

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

% Judgment Reserved On: 07.08.2019
Judgment Pronounced On: 23.10.2019

+ CRL.A. 1317/2015

AARTI Appellant
Through: Mr.Joginder Tuli, Ms.Joshini
Tuli and Ms.Divya Jangid,
Advocates.

versus

STATE Respondent
Through: Mr.Ashish Dutta, APP for the
State.

AND

+ CRL.A. 351/2015

RISHI KUMAR BHATI Appellant
Through: Mr.K.D.Pandey, Advocate.

versus

STATE Respondent
Through: Mr.Ashish Dutta, APP for the
State.

AND

+ CRL.A. 762/2015

PARVEEN @ KALLU Appellant
Through: Mr.K.Singhal, Ms.Heena
Tangi and Mr.Nitish Mittal,
Advocates.

versus

STATE Respondent
Through: Mr.Ashish Dutta, APP for the
State.

AND

+ CRL.A. 497/2015

SUMIT KUMAR Appellant

Through: Mr.Jaideep Malik and
Mr.Avinash Kapoor,
Advocates.

versus

STATE NCT OF DELHI Respondent

Through: Mr.Ashish Dutta, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE BRIJESH SETHI

J U D G M E N T

BRIJESH SETHI, J

1. Vide this judgment, we shall dispose of all the appeals bearing nos. **CRL.A. 1317/2015, CRL.A. 351/2015, CRL.A. 762/2015 & CRL.A. 497/2015** as these arise out of the same judgment of Learned Trial Court in FIR No.20/2011, registered under Sections 302/120-B read with Section 34 of the Indian Penal Code (hereinafter referred to as 'IPC') and under Section 25/54/59 Arm Act.

2. The present appeals have been filed under Section 374 (2) of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') assailing the judgment dated 28.01.2015 and order on sentence dated 19.02.2015 passed by the learned Additional Sessions Judge-02, South District, Saket Courts, New Delhi, in Sessions Case

No.27/2011, arising out of FIR No.20/2011, registered under Sections 302/120-B/34 IPC and under Section 25/54/59 Arms Act at Police Station Neb Sarai, whereby all the appellants have been held guilty under Section 302/120-B IPC.

3. Vide the order on sentence dated 19.02.2015, all the appellants have been sentenced to rigorous imprisonment for life. Convicts Aarti and Rishi Kumar Bhati were further sentenced to pay a sum of Rs. 20,000/- as fine, in default of which they were directed to further undergo simple imprisonment for a period of six months whereas appellants Praveen @ Kalu and Sumit were also sentenced to pay a sum of Rs. 10,000/- as fine, in default, they were directed to further undergo simple imprisonment for a period of six months.

4. Before the rival submissions of learned counsels for the parties can be considered, we deem it appropriate to outline the case of the prosecution as discussed by learned Trial Court and it reads as under:-

“Statement of Dalbir Singh led to the registration of the FIR under section 302 IPC. The crux of the complaint lodged was that on 03.02.2011 at about 10.30pm while members of the extended family of Dalbir Singh were coming back home after attending a marriage function in the vicinity of their residence at Raju

Park, Devli, Khanpur, Delhi, nephew of Dalbir namely Narender @ Naveen, son of Dayal Singh was shot dead by some unknown persons. Assailants had shot Naveen on his head from nearly a point blank range. The victim Naveen was taken to the hospital by the complainant Dalbir Singh in his Maruti van, but the victim Naveen could not be saved, where he was declared brought dead.

The investigations in the matter brought in the role of Aarti, wife of the deceased Naveen into the incident which led to the apprehension and arrest of other co-accused persons namely Rishi, Praveen @ Kalu and Sumit. The investigating agency pieced together the information, evidence and came to the conclusion that the murder was the result of a criminal conspiracy hatched primarily by Rishi and Aarti, who in turn, engaged other two i.e. Sumit and Praveen to carry out the execution of the conspiracy by shooting Naveen dead against a consideration / promise of Rs.3 Lacs. Chargesheet, containing the details of the investigation carried out by police was filed in respect of the accused persons Sumit, Rishi and Praveen under section 302/34 IPC and under section 25 of the Arms Act and qua accused Aarti Rawat under Section 120B IPC. After committal of the case to the court of sessions, accused persons were charged under section 120B and 302 IPC on the basis of evidence gathered by the investigating agency. All four accused persons pleaded not guilty and claimed trial to the charges framed against them respectively.

Before proceeding further a brief narration of the indispensable facts emerged during the investigation and trial, is required. The victim Naveen and accused Aarti were married but their married life was not smooth. It seems that Aarti was not able to reconcile with the

relationship and was suspected to be involved into extra marital affair(s). Her conduct was objected by her husband and as a result of the same, she had to leave her job in a Call Centre and thereafter from the Khajani Institute, too where she had started working, due to some financial misappropriation. She again took up a job at HCL in NOIDA and to go there she used to take a bus early in the morning for NOIDA, which was plying on the route No. 34. She used to take a particular bus every day as that suited her schedule. The bus belonged to one of the co-accused Rishi Bhati, who was not only the owner of the bus but was taking care as conductor also. The regular travel led to interaction between Rishi Bhati and Aarti and thereafter an amorous relationship developed. According to the case of the prosecution the accused Rishi provided a SIM card and separate mobile phone instrument to accused Aarti, which was being used by Aarti to maintain the liaison with Rishi Bhati. Philanderings of Rishi with Aarti somehow came to the knowledge of the husband Aarti, that is the deceased Naveen. Obviously, as any husband would have objected such behavior so was done by Naveen. However, Rishi and Aarti were so blindly and passionately involved with each other that they thought it fit to have the husband of Aarti eliminated. That is how the conspiracy took birth. Accused Rishi then roped in the services of Praveen @ Kalu, who was approached to carry out the execution against a consideration of Rs.3 Lacs, who in turn associated Sumit too. Accused Rishi informed all these things to Aarti but stated that a sum of Rs.5 Lacs would be required to execute this plan. Aarti agreed to provide the money after 20 days of the execution and also stated that she would tell the right time to carry out or execute the plan.

What has been in the knowledge of some of the family members of the deceased viz-a-viz the strained relations between Aarti and her husband Naveen came to the notice of the IO. This angle was probed which provided clues and that led to the apprehension of Rishi, who spilled the beans and the entire conspiracy was unearthed. The call detail report provided the clue to this and recovery of two mobile instruments from Aarti further brought credence to the theory of conspiracy and involvement of Aarti and Rishi. Thereafter, one after the other all the accused persons were arrested and police was able to recover the weapon of offence i.e. a country made pistol from accused Praveen @ Kalu, who then led to the apprehension and arrest of accused Sumit, who had provided the vehicle i.e. Maruti car to come and escape from the scene.

5. Aggrieved by the impugned Judgment dated 28.01.2015 and order on sentence dated 19.02.2015, all the appellants preferred their respective appeals on the following grounds:-

Common arguments made on behalf of all the appellants:-

6. It is argued by learned Counsels for the appellants that Ld. Trial Court has failed to appreciate that the witnesses cited by the police in the present case are the family members of the deceased who apparently had strained relations with the appellant Aarti and had motive to implicate her in the present false case. They were

interested witnesses and there are material contradictions in their testimonies and taking all these cumulatively, it can be inferred that the story as floated by PW-1, PW-2 and PW-6 and other family members is unreliable and untrustworthy and appellants have been nailed to save real culprit.

