed and not on schedule and he was standing at the Palam Airport with a tag of his name in his hand, as the person who was to come with parcel did not know him and he also did not know that passenger, who was to bring the parcel for him. While the passengers came out, he saw deceased Rohin Mehta who was a customer of his shop, coming out with a fat boy (As per prosecution, this other fat boy was R-1). PW-10 further stated, that thereafter, as he himself started looking for conveyance, he saw deceased alongwith three other boys (allegedly the respondents) putting luggage in Fiat car no.DDC 9270 in parking space opposite exit gate. He also thought of taking the lift from the deceased (as he knew that deceased was a resident of Rajouri Garden), but by the time he took decision about that, the deceased alongwith the three boys sat in the car and drove away. This witness, could identify only R-2 & R-3 in the Court correctly but could not identify R-1.

47. However, a close look at the entire testimony of this witness, raises many doubts over its credit-worthiness and the reliability of this witness.

48. Firstly, though this witness tried to clarify his chance presence at the Palam Airport on the fateful night by saying that he had gone to collect his parcel of medicines, but he has failed to provide any definite details of the person who was supposed deliver the parcel to him. He also could not tell the number on which he had made the call to Sonia Medicose (Mumbai); PW-10 also stated that he received a telephone call from Mr. Rajesh from Bombay but Mr. Rajesh did not disclose his telephone number; IO also did not collect any call detail record of telephone number of this witness or the

vendor in Mumbai in this regard; police did not even make the vendor (which, as per PW-10, was supposed to dispatch that parcel) as a witness in this case, which could have clarified the that PW-10 was to actually receive any such parcel or not. The presence of this witness at the palam Aiport further becomes doubtful, as admittedly, PW-10 did not receive any parcel from any of the passenger on the said night and no reason whatsoever was given by this witness of not receiving the same. If any such parcel was actually to be delivered to PW-10, but which could not reach on the relevant date, then he must have inquired with the vendor for not dispatching the same. Therefore, this witness could not establish the probability of his presence at Delhi airport on the fateful night.

49. The legal position regarding the appreciation of testimony of chance witness is that, the testimony of a chance witness should not be seen with doubt, if he is able to explain his presence at scene of the crime.

50. Secondly, even if it is considered for the sake of arguments that PW-10 had gone to airport on the fateful night, the further testimony of this witness also does not inspire confidence. As regards, the prior acquaintance of this witness with the deceased, PW-10 has stated that the deceased used to visit his shop for purchasing medicines since 1985. But PW-30 Rekha Mehta (mother of the deceased) has specifically deposed that they have shifted to Bombay in 1985. Though it has also come to fore in the testimony of PW-5 & PW-30 that the deceased used to visit Delhi and reside in his maternal grandparents' house situated at Defence Colony and at times also in his uncle's Rajouri Garden situated house (where PW-10 was allegedly carrying medicine business), but still it makes it improbable that the deceased, very often, would be visiting PW-10's store to purchase medicines. Moreover,

PW-10 has clearly admitted this fact that he neither knows the name and address of the deceased nor any of the family members of the deceased and he only knew the deceased by face.

51. Thirdly, as rightly pointed out by the Trial Court that this witness could remember the car registration number and make of an unknown car (i.e. Fiat car bearing no. DDC 9270, in which the deceased allegedly left with the respondents) with certainty, despite the fact that he had no concern, whatsoever, with the said car. But at the same time, he failed to give correct number of any other vehicle, while going to airport or while coming back from the airport, as also the vehicle number of conveyance by which he had come to court for giving his testimony on the day of recording of his evidence before the Trial Court.

52. Fourthly, as pointed out by the learned counsel for the respondents that this person also did not have any opportunity to see and remember the faces of the respondents, because he had allegedly seen the respondents alongwith deceased while they were putting the luggage in the trunk of the car in the parking and while the witness was standing at the exit gate of airport. So if this witness was facing the front side of the car, then obviously he could not have seen the faces of the respondents, as their faces would have been blocked by the boot compartment of the car. Whereas, if he was facing the backside of the car, then the witness again would not have any opportunity to see the faces of the respondents, because from the back, he would have seen only the back side of the deceased alongwith the respondents. Finally, if he was facing the sideways of the car, then he would have seen the respondents from one side only which would have made it difficult for him to distinctly carve out the physical description of the

respondents in his mind, standing at 20-30 feet away from them at the night time and that too when he had only little time to see them. The Court does find force in the aforesaid arguments advanced on behalf of the respondents.

53. Further the law on test identification parade has been discussed by the Supreme Court in many cases and the legal position emanating from them, relevant for the purpose of this appeal, is that when a witness has no prior acquaintance with the accused persons, then conducting TIP of the accused at the instance of such a witness by police, at the earliest possible opportunity during investigation, is of great significance. The absence of such TIP, of the accused at the instance of such witness, their identification by the witness at a very later stage in the court, at the time of evidence, is of negligible value.

54. In this case also, admittedly PW-10 had no acquaintance with the accused/respondents and allegedly saw them first time only (that too for a very short span of time) at the Palam Airport on the intervening night of 13/14.09.1990, when the deceased was actually leaving with respondents in the car no. DDC 9270. Furthermore, it is also admitted fact that no TIP proceedings were carried out by the police in this case. Therefore, in the absence of TIP proceedings during investigation, the fact of identification of R-2 & R-3 by PW-10, first time in the court during his evidence, does not carry much weight and is liable to be ignored in the facts of the present case.