7. It is next argued that PW-6 Dayal Singh is a concocted witness as his presence at the spot is doubtful. PW-1 Savitri (Aunt of deceased) is silent about presence of Sh. Dayal Singh at the spot though she has named other members of the family who were present at the spot. Sequence of events given by PW6 Dayal Singh, contradicts his own version and shows his blatant lies. He has made vital improvements and there are inconsistencies and contradictions in his testimony which makes him an unreliable and untrustworthy witness.

8. It is further argued that there are many discrepancies in the testimony of PW-6 Sh. Dayal Singh. According to him, he was behind the other family members and he allegedly reached at the spot after some time. He was at a distance of about 60 feet from the shooting place. It is contended that it is not possible that the other

family members who were allegedly walking with the deceased had only heard the voice of crackers/Dhamaka and had not seen the assailants but an old man of around 60 years, who was sixty feet away from the spot, had seen all the assailants/appellants.

9. It is next argued that the Ld. Trial Court has failed to appreciate that according to the first information, allegedly delivered by brother of deceased namely Sh. Praveen Singh, some biker had killed his brother and that information was recorded vide DD no.37A dated 03.02.2011 at the P.S. Neb Sarai but the police during investigation seized the car instead of motorcycle and apprehended the other co-appellants namely Praveen @ Kalu and Sumit Kumar on the allegation of using the said car in the commission of the alleged murder. It is further argued that prosecution has not mentioned the name of brother of deceased i.e. Sh. Parveen in the array of list of witnesses, consequently he was not examined for the reason that prosecution knew the fact that under the given circumstances, the prosecution will not be able to prove the case against the accused persons beyond reasonable doubt and to fulfil this lacuna, the prosecution has planted PW6 Dayal Singh alleging

him to be an eyewitness. The Ld. Trial Court has failed to consider the fact that Praveen (Brother of deceased Naveen, who is also known by the name of Navender) was not cited as a witness, hence the prosecution version is doubtful from the day one.

10. It is further argued that the Ld. Trial Court has failed to appreciate that the present case is based on the CDRs of the mobile phones allegedly used by the accused persons/appellants before and at the time of alleged incident but the same have not been proved in accordance with law and, therefore, cannot be relied upon. According to prosecution, appellants were arrested on 06.02.2011 whereas according to the Nodal Officer, the CDR was given to the police on 10.02.2011. Moreover, no certificate under section 65B of the Evidence Act is on record regarding the location chart of the phones of the accused persons which is a mandatory requirement of the law before such charts could be read in evidence. It is further argued that CDR may be used to corroborate other evidence appearing on record or to complete a sequence of chain of evidence of crime but cannot be used as a conclusive evidence.

11. It is further argued that the Ld. Trial Court has failed to appreciate the law on admissibility of electronic evidence in light of section 65B of the Indian Evidence Act and has incorrectly placed reliance on *Navjot Sandhu's* case which has been expressly overruled recently, by a three-judge Bench of the Supreme Court in case reported as *Anvar P.V. v. P.K. Basheer (2014) 10 SCC 473*).

12. It is further argued that learned Trial Court has failed to appreciate the fact that no independent eye-witness of the alleged incident was examined despite the fact that a large number of public persons had gathered at the spot after the incident and only selective family members were made witnesses. It is further argued that even there is no public witness either at the time of the alleged arrest of appellant or at the time of recovery of country made pistol from the possession of the appellant Parveen @ Kale. Though appellant Parveen was arrested from a densely populated area yet no independent witness was called before or after arrest of the appellant.

Submissions made on behalf of appellant Aarti:-

13. Apart from the above common arguments, addressed by all the learned defence counsels, it is further argued by learned counsel for the appellant Aarti that learned Trial Court has failed to appreciate the fact that PW-6 Dayal Singh has furnished car number as '5363' driven by assailants in his deposition before the court but he did not give this number to the police. PW-1 and PW-2 who were also allegedly present at the spot at the time of incident, did not disclose number of the offending vehicle. Moreover, this number was given only on 08.02.2011, i.e., after 5/6 days of occurrence and has not been stated by any other family member who claim to be present at the spot at the time of incident.

14. It is further argued that the PW-6 has nowhere stated that the appellant Aarti was employed anywhere or she had strained relations with her husband or that she had any illicit relations with co-accused/appellant. It is further argued that if the deceased husband had come to know about alleged illicit relationship, this fact would have been known to PW-1 Smt Savitri (Aunt of deceased), PW-2 Sh. Dalbir Singh (uncle of deceased) and PW-6 Sh. Dayal Singh (father of deceased) and they would have expressed

their suspicion about her involvement without any delay. There is no reliable evidence of illicit relations of appellant Aarti with co-appellant Rishi.

15. It is further argued that the arrest memo of appellant also has various discrepancies. Initially her place of arrest was shown as PS Neb Sarai but later on it was changed to A-113, Devli Road, Khanpur, Delhi. Hence the arrest memo has been tampered with.

16. It is further argued that Ld. Trial Court has erred in not appreciating the fact that as per MLC, the time of alleged incident is mentioned as 10:30 p.m. whereas the first information report was given to PCR at 11:05 p.m. The injured/deceased had already reached Batra Hospital at 10:45 p.m. and giving the information of the incident after about 35-45 minutes shows that information was given to the PCR after everything was manipulated by the family members.

17. It is further argued that there might be phone conversations between appellant Aarti and Rishi Kumar Bhati from mobile no. 9711381995 (registered in the name of Aarti) and mobile no. 9899703677 (registered in the name of Rishi) and mobile no.

9711841072 (registered in the name of Rishi Kumar Bhati) on or prior to the date of incident but no conversation had taken place after the incident between appellant Aarti and Rishi Kumar Bhati. Moreover, from such conversation alone, it cannot be inferred that appellant Aarti had entered into a conspiracy to kill her husband Naveen. Apart from telephonic conversation, no other evidence was adduced by the prosecution to prove the fact that the appellant Aarti hatched conspiracy with the co-appellant. Moreover, the SIM of mobile no. 9899703677 (registered in the name of Rishi Kumar Bhati) which was allegedly used by the appellant Aarti to talk to co-accused Rishi Kumar Bhati was not recovered by the police. There is no material on record to show that appellant Aarti was aware of the conspiracy hatched by the appellant Rishi Kumar Bhati with co-appellant Praveen @ Kalu and Sumit Kumar to murder deceased Naveen. It is also argued that there is no material on record against the appellant Aarti that she has paid any consideration to the co-accused persons/appellants to eliminate the deceased.

Case laws relied upon by learned counsel for appellant Aarti.