55. Counsel for appellant state has also argued that TIP was not conducted by IO in this case, because the present case was a sensational one, which received wide media coverage at that time; and by the time, this witness PW-10 came forward to the police to make the statement, the faces of deceased alongwith those of accused were splashed all across the media,

therefore, in such circumstances (when a witness had already seen photographs of the accused person), if an investigating officer decided not to conduct Test Identification Parade, then it can affect the case of prosecution as TIP by such a witness would have hardly been of any use.

56. This court is not persuaded by arguments of the learned counsel for the State, because the reasons for not conducting the TIP proceeding by the police should have come on record in the evidence of prosecution. The reasons sought to be given on behalf of the State, at this stage, without the same being reflected from the evidence on record will not lend any support to the case of prosecution. Moreover, PW-10 in his testimony has clearly stated that he has not seen/met the respondents after the day of incident till he made his statement in the court.

57. Therefore, the testimony of PW-10 does not inspire any confidence as a witness of fact of having last seen the deceased in the company of respondents and the court concurs with the finding of the Trial Court in this regard.

58. In view of the aforesaid discussion, the court finds that the prosecution has been able to prove only the fact that deceased Rohin Mehta, to the knowledge of R-2, had traveled to Delhi from Bombay by flight no. IC 83 on the intervening night of 13/14.09.1990 and also the fact that the Fiat car bearing registration no. DDC 9270, belonging to the father of R-3, had come to the parking of Palam Airport and was parked there at about 01.50 a.m. on 14.09.1990. However, from the facts proved above, no probable/conclusive inference can be drawn that any of the respondents had actually visited to Airport on the fateful night in the above-said car or any other vehicle for that matter, because the prosecution could not establish the

factum of deceased being found with or leaving with any of the respondents from the Delhi Airport on the intervening night of 13/14.09.1990.

59. Therefore, we hold that in the entire chain of circumstances, the prosecution has failed to establish beyond reasonable doubt, a very important link of last seen.

(II) Discovery of various relevant facts on account of various recoveries effected during Investigation

60. As per the prosecution, after the arrest of respondents on 21.09.1990 (though at different times), R-3 made three disclosure statements, two on 21.09.1990 & one on 22.09.1990 and the same were recorded vide disclosure memo Ex. PW-14/B, Ex. PW-14/C and Ex. PW-33/DB respectively. Whereas R-1 & R-2 made their disclosure statements on 22.09.1990 (though at different points of time) which were recorded vide disclosure memo Ex. PW-33/C & Ex. PW-33/DX respectively. It is also the case of prosecution (as is clear from testimony of PW-43 IO SI Inderjeet in this regard) that firstly, all the three disclosure statements of R-3 were recorded, then the disclosure statement of R-1 and at the end, disclosure statement of R-2 was recorded. The evidence led by prosecution on the aspect of recovery may be listed point-wise as follows -

- (i) Recovery of blood-stained earth from the the back seat of Car no. DDC 9240, belonging to father of R-3, on 20.09.1990 seized vide seizure memo Ex. PW-33/A (prior to the arrest of and disclosure by R-3).
- (ii) Recovery of scissors and two pieces of rope at the instance of R-2 from his house at 9, Janpath, New Delhi on 22.09.1990, seized vide recovery memo Ex PW-33/D.
- (iii) Recovery of a screw driver at the instance of R-2 from house no. B-

28, Sheikh Sarai vide seizure memo Ex. PW32/E dated 23.09.1990.

(iv) Recovery of a 5 Ltr. Container from Jaspal Singh (PW-6), at the instance of R-2, seized vide seizure memo Ex. PW-6/A dated 23.09.1990.

(v) Recovery of 5 litre plastic container, at the instance of R-1, from house D-1/81, Ravinder Nagar and recovery of broken pieces of windscreen of the car from the garage, situate nearby the said house. All of which were seized vide seizure memo PW-32/C & PW-32/D respectively.

(vi) Recovery of Visiting cards and shoe uppers, from the Ganda Nala at Lajpat Nagar at the instance of respondent R-1, seized vide Ex. PW-32/A dated 23.09.1990.

(vii) Recovery of Rs. 1,700/- from Aradhna (PW-26) at the instance of R-1, seized vide seizure memo Ex. PW-33/E dated 23.09.1990.

(viii) Recovery of Rs. 15,000/- from Sharad Kapoor (PW-20) at the instance of R-1, seized vide seizure memo Ex. PW-20/A dated 23.09.1990.

(ix) Recovery of Rs. 13,000/- from Pankaj Bakolia (PW-19) at the instance of R-1, seized vide seizure memo Ex. PW-17/A dated 01.10.1990.

(x) Recovery of Rs. 1500/- from Mohan (PW-13) at the instance of R-3, seized vide seizure memo Ex. PW-13/A dated 24.09.1990.

(xi) Recovery of blood-stained car mats, carpets etc, from the shop of PW-11 Qadir, at the instance of R-3, seized vide seizure memo Ex. PW-11/B dated 23.09.1990.

(xii) Pointing out the place opposite to House no. 137 in Rishabh Vihar, at the instance of all respondents, where they had allegedly thrown the suitcase/articles of the deceased and the said pointing out was recorded vide pointing out memo Ex. PW-32/F dated 23.09.1990.

61. The Trial Court has also discussed the evidence related to aforesaid

recoveries, after framing 'Circumstance no. 6, 7 & 8' in this regard and held that the recoveries/seizure made and pointing out memos prepared by the police during investigation does not inspire confidence and are quite unreliable and prosecution has failed to prove aforesaid recoveries beyond reasonable doubt. Therefore, it held that the same cannot be of any help to the prosecution for connecting the respondents with the alleged crime.

62. The learned counsel for the State contended that the learned Trial Court has committed a grave error in doubting the aforesaid recoveries. Firstly, by not appreciating the cogent testimonies of PW-32 Harchet Singh, PW33 SI Om Prakash Singh, PW-43 IO SI Inderjeet Singh and PW-44 Inspector Mehtab Singh as well, other connected pieces of evidence, in proper light. Secondly, the Trial Court has doubted the above-said recoveries, mainly on the ground, that the police did not join any independent public witness, whereas joining of an independent public witness is not a requirement of law. He further contends that the learned Trial Court has failed to appreciate that PW-32 Harchet Singh was an independent public witness & Trial Court fell in error by holding him as an interested witness, just because he had worked under PW-5 Ramesh Mehta (father of the deceased). The learned Counsel further submitted that the Trial Court fell, both in error of fact and law, in rejecting the evidence of pointing out the place in Rishabh Vihar (the place where the respondents have allegedly thrown the suitcase belonging to the deceased after killing him), by the respondents pursuant to their disclosure statement in this regard.

63. On the other hand, the learned counsel for the respondents have made detailed submissions on this point and supported the Trial Court finding in

this regard. They submitted that the prosecution has failed to establish the fact of discovery pursuant to the alleged disclosure statements of the respondents and also submitted that none of the recoveries, nowhere attaches the respondents with the alleged crime.

64. Before dealing the prosecution evidence on the seizure/recoveries effected by police during investigation, it will be pertinent to clarify few legal aspects (pertinent for adjudication of this appeal on merit) regarding the relevancy of discovery of facts under section 27 Indian Evidence Act -

(i) If recovery is made from an open place which is not only accessible, but also visible to the public at large, then such recovery is not relevant. But merely because a recovery is effected from an open and accessible place, which is not visible to the public at large, then it still be relevant.

(ii) Mere discovery of a fact by reason of information by accused is not relevant under section 27. To make the information admissible, it must further be shown by other evidence that the articles discovered were connected with the offence charged and hence points towards the guilt of the accused.

(iii) If the same disclosure is made by several accused persons, then the disclosure by accused which is first in point of time is only relevant.

65. Now in the light of aforesaid legal principles, we will discuss the evidence regarding various recoveries/seizures indicated at point 57 above.

66. Apropos point 60(i) above, as per prosecution case itself, the blood-stained earth was recovered from car no. DDC 9270 (belonging to the father of deceased) on 20.09.1990 itself i.e. prior to any arrest of or disclosure statement to this effect by R-3. Therefore, the same in our view, cannot be held to be a discovery of fact under section 27 Indian Evidence Act and

hence cannot be read against R-3.

67. Even otherwise, the recovery of blood-stained earth does not connect any of the respondents with the alleged crime, because in this regard, the FSL Report Ex. 39/A & Ex. 39/B only indicates that the blood in it was found to be of human origin (the report could not even confirm the blood group); the prosecution has failed to establish, how the report could connect the respondents with the alleged crime.

68. Apropos point 60 (ii) above, the case of prosecution, as contended, is that the deceased was killed by the respondents by strangulating him with a rope; the two pieces of rope which were recovered on 22.09.1990, pursuant to disclosure by R-2 from his house situate at 9, Janpath, New Delhi, are similar to the plastic rope seized from near/underneath the dead body of the deceased on 15.09.1990 and that, this is an important piece of incriminating evidence against the respondents.

69. Without going into the details, whether the said recovery at the instance of R-2 is reliable or not, the Court is of the view that the prosecution has failed to establish, even the first premise that the deceased died due to “strangulation by a rope”. In this regard, the testimony of PW-38 Dr. P. K. Pillai (who conducted the post-mortem of the deceased) and report Ex. PW-38/A exhibited by him is very clear. He had clearly opined that apart from injury no. 1 which was caused by a hard and blunt object, he found injury no. 2 present over the body of deceased, which in his opinion, was caused due to manual strangulation and was ante-mortem and homicidal in nature. Even during cross-examination on the behalf of accused/respondents, he stated that *“I did not find any ligature mark of rope on the neck of the deceased. No rope was forwarded by the police to me. I have not*

given any pathological reason for holding it a case of manual strangulation except the fracture of greater cornoea of hyoid bone which is characterstic of manual strangulation and found rarely in case of either hanging or strangulation by means of a rope or other like material.” Therefore, the opinion of expert in this regard is conclusive that injury no. 2 was caused due to manual strangulation.

70. The learned Counsel for the appellant state raised an argument that the only reason for PW-38 to opine that injury no. 2 was caused due to manual strangulation is that, he found the hyoid bone fractured and which according to him is found rarely in strangulation by means of a rope. He also contends that this opinion is not in tandem with contemporary medical literature, on death by strangulation and various other studies, including the statistics mentioned in Modi's Medical Jurisprudence and Toxicology, indicating that, in sufficient percentage of cases of strangulation by means of a rope, the fracture of hyoid bone was found and such percentage is comparable with the percentage of cases of manual strangulation in which the fracture of hyoid bone was found.

71. However, the Court is not persuaded by the argument of the learned counsel of appellant/state, because notably, during the examination of PW-38, no questions were put on behalf of the State to find reasons for his opinion regarding injury no. 2. Indeed, it is only the respondents who have tried to seek clarification and cogent reasons for the opinion of the said crucial witness. PW-38 was never re-examined on this aspect. So when an expert is examined on behalf of the State, who had the opportunity to observe and examine the deceased body and ascertain the cause of death in detail, and had arrived at a conclusion in the particular facts and

circumstances, then merely referring to the statistics and another possible opinions as per contemporary medical literature, at this stage, will not help the prosecution.