- 1) *S.Arul Raja vs. State of Tamil Nadu*, (2010) 8 SCC 233);

- 2) *Saju vs. State of Kerala* (MANU/SC/0688/2000: AIR 2001 SC 175);
- 3) *Kiriti Pal & Ors. vs. State of West Bengal* (MANU/SC/0549/2015: (2015) 11 SCC 178);
- 4) *Bimla vs. State (NCT) of Delhi*, MANU/DE/6662/2011

Submissions made on behalf of appellant Rishi Kumar Bhati:-

18. Apart from the arguments, as referred earlier, it is also argued by learned counsel for appellant Rishi Kumar Bhati that learned Trial Court has failed to appreciate the fact that in order to connect the appellant Rishi with co-convict Praveen, the police has seized phone number 9718975053 but said phone is in the name of one Smt. Savadesh W/o Sh. Dude Ram and there is no evidence on record to show that said mobile phone was, in any manner, related to the appellant Praveen @ Kalu, nor the said customer or any other person was examined as a witness to prove the fact that the said mobile phone was being used by accused Praveen @ Kalu at the time of alleged incident.

19. There is no link evidence between the appellant Rishi and co-accused Parveen @ Kallu. Thus, the prosecution has failed to prove the alleged conspiracy beyond reasonable doubt. The chain of

conspiracy should be proved from the beginning to the end and if the said chain is missing at any point then same cannot be considered as proved as per law.

Case laws relied upon by learned counsel for appellant Rishi Kumar Bhati.

Deepak Sarna vs. State(NCT of Delhi) MANU/DE/3947/2018.

Submissions made on behalf of appellant Praveen @ Kalu:-

20. Apart from the above arguments, it is further argued by learned Counsel for the appellant Praveen @ Kalu that learned Trial Court has failed to appreciate the fact that IO of the case deposed that the site plan was prepared at the instance of PW6 Dayal Singh, whereas PW-6 has categorically denied about preparation of site plan at his instance or in his presence.

21. It is next argued that it is a rule of law that refusal of an accused to participate in TIP can be read against him but where accused has been shown to the witness in the police station and in the court, no purpose is served by participating in TIP and, therefore, no adverse inference can be drawn against the appellant.

22. It is next argued that bullet allegedly recovered from the body of deceased was not proved as the same was not put before doctor who conducted Postmortem. Further, the bullet was also not sent for biological examination to detect blood and to further match it with the blood of the deceased to rule out the possibility of any foul play.

23. It is next argued by learned counsel that CDRs of Mobile Number 9718975053 do not show the location of appellant at the place of incident.

Case laws relied upon by learned counsel for appellant Praveen @ Kalu.

- 1) State of Punjab vs. Sucha Singh & Ors. (2003) 3 SCC 153;
- 2) Lallu Manjhi and Anr. vs. State of Uttrakhand, (2003) 2 SCC 401;
- 3) Govindaraju @ Govinda vs. State, (2012) 4 SCC 722;
- 4) Musheer Khan @ Badshah Khan & Anr. Vs. State of Madhya Pradesh, (2010) 2 SCC 748;
- 5) State vs. Saravanan & Anr., (2008) 17 SCC 587;
- 6) State of Rajasthan vs. Rajendra Singh, (2009) 11 SCC 106;
- 7) State-Represented by Insp. of Police, Tamil Nadu vs. Sait @ Krishnakumar, (2008) 15 SCC 440;
- 8) Mukesh vs. State, Crl.A No. 102/2013;
- 9) Gagan vs. State, Crl.A. No. 1062/2011.

Submissions made on behalf of appellant Sumit Kumar:-

24. Apart from the above arguments, it is further argued by learned Counsel for the appellant Sumit Kumar that learned Trial Court has failed to prove any involvement of appellant Sumit Kumar in killing of the victim Naveen. His vehicle is, however, falsely shown to be involved.

25. It is further argued that prosecution has failed to prove any motive on the part of appellant Sumit in commission of the offence. There is no evidence to connect him with the crime as all the facts of the case points towards alleged involvement of Aarti, Rishi Kumar Bhati and Praveen @ Kalu. The prosecution has wrongly shown the recovery of vehicle at the instance of appellant Sumit.

26. *Per contra*, learned APP for the State submitted that the state has proved its case beyond reasonable doubt. There is no infirmity or illegality in the impugned judgment passed by the learned Trial Court and no interference is required by this Court. Prosecution has proved commission of the offence with the testimonies of reliable witnesses, medical as well as forensic evidence. It was further submitted that postmortem report and FSL report stands corroborated by the deposition of eye witnesses and the witnesses

have given a consistent version of the incident and rightly deposed about the manner in which offence was committed by all the appellants. He has further submitted that the statement of witnesses remained uncontroverted and they fully supported the case of the prosecution from all four corners. It is next submitted that presence of the appellant Rishi Kumar Bhati, Praveen @ Kalu and Sumit has been clearly proved on record. PW-6 Sh. Dayal Singh, father of the deceased, has deposed each and every fact and has given details of the entire sequence of event. The CDRs have duly proved the connection of all the appellants with each other. The disclosure statements of appellants and recovery of weapon and vehicle used in the crime proves the prosecution version beyond reasonable doubt. It is lastly submitted that since, the prosecution has proved its case beyond reasonable doubt, the present appeals be dismissed and the judgment of learned Trial Court be upheld.

27. We have heard learned counsels for both the parties and considered their rival submissions, carefully examined the testimonies of the witnesses on record and the impugned judgment given by the learned Trial Court.

28. All the appellants have been convicted for the offence punishable under Section 302/120B IPC. Let this court now examine the fact whether learned Trial Court has rightly convicted all the four appellants for the offence charged and the prosecution has proved its case with the help of ocular and trustworthy evidence. Let this court first examine the evidence and other material available on record and the findings of learned Trial Court.

29. The first argument addressed by all the learned counsels for the appellants is that PW-6 Dayal Singh is not an eye witness to the incident. He is a planted, interested and related witness and his presence at the spot is doubtful.

30. Though, learned Trial Court has given a detailed finding on this fact, let this Court examine the evidence to find out if the evaluation of evidence by learned Trial Court is in accordance with law. At the outset, it would be useful to discuss the testimony of PW-6 Dayal Singh who was examined as an eye-witness to the incident and was star witness of the prosecution. Though, learned counsels for the appellants have vehemently contended that PW-6 Dayal Singh was not present at the spot but we are not in agreement

with this submission of learned Counsels for the appellants. We have carefully perused the testimony of PW-6 Sh. Dayal Singh appearing on record. In his deposition, he has categorically deposed that on 03.02.2011, there was a marriage function at the place of his relative at B-29, Jawahar Park, Delhi-62. He had gone to attend the same on 03.02.2011. He had attended the ceremony with his family members. After attending the ceremony all of them were coming back to their home at about 10:00/10:15pm. The other members of family were ahead of him because he (PW-6) had stayed for a while as he was talking to someone. He was at a distance of about 20-25 paces from other family members. The other members of the family who were walking ahead of him were his brother Dalbir Singh, wife of Dalbir Singh (Smt Savitri), his wife (Jamuna Devi), his son (Navender Singh) and his daughter-in-law (Anuradha). When he had reached near Taneja Garments, which is situated near his house, he saw a Maruti 800 car in a start condition and a boy aged about 30-32 years was standing near the same. As he moved ahead, he saw two cars parked in front H.No. A-112 and two persons were standing between these two cars. The age of those two boys might be 20-22