72. Furthermore, PW-38, has specifically deposed that no ligature mark of rope were found on the neck of deceased, which further goes against the hypothesis of strangulation by a rope.

73. Even otherwise, regarding the comparison of pieces of rope seized at the instance of R-2 and the rope found near/underneath the body, there is the FSL report Ex. 42/A on record, which has only indicated that the rope found near the body of the deceased and the pieces of rope recovered from the house of R-2, are found similar in diameter, direction of twists and number of plies, but, physical match was not observed regarding the cut loose ends of these ropes. It further indicates that the pieces of rope (recovered allegedly from the house of R-2) may or may not have been cut by scissors. So the ropes were found similar only on the basis of their physical characteristics but then too, no opinion could be given regarding the cut loose-ends of the rope. Furthermore, there is no dispute regarding the fact that similar ropes are also easily available in the market.

74. Therefore, recovery of rope and scissors, at the instance of R-2, nowhere connects him with the alleged crime. The same does not help the case of prosecution.

75. As regards point 60 (iii) above, it is the prosecution's case that the screwdriver recovered at the instance of R-2, was allegedly used by respondents to break open the suitcases of the deceased. But without going into detailed discussion regarding reliability of this recovery, we are again of the opinion that prosecution has failed to connect the screwdriver with the

alleged crime, because the FSL report Ex. PW-42/A is again very clear on this aspect. It indicates that though the tool marks were found present on two of the recovered suitcases, but no opinion could be given whether the tool marks were caused by the said screwdriver.

76. As far as recoveries mentioned at 60 (iv) and 60 (v) are concerned, these also in no way connect the respondents with crime. The alleged recoveries of cans at the instance of R-1 and R-2, was sought to be proved by the prosecution as the link evidence, to indicate that respondents took some petrol in the can from PW-6 Jaspal Singh, which was used by respondents later on, to burn the body of the deceased. But PW-6 Jaspal Singh, examined by prosecution, had turned totally hostile to proving the factum and allegation of the respondents approaching him on the fateful night, for taking petrol in the can. Apart from the examination of PW-6, there is no material on record which could connect the said recovery of containers, and hence link the respondents with the alleged crime.

77. As far as the recovery of broken pieces of windscreen at this instance of R-1 is concerned, then as per prosecution case only, the same were recovered from an open space which was accessible and visible to the public. Therefore this recovery also loses relevancy on this ground alone. Even otherwise, the mere recovery of broken pieces of windscreen, without any other evidence in this regard, does not connect the respondents with the crime.

78. Apropos to point 60 (vi), as per prosecution, the visiting cards and shoe uppers belonging to the deceased were from the Ganda Nala at Lajpat Nagar, at the instance of respondent R-1 and the same were seized vide Ex. PW-32/A dated 23.09.1990.

79. But one point worth noting here is that, the admitted case of prosecution that all three disclosure statements of R-3 were recorded prior to R-1 and R-2 and just a glance at disclosure statements of R-3 i.e. Ex. PW-14/B, Ex. PW-14/C and Ex. PW-33/DB suggest that R-3 has disclosed very clearly about the throwing of papers belonging to the deceased in the Nala in Lajpat Nagar and the said fact was later on disclosed by other respondents to IO. So when IO has received the information regarding a place of recovery from one of the accused persons (here R-3), then the similar information, if any, given by other accused persons, will be of no use, as the IO cannot rediscover the same fact again. Information about the aforesaid place of recovery has been divulged by R-3, however, the alleged recovery of visiting cards and shoe uppers has been carried out at the instance of R-1. Therefore, in view of the court, the same can not be used against either of them.

80. Even otherwise, the evidence on record suggests that this recovery of visiting cards and shoe uppers took place from an open place, easily visible and accessible to public at large, therefore, the recovery loses relevancy in the eyes of law. In this regard, PW-43 IO SI Inderjeet Singh, himself has admitted during the cross-examination that “the place of recovery in Lajpat Nagar also could be visited by anyone and was open space”, and PW-32 Harchet singh also stated in his cross-examination, that Nala was dry. Further, nothing is indicated in seizure memo Ex. PW-32/A, which may show that the place, from where the recovery was effected, was a concealed spot (as argued on behalf of appellant state).

81. As far as point 60 (vii), (viii), (ix) & (x) are concerned, they relate to the recovery of money effected at the instance of R-1 & R-3 from different persons. The learned Trial Court has found the recoveries as unreliable. The learned counsel for the respondents have also supported this finding of the learned Trial Court on various grounds, such as: (i) that the witnesses from whom the money was seized, turned hostile; (ii) that there are glaring inconsistencies in the deposition of witnesses apropos these recoveries; (iii) the recoveries were being effected without a preceding disclosure and some of these were not at the instance of the respondents; (iv) that the recoveries do not pointing towards the guilt of the respondents; (v) that seized money was never produced in the court; (vi) that Malkhana Moharrir was not examined by prosecution, etc.

82. It may not be necessary for us to deal with all the arguments advanced on behalf of the respondents, which do carry force (some of which have been dealt with and relied by the learned Trial Court also), we propose to examine the only fundamental aspect i.e. whether the prosecution could establish that the said amount of money, allegedly recovered at the instance of respondents, was indeed the proceeds of alleged crime. In other words, we need to look whether the money recovered is same as the deceased was allegedly carrying.

83. The learned counsel for the respondents have submitted that the prosecution has not been able to prove, even the basic fact that the deceased was carrying any sum of money on the fateful night, as indicated in the FIR.

84. While discussing 'Circumstance no. 2' the Trial Court has found the version of prosecution credible that the deceased was carrying an amount of

Rs. 40,000/- with him on the fateful night to the knowledge of R-2. We find that, though a different view on this aspect is possible, looking at the cumulative testimony of prosecution witnesses (particularly PW-5, PW-29, PW-30) & other evidence led on behalf of prosecution; but going by the mandate of law in this regard (as discussed by us in para 9 & 10 above), we, sitting in appeal, are not inclined to disturb the aforesaid finding of learned Trial Court, just because a different view is also possible.

85. Therefore, coming to issue of whether the prosecution could prove that the money, recovered through aforesaid alleged recoveries, is distinctly the same money which the deceased was carrying along with him on the fateful night. In this regard, none of the prosecution witnesses could depose anything, even about the denomination of notes being carried by the deceased. Even the most relevant witness in this regard i.e. PW-30 Rekha Mehta (mother of the deceased, who packed the baggage of deceased) in her examination-in-chief stated that she does not recollect the denomination of the currency or packets which consisted of Rs. 40,000/-. Further, the other relevant witness in this regard, PW-29 Nitin Mehta (brother of the deceased, who allegedly withdrew the money from the bank on 17.07.1990 and as per him, the deceased was carrying the same money with him) did not utter a single word about the denomination of notes. According to the prosecution, as per the disclosure statements of respondents, they found Rs. 40,000/- (in four bundles of Rs. 100/- notes) in the baggage of deceased, which amount was then distributed by them amongst themselves. But in this regard, the amount of Rs. 1,700/- seized from PW-26 Aradhna Dutt vide seizure memo Ex. PW-33/E clearly indicates that the amount consisted of three notes of

Rs. 500/- each and two notes of Rs. 100/- each. Therefore, the alleged disclosure statement of respondent contained different denomination of currency notes, than what was recovered in this recovery and hence this particular recovery is not even matching with the disclosure of the respondent. Further, PW-13 Mohan deposed that R-3 gave him Rs. 1,500/- (Rs. 750/- for him & Rs. 750/- for Bhola) out of which he handed over Rs. 750/- to Bhola and when police came to him along with R-3 to recover the amount he himself gave the entire amount of Rs. 1,500/-, as Bhola was not available then. This fact itself suggests that the money handed over by PW-13 to the police was not the same money which was handed over by R-3 to him.

86. In view of the aforesaid discussion, it can not be said that, the money seized by the police from various persons (allegedly paid by respondents to those persons out of proceeds of crime), was the same money, which the respondents allegedly looted from the deceased. Therefore, the aforesaid recoveries also do not help the case of the prosecution and it in no way connects the respondents with the alleged crime.

87. Apropos to point 60 (xi), it is the case of prosecution that blood stained car mats, carpets etc, were recovered from the shop of PW-11 Qadir at the instance of R-3, seized vide seizure memo Ex. PW-11/B dated 23.09.1990 and the blood found on these carpets, mats, etc., is of same group as that of the deceased (i.e. blood group 'A').

88. After going through the evidence on record, this recovery also does not inspire confidence due to various reasons. Firstly, entries in cash book Ex. P-55 are questionable (in which the entry of car no. DDC 9270 is

indicated at receipt no. 217 dated 18.09.1990) because as per shopkeeper PW-11 Qadir, they do not note down the car number in the cash book in every case, and admittedly, there is cutting in some of the entries and some of the receipts are not even signed by maker thereof. Secondly, PW-11 also stated that they keep all old articles taken out from the cars, at one place and these articles remain mixed up. He further stated that they do not give any separate identification mark for identifying which article was taken out from which car. This testimony of PW-11 reveals that the said mats and carpets were handed over to the police after taking the same out from the place, where all old articles remain mixed up. Thirdly, PW-11 could not identify in the court that the articles (carpets, mats, etc., seized vide seizure memo Ex. PW-11/B) produced in the court as being the same articles which were seized by the police from him. Fourthly, it is quite unbelievable that an accused, after having committed the ghastly act of murdering somebody, will not throw the same away and will allow the blood-stained mats, carpets etc. to be kept by shopkeeper at the time of replacement of the same.

89. Apart from it, the said recovery also does not connect R-3 with the alleged crime as the only connecting link, as per prosecution, is that the blood found on these carpets, mats, etc., is of same group as that of the deceased (i.e. blood group 'A').

90. Without going into the details, whether the prosecution could prove that the blood group of deceased was group 'A' (as contended by learned counsel of the respondents), a look at the CFSL report Ex. PW-39/B, shows the presence of two blood groups on the said carpets and mats i.e. Group 'A' & Group 'AB'. The prosecution failed to render any explanation on record as to whom the blood group 'AB' belonged, as it is not the case of the

prosecution that any of the respondents had that group and any one of them received any injuries in the incident, causing the possibility of two blood groups to appear on these items. Further, the Supreme Court in *Shankarlal Gayarasilal Dixit Vs. State of Maharashtra* (1981) 2 SCC 35 observed as under -

“The discovery of a blood stain of the 'B' Group measuring 0.5 cm. in diameter on the appellant's pant and of a dried stain of semen on his under-pant are circumstances far too feeble to establish that the appellant raped or murdered Sunita. 'B' Group is not an uncommon group of blood and no effort was made to exclude the possibility that the blood of the appellant belonged to the same group”.

91. In view of aforesaid judgment of the Supreme Court, we hold that it was incumbent upon the prosecution, not only to prove that the blood group was of the deceased, but also to rule out the possibility that the said blood group (i.e. blood group 'A') was not of any of the respondents either.