years. One of the two boys was of dark complexion (*sanwla*) and the other boy was a lean one. When he had reached near Taneja Garment, he saw his family members taking turn towards their house. At the same time, he saw the dark complexion man shooting his son Navender from country made pistol. He got stunned and could not understand as to what happened. Thereafter, those two boys came running towards him and sat in the white colour Maruti 800 car, which he had seen in a start condition. The number of the said Maruti car was 5363. The boy whom he had seen earlier standing near the Maruti car had driven that car and taken those two boys with him. During his examination in court, this witness has correctly identified appellant Rishi Kumar and stated that this accused was standing near the Maruti Car and had driven away the same. He has also correctly identified appellant Praveen @ Kalu as the one who had shot his son dead. He has also correctly identified appellant Sumit Kumar and deposed that he was standing near the dark complexion boy, who had shot his son. In his examination in chief, this witness has further deposed that on 06.02.2011, in the evening time, police came to his house and after interrogating his

daughter-in-law Aarti, took her with them to the police station. When Aarti did not return till morning from the police station, then on 07.02.2011, he went to police station Neb Sarai and there he came to know that police has arrested Aarti in the murder case of his son and three more accused persons have also been arrested in this case. He also came to know that police has taken all the four accused persons to Saket Court. Thereafter, he went to court and saw all the three accused persons, who had fled away from the spot after committing murder of his son. He had stated this fact to the police. The names of the three accused persons were told to him by the police official. He further deposed that in the PS Neb Sarai, he had seen a white colour Maruti 800 car, bearing registration no. 5363 and told the police that it was the same car on which the appellants had fled away after committing murder of his son. He has further deposed that it was the same car which he had seen while coming back from the function to his house. He was thoroughly cross examined and in his cross examination, he has deposed that at about 1.00 PM, he had gone alone to Jawahar Park to attend the ceremony as he was supposed to do some arrangements for the

function. The other family members had come in the evening at about 7.00 pm approximately. They all had left the place of function together but he had stayed behind as one Yashpal Singh Rawat had met him and had talked to him for about 1 ½ minute. He has further deposed that he was supervising the halwai work and remained at the venue of function till the conclusion of the party. The factum of his presence at the function and also at the spot is further corroborated by PW-2 Sh. Dalbir Singh who in his examination in chief has deposed that they had left the marriage venue at about 10.00 pm and were coming back on foot. At that time, he was accompanied by Naveen, Naveen's mother, Naveen's chhoti chachi, badi chadhi i.e. his wife, **whereas his elder brother Dayal Singh was behind them.** Confirming the presence of PW-6 Dayal Singh at the spot, PW-7 Jamuna Devi has deposed that **her husband Dayal Singh was following them and he was at some distance behind them.** PW-8 Smt. Anuradha has also deposed in her examination in chief that **her jeth Dayal Singh was standing at a distance of 20-22 feet when this incident happened.** In her cross examination, she has further deposed that Dayal Singh had not gone

with them but he was in the function since morning. In view of above statement of witnesses appearing on record, it is difficult to disbelieve the fact that PW-6 Sh. Dayal Singh had not attended the function or he was not present at the spot at the time of alleged incident and he is a planted witness. Though PW-1 Smt Savitri had not named Dayal Singh in her examination in chief but in her cross examination, she has categorically stated that her jeth i.e. PW-6 Sh. Dayal Singh and nephew also attended the ceremony. The cogent and trustworthy evidence of PW-6 Sh. Dayal Singh corroborated by the testimonies of PW-2 Sh. Dalbir Singh, PW-7 Jamuna Devi and PW-8 Anuradha prove beyond reasonable doubt that he was present at the spot. Though, there may be some minor contradictions in the testimonies of prosecution witnesses but if read as a whole, their deposition clearly proves presence of PW-6 at the spot. Thus, PW-6 Dayal Singh cannot be said to be a dubious or planted witness.

31. It was also vehemently argued by learned counsels for the appellants that it was not possible that the other family members who were allegedly walking with the deceased had only heard the voice of crackers/*Dhamaka* but had not seen the assailants but an

old man of around 60 years at around 10.30 p.m. who was 60 feet away from the spot had seen all the assailants/appellants.

32. We have carefully perused the testimonies of all the witnesses who were allegedly present at the spot, particularly the statement of PW-6 Dayal Singh in this regard. It has categorically come in the testimony of PW-6 Dayal Singh that when he was present near Taneja Garment, he saw his family members taking turn towards their house, and at the same time, he saw the dark complexion man shooting his son Navender from country made pistol. He got stunned and could not understand as to what happened. Thereafter, those two boys came running towards him and sat in the Maruti 800 car of white colour, which was seen by him in a start condition. The number of the said Maruti car was 5363. The boy whom he had seen before near the Maruti car had driven away that car and taken those two boys with him. In his examination in chief, he has also identified those two boys as Praveen and Sumit and the third boy who was standing near Maruti 800 as accused Rishi. **In his cross examination he further deposed that the vehicle was parked at the left side ahead of Taneja garments.** The distance between the

Taneja garment and the vehicle was 2 or 3 yards. He was moving towards his house when he had heard the sound of gunshot and he had not crossed the vehicle. He had tried to run towards his house after hearing the sound of gunshot but stayed at Taneja Garments itself because he had seen his son falling down at a distance of 60 feet. There was a light at the Taneja Garments itself.

33. In view of above testimony of PW-6, it is clear that he was at such a place from where it was feasible for him to see the scene of crime clearly particularly the assailants/appellants, who had run away in a car parked just 2-3 yards away from the place where he was standing at the time of incident. The way in which he has narrated the entire scene of incident i.e. consistency in his deposition which is not shaken by detailed cross-examination, appears to be natural and cannot be said to be a concocted story prepared by him just to falsely implicate the appellants. This witness was extensively cross examined by learned counsel for the appellants but nothing beneficial to the defence could emerge out of the same. Since the firing was sudden and the incident happened so fast that other members who were present near the deceased could

not have noticed the details of the assailants and the exact manner in which the incident has taken place. The murder of a near and dear one can leave the relatives in a stake of shock. PW-6 has deposed that he was present at Taneja Garments at the time of incident and his house was at a distance of around 60-62 feet from Taneja Garments. In our opinion, 60-62 feet is not such a distance that a person cannot see an incident clearly. Moreover, it has also come in the cross-examination of the witness that both the appellants i.e. Praveen @ Kalu and Sumit had run towards the car which was parked just 2 or 3 yards from Taneja Garments and had run away with appellant Rishi Kumar Bhati who was waiting for them with head lights of the car on. In our view learned Trial Court has given a very cogent and detailed finding regarding presence of PW-6 Dayal Singh at the spot and his being an eye-witness of the incident, we find no infirmity, illegality and ambiguity in his statement. The observations given by learned Trial Court runs as follows:-

“16. There seems to be a valid explanation as to why the persons walking along with deceased Naveen could not see the accused persons clearly and why Dayal Singh was able to see them. It can be put up in a different manner that those who were walking side by side were taken by a surprise that too in the night leaves

therewith practically no time to react or understand as to what exactly has happened. The scene needs to be visualized in order to appreciate the correct position. The family was coming back to their place after attending a function leisurely and Naveen was suddenly shot. The assailants immediately ran away. Before the family members could realize as to what has happened, the assailants managed to cover a safe distance. However, since Dayal Singh was not with them rather was at a distance, therefore he was in a position to see as to what has happened. In this context, site plan Ex.PW25/A can be referred to where the position of the deceased and others, who were there with him have been shown together with the position of Dayal Singh, the two sodium lights and inter alia the vehicle parked by the assailants for their escape. It can be seen from the site plan that the assailants must have ran towards Dayal Singh as the escape vehicle was parked in the alley which was very close to the position of Dayal Singh. Thus, time was enough for Dayal Singh to at least have a look of the persons who must have been in a very panicky situation after shooting the victim. Out of curiosity arising out of unusual movement of the accused persons/assailants they must have been noticed by Dayal Singh as there is a tendency with the persons to try to ascertain as to why somebody is running in such a fashion. It is quite natural human behaviour in such a situation. This would have probably given an opportunity to the father of the deceased Dayal Singh to have a look of the number of vehicle in which the assailants had escaped which he has deposed of 5363 only without disclosing the remaining part of the registration number. This seems perfectly natural, if the scene and incident is visualized by any normal person.