92. The aforesaid recovery is unreliable. The prosecution has failed to establish any connection of the said recovery with the alleged crime.

93. Apropos 60(xii) above, it is the case of prosecution that on 23.09.1990, all the three respondents had jointly pointed out (vide pointing memo Ex. PW-32/F) and led the police, to the place in Rishabh Vihar, where they had thrown the suitcase belonging to the deceased. Interestingly, though nothing could be discovered from that place, because on 14.09.1990 officials from PS Anand Vihar, after receiving a PCR call, had reached to the aforesaid place and seized the suitcase and things inside it under section 66 DP Act. The DD Entry and Seizure memo in this regard are Ex. PW-15/A & PW-15/B. It is also the case of prosecution that on 25.09.1990, the said

suitcase and various articles in it were identified (vide identification memo Ex. PW-5/DB) by PW-5 Ramesh Mehta (father of the deceased) as belonging to the deceased.

94. The learned Trial Court recorded that the pointing out of the place in Rishabh Vihar is of no consequence as the jurisdictional police had already visited the said place.

95. The learned counsel for the State submitted that the learned Trial Court erred on fact, in holding that the police had already visited the place. Whereas the facts on record state that the investigation was being carried out by officials of PS Palam Vihar in this case, however, the said suitcase was seized on 14.09.1990 under section 66 DP Act by officials of PS Anand Vihar. Therefore, till the said place was jointly pointed out by the respondents on 23.09.1990, the police had no information of and had not visited, the said place in relation to investigation in this case. Furthermore, after reaching the spot, on pointing out by the respondents, the police made inquiries from a resident of the area, namely Sandeep (as indicated in pointing out memo Ex. PW-32/F), and the investigating team discovered that officials of PS Anand Vihar had already recovered the article from the said spot; the latter had seized it, without having any information about the present case at that time. The learned counsel also submitted that prior to 23.09.1990, PS Palam Vihar had no information, whatsoever, about the said recovery by PS Anand Vihar. No suggestion was extended to relevant witnesses PW-15 ASI Om Bir Singh and PW-37 Ct Sanjay Singh, on behalf of respondents, that they had shared this information with PS Palam.

96. On the other hand, the learned counsels for the respondents submitted that the learned Trial Court was correct in its reasoning. The fact of pointing

out of the said place or the alleged recovery from there, can not be attributed to the respondents, because, as per the evidence of PW-43, a wireless message was sent across to all the police stations immediately after registration of 'missing person report' Ex. PW-5/B dated 15.09.1990. Therefore, the officials of PS Anand Vihar were evidently aware about this case and they must have shared the information about recovery with PS Palam immediately. They also submitted that the 'pointing out memo' itself is not relevant, unless any recovery is effected pursuant to the disclosure by the accused persons and in this case, admittedly, the recovery had taken prior to the disclosure by PS Anand Vihar. Therefore, same facts can not be discovered again by PS Palam Vihar. They further contended that the prosecution has failed even to prove that the articles recovered from the said place, actually belonged to the deceased, as the identification by and testimony of PW-5-the father regarding it are not reliable. Furthermore, the police has not recorded the statement of PW-30-the mother, who could have been the best person to identify the same during investigation.

97. Rebutting the said arguments, the appellant contends that if recovery is made by officials of different police jurisdictions, without any such information being divulged to each other, by which the disclosure statement is recorded, then the place discovered by the investigating team of a different police station on the basis of pointing out memo of the accused persons remains relevant under section 27 Indian Evidence Act. Reliance was placed on the judgment of Supreme Court in the case of *Chandra Swami Vs State of Gujrat* (2017) 7 SCC 177. The appellant further contended that irrespective of relevancy under section 27 Indian Evidence, such fact of pointing out of the place still remains relevant under section 8 of

Indian Evidence Act apropos the conduct of the respondents. Reference was made to the judgment of the Supreme Court in *State (N.C.T. Of Delhi) vs Navjot Sandhu@ Afsan Guru*, decided on 4 August, 2005 and *Himachal Pradesh Administration vs Shri Om Prakash*, decided on 7 December, 1971.

98. We have examined the evidence on record, it indicates various discrepancies.

99. Firstly, the said pointing out memo Ex. PW-32/F dated 23.09.1990 is said to have been prepared at the instance of all the respondents; PW-43 IO SI Indrajeet Singh and PW-33 SI Om Prakash have unequivocally submitted that the said place in Rishabh Vihar was pointed out by all the respondents jointly, but a perusal of pointing out memo Ex. PW-32/F dated 23.09.1990 shows only the signature of respondent No. 1 on it; there is no explanation, on record, as to why, when all the respondents were present at the spot and the place was also pointed out by them jointly, the signatures of only respondent No. 1 were obtained. Though there is no mandate of law that the disclosure or pointing out memo should be signed by the accused/respondent, but in present case when the signatures of one of the respondents were obtained, while all of the respondents were allegedly present at the spot, then not obtaining the signatures of other respondents raises doubt over the authenticity of such proceedings.

100. Secondly, no public witness was joined by the Investigating Officer for preparation of said pointing out memo Ex. PW-32/F. In this regard, PW-33 SI Om Prakash, PW-43 IO SI Indrajeet Singh and PW-44 Mehtab Singh have clearly stated in his cross-examination that no public persons were joined at the time of any recovery from any of the accused/respondents, while not disputing the presence of public witnesses at the spot. In the

present case, it is indicated in the pointing out memo Ex. PW-32/F itself, that police enquired about the suitcase and other articles, from resident of House No. 137, Rishabh Vihar viz. Mr. Sandeep Kumar, who told the police that the same had already been taken away by PS Anand Vihar. Therefore, though the police made enquiries from said witness Mr. Sandeep Kumar but still, he was not made a witness to the seizure memo. He was examined as a witness by the prosecution.