17.The contention raised on behalf of the accused persons that he is a planted witness does not appeal to the reason inasmuch as if a witness was to be planted, then anybody from those who were moving alongwith the deceased would have been the person chosen for the job but it is not the case, therefore element of credibility is there in the case of the prosecution.

18.It has been further contended that the family members were not aware as to whether Dayal Singh had visited the function or not or so to say that he had not wished to go or had not gone, stands belied and explained in view of the fact that the function which was to be attended by the family was at a walking distance and therefore it is invariably difficult to keep track as to who has visited and who has not. Had it been at a place which was far requiring some mode of transport, then there is a possibility that those who had gone were counted and numbered leading to a definite number of family members visiting the function. The function was in the near relation of the family of the deceased and at a walking distance then there is every possibility, that, practically, all the family members had visited / attended the function. Dayal Singh being one of the elder members of the family was bound to be there. Thus, it is evident that he was present and his presence cannot be ruled out at a place where he is stated to be present when the incident took place."

34. In view of above discussion, statement of witnesses and reasoned findings given by learned Trial court, we find no merit in the argument of learned counsels for the appellants that PW-6 Sh.

Dayal Singh was not present at the spot or that he is a planted witness or he has not seen the incident happening.

35. It is next argued by learned counsels for the appellants that according to the first information of the incident, allegedly given by brother of the deceased namely Sh. Praveen Singh, was that some biker had killed his brother. This information was recorded vide DD no.37A dated 03.02.2011 at the P.S. Neb Sarai but prosecution has not named brother of deceased Naveen as a witness. Since a material witness who is the first informant of the offence, has not been examined, the prosecution version is doubtful.

36. We have given our thoughts to the matter. It is a settled law that prosecution is not bound to produce all the witnesses. Only those witnesses who are considered necessary by the prosecution for unfolding its version need to be produced before the court. It is also a settled principle of law that a case is decided on the basis of quality of evidence and not quantity of evidence. Reliance in this regard is placed on **Laxmibai and another Vs. Bhagwantbuva and others, (2013) 4 SCC 97** wherein Hon'ble Supreme Court has held as under:-

"39. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement in law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle, that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

37. In the present appeal, it is not the case of the prosecution that Praveen Singh is the eye-witness of the incident. At the time of alleged incident, he was present inside his house. He was not the eye-witness to the incident, he must not have been aware about the fact that who had committed the murder of his brother. Nowhere it has come on record that he had been told by any of the eye-witnesses to the incident that who had fired upon his brother Naveen. Moreover, the information given by Praveen Singh that some biker has killed his brother, is not of much value as the eye-witness to the incident, i.e., PW-6 Sh. Dayal Singh has categorically deposed that murder was committed by the appellants who ran away from the spot in a car and this fact remains uncontroverted during his cross-examination. This fact can be looked from another angle as well. It is also well known fact that when any offence like murder is

committed, the situation is very panicky. No one knows what to do. There is total chaos and the mind stops working altogether and is focused on the one who is injured or has died in the incident. It is a matter of common knowledge that when a victim of crime is lying in front of their parents or near relatives i.e. brothers or sisters in a nearly dead condition, no one gives much attention to the fact as to who has fired or where the assailants have gone after firing or what were they wearing for the reason that at the said time their utmost priority is to rush the victim to the hospital so that a precious life can be saved. In the present case, the condition of the mind of family members of deceased can also be judged from the fact that the incident had taken place at about 10.30 p.m. and the PCR call was only made at about 11.05 p.m. for the simple reason that all the relatives were so concerned about the life of the victim that for about half an hour no PCR call was even made. It is also a well known fact that in such a situation, the mind of a person cannot remain calm and is upset with the result that a very coherent, clear, fine and exact description of the happening event is not expected from the relatives. Thus, in such a scenario, the PCR call made by the brother of the

deceased to the effect that some biker has killed his brother does not demolish the prosecution version which is otherwise duly supported by eye-witnesses. On this point, the observation of Ld. Trial Court is also material and we do not find any infirmity in the same and it reads as under:-

“It is primarily for the prosecution to decide as to what is to be done and what not to prosecute the case. If it is chosen by the prosecution not to examine Praveen, then it is the decision of the prosecution which should not be looked into otherwise in order to draw any inference although no cogent explanation has come as to why he has not been arrayed as a witness by the prosecution and not examined and same is the position with regard to the story of bikers. However, what is not there is not required to be looked into nor it can be rather what is there is to be appreciated in order to draw inferences. If better and direct evidence is available then that should be brought on record, which seemingly is the reason as in Dayal Singh police found a strong witness falling in to the category of an eye witness with more details as compared to mere information about shooting”.

38. It is next argued that the present case is based on the CDRs of the mobile phones allegedly used by the accused persons before and at the time of alleged incident but the same have not been proved in accordance with law and, therefore, cannot be relied upon. Similarly, no certificate under section 65B of the Evidence Act is on

record regarding the location chart of the phones of the accused persons which is also a mandatory requirement of the law before these charts can be read in evidence for the reason that these charts were also obtained in the same manner as CDRs are obtained and are thus in the nature of electronic evidence. It is further argued that CDRs may be used to corroborate other existing evidence but cannot be used as conclusive evidence. Learned Trial Court has also dealt with the issue, however, let us examine the contention of learned defence counsels to find out whether learned Trial Court was justified in arriving at the conclusion that CDRs of Mobile phones of appellants and their location corroborate with the other evidence appearing on record.

39. Let us first discuss the prosecution version regarding mobile phones being used by appellants Aarti, Rishi Kumar Bhati and Praveen @ Kalu, in commission of offence. As per prosecution, the mobile connection nos. 9711381995 and 9899703677 were allegedly being used by appellant Aarti whereas mobile connection no. 9711841072 was allegedly being used by appellant Rishi Kumar Bhati. Apart from the above mobiles, appellant Praveen @ Kalu

was also using one mobile connection bearing no. 9718975053. According to prosecution, all the appellants were in touch with each other with the help of these mobile phones, not only prior to the date of incident but also just before and after the incident.