101. Though the learned counsel for the State has argued that there is no requirement of law as far as joining of public witnesses at the time of recovery is concerned. In support of this argument, he relies upon the judgment of the Supreme Court in *State vs. Sunil* (2001) 1 SCC 652.

102. It is settled law that though recoveries effected only at the instance of police officials, without joining any witness from public, cannot be looked upon with suspicion, but in such cases, the police officials must explain why the witnesses from the public were not joined i.e. whether the witnesses were not available or despite efforts of the IO to join public witnesses, none was willing to join the proceedings, out of fear.

103. The records do not reveal that the IO made any efforts, whatsoever, to join any public witness in the recovery proceedings. Nor is there any explanation, on record, for not joining the public witnesses, despite the fact that there were many public witnesses available at the spot at the time of preparing the said pointing out memo Ex. PW-32/F.

104. Further, PW-15 ASI Ombir has stated in his evidence that after receiving a PCR call, they proceeded to the place in Rishabh Vihar and effected, the recovery of suit case and other articles therefrom and seized the same vide seizure memo Ex. PW-15/A. The seized articles were deposited

with In-charge of Malkhana Moharrir at PS Anand Vihar along with original recovery memo. In this regard, PW-5 Ramesh Mehta has also stated that when on 25.09.1990, he had gone to PS Palam Vihar to inquire about further progress in this case, he was taken to the Malkhana and there he was asked to identify the suitcase and other articles belonging to the deceased, he identified the three suitcases lying there, as belonging to his deceased son (vide identification memo Ex. PW-5/DB). It is also the case of prosecution that before 23.09.1990, PS Palam Vihar had no information about the seizure of the said suitcase at the instance of PS Anand Vihar.

105. Therefore, as per the case of prosecution, officials of PS Palam Vihar must have visited PS Anand Vihar between 23.09.1990 to 25.09.1990 to collect the said articles, because admittedly, the PW-5 had identified the said articles in PS Palam Vihar on 25.09.1990 vide identification Memo PW-5/B and before 23.09.1990, PS Palam Vihar had no information about the said articles.

106. Now, in this context, PW-33 SI Om Prakash has stated during his examination-in-chief that after preparation of pointing out memo Ex. PW-32/F on 23.09.1990 and after recording of the statement of Sandeep, they went to PS Anand Vihar, but Malkhana Moharrir was not present there, therefore, they went to place of occurrence. Whereas PW-44 Mehtab Singh, during his cross-examination had clearly stated that, on 23.09.1990, he had not gone to PS Anand Vihar and also did not depute anyone to go there. It is also admitted by him that he took over the investigation of the present case from 24.09.1990 till 06.10.1990. Therefore, there is clear contradiction between the statement of PW-33 and PW-44 as far as visiting to PS Anand Vihar is concerned. Furthermore, none of the prosecution witnesses

including PW-43 IO Indrajeet Singh, PW-44 Mehtab Singh and PW-33 SI Om Prakash, have said a word about the fact, that how the said articles lying in Malkhana of PS Anand Vihar had been brought to PS Palam Vihar. In this regard, PW-15 ASI Om Bir Singh has only stated that SI Indrajeet Singh from PS Palam Vihar had come to PS Anand Vihar and recorded his statement. He further stated that he also handed over the copy of seizure memo and DD entry recorded by him in respect to the aforesaid articles. But this witness also did not whisper anything about the handing over of the said articles to PS Palam Vihar. This mystery remains unsolved.

107. Therefore, a vital link is missing as to how the property seized by PS Anand Vihar has come to PS Palam Vihar. The prosecution has not examined even the Malkhana Moharrir of PS Anand Vihar, who could have given some explanation in this regard. Interestingly, even the identification memo PW-5/DB dated 25.09.1990, mentions about the identification of three suitcases only, by PW-5 Ramesh Mehta. There is nothing in the said identification memo, that PW-5 or any other witness identified any other article except the three suitcases; whereas there is a long list of articles seized by PS Anand Vihar vide seizure memo Ex. PW-15/A dated 14.09.1990, allegedly from Rishabh Vihar. All these articles were produced from PS Palam Vihar during the evidence before Trial Court. The sequence of event raises a strong doubt over as whether any of the articles were seized by PS Anand Vihar and if at all the same were seized, then when were the articles handed over to PS Palam Vihar. Furthermore, as discussed hereinabove, it is doubtful whether prior to 23.09.1990, PS Palam Vihar did not have any information about the said seizure of articles at the instance of PS Anand Vihar and whether the officials of PS Palam Vihar could come to

know about this fact only from the resident Mr. Sandeep, found on the spot on 23.09.1990.

108. As stated above, the said witness Sandeep Kumar (mentioned in Pointing out memo Ex. PW-32/F and who told the officers of PS Palam Vihar that the articles had already been taken away by PS Anand Vihar) was never examined as a prosecution witness, who could have deposed about his telling the officials of PS Palam Vihar about this fact and how he came to know that the said articles had already been seized by PS Anand Vihar. Further, as discussed, neither the Malkhana Moharrir of PS Anand Vihar nor the Malkhana Moharrir of PS Palam vihar were examined, who could have deposed about when the said articles were exchanged amongst both police stations and could have proved the relevant entries of Malkhan registers in this regard (which would have been very relevant to prove the factum of seizure by PS Anand Vihar as also the fact that the information was not shared with PS Palam Vihar before 23.09.1990, atleast as per written available record). Therefore, an adverse inference has to be raised against prosecution under section 114 of Indian Evidence Act, for withholding the best piece of evidence in this regard.