40. Let us first take up the mobile connection no. 9711381995. It has come in the evidence of PW-17 Sh. Israr Babu, Alternate Nodal Officer, Vodafone that Aarti Rawat D/o D.S.Nayal is the registered consumer of mobile phone no. 9711381995. He has also proved customer application form (CAF) as Ex.PW17/A wherein the ID proof documents of Aarti viz-a-vis ID Election Card, PAN Card, I-Card and Salary Slip of HCL were attached with the CAF. Thus, it is clear that the mobile connection no. 9711381995 was registered in the name of appellant Aarti. PW-17 has further deposed that as per customer application forms, mobile phone no. 9711841072 and 9899703677, were issued to Rishi S/o Mahipal and has proved the said forms as Ex.PW17/B and Ex.PW17/C respectively. According to the prosecution, mobile connection no. 9899703677 was gifted by appellant Rishi to Aarti so that he can talk to her secretly. It has also come in the testimony of PW-19 Sh. Pawan Singh, Nodal Officer,

Idea Cellular that mobile connection no. 9718975053 is in the name of one Smt. Savdesh W/o Dudhe Ram which as per prosecution case was being used by appellant Praveen @ Kalu at the time of commission of offence.

41. Let us now further examine the call detail records (CDRs) of all the above four mobiles numbers and the fact whether prosecution has been able to connect the appellants Aarti, Rishi Kumar Bhati and Praveen @ Kalu with the above mobile connections. In order to prove the CDRs of mobile connection numbers 9711381995, 9899703677, 9711841072 and 9718975053, prosecution has examined PW-18 Sh. Anuj Bhatia. In his testimony PW-18 Sh. Anuj Bhatia has proved the CDRs of mobile connection number 9899703677 as Ex.PW18/A, CDRs of mobile connection no. 9711381995 as Ex.PW18/E, CDRs of mobile connection no. 9711841072 as Ex.PW18/G and CDRs of mobile connection no. 9718975053 as Ex.PW19/B.

42. As per CDRs Ex.PW18/A in respect of mobile connection no. 9899703677 (allegedly gifted by appellant Rishi Kumar Bhati to Aarti) and CDRs Ex.PW18/E in respect of mobile connection

number 9711381995 (in the name of Aarti), it has come on record that calls were being made from the above mobile to the mobile phone no. 9711841072 (which is in the name of Rishi Kumar Bhati) and vice versa. Even on the date of incident i.e. on 03.02.2011, number of calls from morning till night and even after the incident were exchanged between these numbers which clearly show that both appellant Aarti and Rishi Kumar Bhati were in regular touch with each other. The record further reveals that there were telephonic calls between mobile no. 9711381995 (of Aarti) to the mobile no. 9711841072 (Rishi Kumar Bhati). However, Aarti in her statement recorded under Section 313 Cr.P.C. has denied the fact that she even knew Rishi which is contrary to the phone call records. In the opinion of this Court, a false answer given by Aarti in her statement u/s. 313 CrPC further strengthens the prosecution version that both Rishi and Aarti knew each other and makes it difficult to disbelieve the prosecution version that they conspired in the commission of the murder of deceased. The contention of the learned defence counsel that Mob. No. 9899703677 was not given to Aarti or was not used by her stands belied by the evidence led by

the defence itself. The defence in support of its case has examined one Surender Singh as DW-1 who was helper in the bus which was being operated on route no. 34 and where Rishi was working as conductor. It is the case of the appellant Rishi that above phone bearing no. 9899703677 was given to and was being used by DW-1 Surender Singh. However, DW-1 Surender Singh in his cross examination has categorically stated that Mob. Phone in question was also used to be taken by Aarti from him and returned sometimes within five minutes and sometimes after one or two days. He has further deposed that on the day of incident, the mobile phone was not with him. This belies the defence version that the said mobile phone was not used by Aarti. So far as mobile phone no. 971895053 is concerned, it is argued by learned counsel for appellant Praveen @ Kalu that it was in the name of one Smt. Savdesh and was, therefore, not being used by him. However, PW-26 IO Insp. Vijay Singh in his statement has categorically deposed that the said mobile phone was recovered from appellant Praveen vide seizure memo Ex.PW13/O and there is no cross examination of the PW-26 IO Insp. Vijay Singh on the said point by learned counsel

for the appellant. Meaning thereby that the said factum was never questioned or disputed by him.

43. The CDRs of the above mobile phones reveal that not only Aarti and Rishi Kumar Bhati were in regular touch with each other, appellant Praveen @ Kalu was also in touch with appellant Aarti and Rishi and it strengthens the case of the prosecution that appellant Aarti, Rishi Kumar Bhati and Praveen @ Kalu were in regular touch with each other. Learned Trial Court has also given its finding regarding the use of mobile phone by Aarti and her contention that she did not know Rishi and it runs as follows:-

“The stand taken by accused Aarti in her statement under section 313 Cr.P.C. further strengthens the case of the prosecution as the two very prominent facts asserted repeatedly by Aarti are that she was not having any mobile phone or connection at all leave alone having two, one of which was provided by Rishi and that she did not know Rishi at all. Incidentally, Rishi says he knows Aarti. As per the evidence on record i.e. CAF Ex.PW17/A qua the phone number 9711381995, belonging to Aarti, her documents including photo, PAN card on record, which incidentally answers the argument that no proof of job of Aarti at HCL is there as raised by her Counsel besides showing that she had mobile phone connection and that she is lying.”

44. So far as locations of mobile phone of appellants at the time of incident and they being in contact with each other is concerned, learned Trial Court has discussed this fact in detail and the relevant portion of its finding runs as follows:-

“9...Testimony of PW-17 Sh. Israr Babu, PW-18 Sh. Anuj Bhatia and PW-32 Sh. Deepak, latter two being Nodal Officers and the first one being the Associate Nodal Officer from Vodafone Company, is relevant qua the data relating to the mobile phones. The total and cumulative effect is that it supports prosecution case that accused persons were in touch with each other even on the date of incident, there location was also in that very area at the relevant time and that the accused Rishi and Aarti were into a kind of relationship, evident from their long continuous / regular talks even at odd hours. The stand taken by accused Aarti in her statement under section 313 Cr.P.C. further strengthens the case of the prosecution as the two very prominent facts asserted repeatedly by Aarti are that she was not having any mobile phone or connection at all leave alone having two, one of which was provided by Rishi and that she did not know Rishi at all. Incidentally, Rishi says he knows Aarti. As per the evidence on record i.e. CAF Ex.PW17/A qua the phone number belonging to Aarti, her documents including photo, PAN card on record, which incidentally answers the argument that no proof of job of Aarti at HCL is there as raised by her Counsel besides showing that she had mobile phone connection and that she is lying. Secondly, the DW Surender has stated that he himself can't dial a number on mobile and in any case the mobile No. 9899703677 with him remained in use till 07.00

A.M. to 10.00 P.M. only. Then, in these circumstances, how come there are outgoing and incoming calls beyond 07.00 A.M. to 10.00 P.M. It is pertinent to note here that as per prosecution mobile NO. 9899703677 was provided to Aarti by accused Rishi. These two aspects bring the falsehood on the part of Aarti and thereby establish her complicity in the offence / conspiracy. As by any stretch of imagination more than 100 calls from 01.11.2010 to 02.02.2011 and on the day of incident about 52 calls between Rishi Bhati (9711841072) and Aarti (9899703677) and 07 calls were between 09.10 P.M. to 09.30 P.M. are not normal and indicate / strengthen the theory of conspiracy mooted by prosecution.”

45. Learned counsels for the appellants have argued that the certificates under section 65B of Indian Evidence Act particularly under Section 65B(4) of Indian Evidence Act are not as per the requirements of law, therefore, the CDRs cannot be stated to have been proved by the prosecution and as such cannot be read in evidence. Section 64B of Evidence Act reads as under:-

Section 65B(4) in The Indian Evidence Act, 1872

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

46. Perusal of certificates under Section 65B of Indian Evidence Act reveals that all the conditions as prescribed in Section 65B(4) of Evidence Act have been duly complied with. The testimonies of PW-18 Sh. Anuj Bhatia, Nodal Officer, Vodafone, PW-19 Sh. Pawan Singh, Nodal Officer, Idea Cellular Ltd. and PW-32 Sh. Deepak, Nodal Officer, Vodafone Mobile Services Ltd. have proved the CDRs Ex.PW18/A, Ex.PW18/E, Ex.PW18/C, Ex.PW18/G and Ex.PW19/A pertaining to mobile connection numbers 9899703677, 9711381995, 7838501424, 9711841072 and 9718975053 respectively. They also proved the certificates under section 65B of Indian Evidence Act Ex.PW18/B, Ex.PW18/F, Ex.PW18/D,

Ex.PW18/H and Ex.PW19/C. So far testimony of PW-18 Sh. Anuj Bhati is concerned, he could not be cross examined and the CDRs and certificates proved by him have been later on proved by PW-32 Sh. Deepak, Nodal Officer, Vodafone Mobile Services Ltd. He has proved CDRs and certificates of all the mobile phone no. 9711381995, 9711841072, 7838501424, 9899703677. This witness has categorically deposed in his testimony that CDR which is a computer generated version is correct as per their system and CAFs are also as per their original records. This witness has also identified the signature of Sh. Anuj Bhatia and Israr Babu. Thus, though the certificates issued u/s. 65-B of the Indian Evidence Act are in accordance with law, however, even if it is assumed for the sake of arguments that these are not correctly proved, the same being procedural in nature does not vitiate the trial. The Hon'ble Supreme Court in **Shafi Mohammad vs. The State of Himachal Pradesh, Special Leave Petition (Crl.) No. 2302 of 2017, decided on 30th January, 2018**, has held that the applicability of requirement of certificate being procedural can be relaxed by court wherever interest of justice so justifies.

47. It is further argued by learned defence counsels that as per deposition of IO, CDR was obtained on 10.06.2011, however, the date of incident is 3.02.2011 and arrest of the accused persons is 06.02.2011 and, therefore, it is clear that IO had arrested the appellants without obtaining the CDRs and without any evidence against them and therefore there is every possibility that they have been falsely implicated in the present case and the findings on the above issue is totally unlawful without any basis.

48. In the regard, the testimony of PW-26, IO Insp. Vijay Singh is relevant. In his deposition, PW-26 Insp. Vijay Singh has stated that he had visited the ACP office, Mehrauli and got the calls details of mobile phone number of Aarti i.e. 9711381995. He had also collected the CDR of IEMI number of the handset being used by Aarti for SIM card bearing phone number 9711381995. After analyzing the CDR of IEMI of the handset being used by Aarti, he found another mobile phone number being used in the handset (used by Aarti). The phone number so found was 9899703677. He had also collected the call detail records of this mobile phone number. On analysis of this phone number, he noticed that holder of mobile

phone number 9711841072 is in constant touch with the mobile phone number holder of 98997036767. Thereafter, he had ascertained the ownership of the aforesaid number and found the owner of the mobile phone no. 9711841072 and 9899703677 as Rishi S/o Mahipal, R/o D1/10, Sangam Vihar. The location of the mobile phone number 9899703677 was generally coming as that of Raju Park, Devli Road, Delhi and thereafter he came to know that the person holding this mobile phone or its user is resident of area of Raju Park, Devli Road, Delhi.

49. In view of above, it is clear that before arrest of appellants Rishi Kumar Bhati, IO had already made oral inquiries from ACP office, Mehrauli and found involvement of appellant Aarti, Rishi Kumar Bhati and Praveen @ Kalu in the present case and thereafter, on the basis of investigation conducted by him, he had arrested all the accused persons on 06.02.2011. On 09.02.2011, he had moved an application to the Nodal officers of the telecom operators of concerned mobile phone numbers and collected the CDRs and other related documents. In these circumstances, it cannot be said

that all the appellants were arrested on 06.02.2011 without any evidence and the CDRs were obtained only on 10.02.2011.

50. It is next argued by learned counsel for the appellant Praveen that the recovery of the alleged weapon i.e. country made pistol from the appellant is doubtful. It is also argued that bullet allegedly recovered from the body of deceased was not proved as the same was not put to doctor who conducted Postmortem for the purpose of identification. Further, the bullet was not sent for biological examination to detect blood and to further match it with the blood of deceased so as to rule out the possibility of any foul play.

51. We have given our thoughts to the issue in hand. It is the case of the prosecution that in order to eliminate Naveen, appellant Rishi and Aarti had hatched a conspiracy and appellant Rishi had roped in the service of Praveen @ Kalu for carrying out the execution, who had then approached appellant Sumit for arrangement of vehicle. Accordingly to the prosecution, appellant Praveen @ Kalu had opened fire on deceased Naveen with country made pistol which was later on recovered at his instance and seized by the IO vide seizure memo Ex.PW13/M. It has also categorically come in the

testimony of PW-6 Dayal Singh that he saw the dark complexion man shooting his son Naveen from country made pistol and later on he also identified him in the court as the person who had opened fire on his son. PW-15 Dr Akhilesh Raj has categorically deposed that the cause of death in this case was shock due to carnio cerebral injury caused by bullet (fire arm injury). He has further opined that injury no. 4 was sufficient to cause death in ordinary nature. All injuries were anti-mortem in nature and the range is near short range (10-90 cm). Thus, in view of above discussion, it is clear that the cause of death was due to fire arm injury. Now, it is to be examined whether the country made pistol recovered from the possession of appellant Praveen was the same which was used for committing murder of deceased Naveen. It has come in the testimony of PW-26 Insp. Vijay Singh that Accused Praveen @ Kalu was arrested at the instance of accused Rishi Kumar Bhati from Village Salarpur near Ganda Naala. Personal search of accused Praveen was conducted and one 'katta' was recovered from his right pocket of his trouser and on opening the katta, one live cartridge was found inside it. Sketch of country made pistol and live cartridge Ex.PW13/L was

prepared and the same were seized vide memo Ex.PW13/M and were also sent to the FSL for its forensic examination. **FSL report Ex.PW31/A categorically states that the individual characteristics of striations marks on bullet marked exhibit 'EB1' and on recovered test fired bullet marked as 'TB1' were examined and compared under the Comparison Microscope Model Leica DMC and were found identical. Hence, the exhibit 'EB1' has been discharged through the country made pistol .315" bore marked exhibit 'F1' above.** Thus, in view of FSL report Ex/PW31/A, it is clear that the bullet marked 'EB1' recovered from the body of deceased was fired from the country made pistol marked as 'F1' which was recovered from the possession of appellant Praveen at the time of his arrest. In view of above, it is duly proved that it was Praveen @ Kalu who had opened fire with his country made pistol on deceased Naveen who later on succumbed to his injuries.