109. Furthermore, prosecution has examined PW-5 & PW-30 so as to establish the identity of the said articles in the court, as the belonging of the deceased. But in this context, PW-5 in his examination-in-chief has identified before the court only some of the articles seized vide seizure memo PW-15/A and in respect of some articles, he has only stated that these articles are the same which he has seen in PS Palam Vihar on 25.09.1990 and did not state anything that the same were in any way connected with the deceased. Also, as stated above, the identification memo Ex. PW-5/DB

dated 25.09.1990 in this regard mentions the factum of identification of only three suitcases and not of any articles or personal belongings of the deceased by PW- 5 Ramesh Mehta at PS Palam Vihar on 25.09.1990.

110. In view of the aforesaid discussion, the prosecution has failed to establish the relevance of this pointing out memo. There are evident discrepancies in the prosecution's case. Firstly, over the alleged seizure at the instance of PS Anand Vihar. Secondly, on the factum non-sharing of information with PS Palam Vihar before 23.09.1990. Thirdly, over the details of exchange of articles between these two police station. Lastly, apropos the identification of the articles as belonging to the deceased and hence, the alleged crime by the respondents.

111. Therefore, no reliance can be placed upon the said pointing out memo Ex. PW-32/F and alleged recoveries made by PS Anand Vihar. Since we have found this piece of evidence as unreliable in the particular facts and circumstances of the case, we do not consider it necessary to deal with the argument on point of law, advanced by the counsel of the State, that such pointing out memos are relevant u/s 27 r/w section 8 of Indian Evidence Act.

(III) & (IV) MOTIVE AND CONSPIRACY

112. It is the case of the prosecution that the respondents indulged in a criminal conspiracy to murder the deceased with the purpose to loot the hefty amount, that was being carried by the deceased on the fateful night. The learned counsel for the State has also submitted that the knowledge of respondent no.2 about the fact, that deceased is carrying a lot of money with him, had induced him to indulge in conspiracy with his friends respondent nos. 1 and 3 and after hatching the said conspiracy, all three respondents went to the airport in the car of respondent no. 3. The fact of the car

belonging to respondent no. 3, being parked at the airport on the fateful night, as also the last seen evidence given by PW10, stating therein that, the deceased was leaving from the airport in the said car in the company of respondents and, thereafter the facts of disclosure statements made by the respondents coupled with the recoveries effected thereafter fully establishes the fact of conspiracy and motive in this case.

113. On the other hand, the learned counsel on behalf of the respondents have submitted that prosecution has failed to establish any link of the alleged crime with the respondents; further the prosecution has failed to establish any link amongst the respondents and, therefore, the motive and conspiracy as imputed by the prosecution have not been proved beyond reasonable doubt.

114. It is clear proposition of law that motive is required to be proved like any other fact and in any case based on circumstantial evidence, motive becomes very relevant factor in supplying the missing link. But it is also a settled position of law that the conviction cannot be based solely on the basis of motive, if other incriminating circumstances are not proved.

115. In view of the arguments advanced and the facts on record, we find that the motive to loot money, as imputed by the prosecution upon the respondents, is not convincing, because *inter alia*, admittedly all the respondents belonged to reputed and economically well-off families. Albeit that in itself may not be the exclusive reason. Furthermore, the prosecution has failed to establish anything by leading positive evidence on the point, which could point out that the respondents were in an urgent need of money at the time of alleged incident or otherwise in the habit of looting people for

money.

116. Furthermore, as far as conspiracy between the respondents to commit the alleged crime is concerned, the prosecution has failed to prove any circumstances which may indicate such conspiracy amongst the respondents to carry out such heinous crime. Though it is also true that the direct evidence of conspiracy is never possible, because the conspiracies are always hatched in secrecy, but in the present case the IO has not collected the evidence which could have been relevant for pointing towards conspiracy. Because the disclosure statements of the respondents are on record and in these statements, it is indicated that respondent no. 2 received a telephone call from deceased at about 10.00 pm on 13.9.1990 and came to know about the factum of coming of deceased to Delhi with lots of money, and at that time respondent no.1 was also present there. Then respondent no. 2 rang up respondent no. 3 and asked him to come at his house, and at the house of respondent no. 2 they made a plan to murder the deceased for looting his money. Despite this disclosure, the IO had made no attempt to collect the call detail record of telephone numbers installed at the house of respondent nos. 2 and 3, which could have pointed out towards the truth of statements contained in disclosures of the accused and could have supplied an important missing link in establishing some connection amongst the respondents.

117. As concluded hereinabove, the prosecution has failed to prove the last seen evidence, and of all the recoveries effected at the instance of respondents, therefore, no inference can be drawn that respondents were quite hand in glove and had any pre-meditated plan to loot and kill the

deceased. Also, in absence of any other evidence, the disclosure statements (confessional in nature), in themselves, are not admissible in evidence, for the purpose of proving any meeting of mind or conspiracy between respondents, due to the bar against self-incriminatory confessions or statements made to police officials in sections 25 and 26 of Indian Evidence Act (as rightly held by the learned Trial Court, while dealing with 'Circumstance 5').

118. Therefore, we find that the prosecution has failed to impute any motive or establish any criminal conspiracy between the respondents. We do not find any reason to interfere with the impugned judgment. The appeal is without merit and is, accordingly, dismissed.

NAJMI WAZIRI, J

SIDDHARTH MRIDUL, J

NOVEMBER 13, 2019