52. So far as contention of learned counsel for the appellants that the bullet allegedly recovered from the body of deceased was not proved as the same was not put for identification purposes to doctor

who conducted Postmortem is concerned, we are of the opinion that a postmortem is conducted only to determine the cause of death. It is not the duty of doctor concerned who conducted the postmortem to give findings on the genuineness of the recovered bullet. He is an expert witness of Autopsy/postmortem and not an expert in forensic science. Thus, it is not expected from a doctor to give finding on bullet recovered from the body of the deceased as it is within the domain of forensic expert. Moreover, when there is ocular evidence corroborated by forensic evidence, we find no reason to disbelieve the case of the prosecution as it has remained uncontroverted for the reason that learned defence counsels were unable to impeach the creditworthiness of the material witnesses. Learned Trial court has also rightly appreciated the FSL report and has given the following reasoning regarding the weapon of offence and we find no infirmity in the same:-

"11. A vital piece of evidence is the CFSL report Ex.PW31/A which is to the effect that country made pistol which was recovered from the possession of accused Praveen @ Kalu is the weapon which was used in the offence. In this context the medical documents, including the post-mortem report of Naveen Ex.PW15/A which clearly reflects that a bullet was recovered from the body of the deceased, when

read together with FSL report Ex.PW31/A to Ex.PW31/C then it is evident that the weapon recovered from Praveen was used in the murder of Naveen. And if the evidence or series of events is looked into in a reverse order then also the complicity of all the accused persons surface."

23. The disclosure made by Rishi Kumar Bhati has led to the apprehension of Praveen @ Kalu with a countrymade pistol and cartridge, therefore that part is admissible and the CFSL report Ex.PW31/A, B and C read with PW-13/D which is the covering letter alongwith the report containing the sample seals brings on record that the bullet recovered from the body of deceased Naveen was fired from the pistol which was recovered from accused Praveen @ Kalu. This fact brings more credence and credibility to the case of the prosecution and binds all the persons into the conspiracy."

53. It is also argued by learned counsel for the appellant Sumit that he has been falsely implicated in the present case as there is no linking evidence to connect the appellant with the commission of offence and also the fact that PW-6 Dayal Singh has furnished car number as '5363', only on 08.02.2011, i.e., after 5/6 days of occurrence. Moreover, the car number was not disclosed by him in his statement recorded under section 161 Cr.P.C and, thus, it throws grave doubt on prosecution version and it has failed to prove its case beyond reasonable doubt.

54. Having perused the entire material available on record, we are not in agreement with the above submission of learned counsel. On his arrest, appellant Sumit had disclosed that he was resident of Chirodi Village and he had arranged a vehicle on the request of his associate Praveen. At the pointing out of Sumit, vehicle bearing no. UP 16-5363, Maruti 800 of white colour was recovered from the plot near the house of Sumit. Thereafter, Sumit was arrested and offending vehicle was seized. In view of deposition of PW-26 Insp. Vijay Singh, it is clear that appellant Sumit was also involved in committing the murder of deceased Naveen. He had also demanded Rs. One lac for the arrangement of offending vehicle i.e. Maruti 800 car bearing no. UP 16-5363. It is difficult of believe the argument of learned Counsel for the appellant Sumit that there is no linking evidence against him with the commission of offence. Perusal of evidence of PW-26 IO Insp. Vijay Singh reveals that he has categorically deposed that the vehicle involved in the offence bearing no. UP 16-5363 was recovered from him. However, there is no cross-examination on the said point by the learned defence counsel. Even no suggestion has been given to the effect that

appellant was not arrested from Meethapur and he had not taken an amount of Rs. 1 lac for arrangement of vehicle from appellant Praveen @ Kalu. In the absence of cross examination, it cannot be held that appellant Sumit was not involved in the commission of offence and he was not part of criminal conspiracy to commit murder of deceased Naveen.

55. Now the next question to be examined is whether the prosecution has proved that all the appellants were involved in criminal conspiracy of committing the murder of deceased Naveen. As discussed earlier, the call details of appellant Aarti, Rishi Kumar Bhati and Praveen @ Kalu reveal that they were constantly in contact with each other. The location of the mobile phones at the relevant time, date and details of the area concerned are also matching. Appellant Rishi Kumar Bhati knew Aarti and this fact is not only clear from the mobile phone calls but also from the evidence of DW-1 Surender Singh who has categorically deposed in his cross examination that he used to give phone having SIM no. 9899703677 to Aarti and appellant Rishi knew Aarti as he (Rishi Kumar bhati) was conductor of the bus where DW-1 Surender Singh

was working as a helper. There is absolutely no explanation from the side of appellant Rishi Kumar Bhati as to why he had allowed the use of his phone by Aarti. He had never objected as to why DW-1 Surender Singh used to give his phone to Aarti. Even though this fact was categorically told to him by DW-1 Surender Singh. The telephonic conversation between Aarti and Rishi for long time and particularly at odd hours gives rise to suspicion that there was something more between them than the mere relationship. Though Aarti had denied that she knew Rishi but as discussed earlier, this fact stands falsified by the evidence appearing on record. The exchange of telephone calls at the time of incident and before or after that also fortify the theory of criminal conspiracy. It is a settled law that criminal conspiracy is a concept of criminal mind and it is not easy to get direct evidence for proving this offence as conspiracy is hatched in secrecy and can only be perceived by actions of the participants. It is also a settled principle of law that it is not necessary that all the conspirators must actively participate in the conspiracy from its beginning to end. Mere agreement to participate in the act is sufficient to constitute this offence. In this

regard reliance can be placed on *Rajiv Kumar v. State of U.P.*, (2017) 8 SCC 791 and *Firozuddin Basheeruddin and others vs. State of Kerala*, 2001 SCC (Crl) 1341.

56. The chain of event i.e. CDRs, medical evidence, forensic evidence, recovery of weapon of offence and the offending car at the instance of appellant Sumit clearly points out the suspicion of needle towards all the appellants that they were actively involved in the commission of offence. Thus, in view of the above cogent evidence appearing on record, it cannot be said that there is no linking evidence against all the appellants and, the argument of learned counsels for appellants to this effect, therefore, cannot be accepted.

57. It was also argued by learned Counsels for the appellants that that the witnesses cited by the prosecution in the present case are the family members of the deceased and therefore not worthy of reliance.

58. We have considered the submission of learned Counsels and are of the opinion that testimony of the witnesses cannot be disbelieved merely on the ground that they are relatives of the

deceased Naveen, since their testimonies are cogent, consistent and trustworthy. In a case titled '**Israr Vs. State of U.P. (2005) 9 SCC 616**' the Hon'ble Supreme Court has held that relationship is not a factor to affect credibility of a witness. The observation runs as follows;

"12. We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not counsel actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

59. In view of the above proposition of law, we have no hesitation to hold that learned Trial Court has rightly relied upon the testimonies of the witnesses who were natural witnesses and have given a consistent, reliable and trustworthy account of the incident and, therefore, they cannot be held to be planted witnesses.

60. Learned counsels for the appellants have further argued that the testimonies of police officials cannot be relied upon to convict the appellants as they are interested witnesses and public witnesses were not joined at the time of arrest of appellants or at the time of

recovery of alleged weapon of offence or car bearing no. UP-16-5363.

61. We have considered the submissions of learned counsels for the appellants and are of the view that evidence of police official cannot be discarded merely on the ground that they belong to the police force. In this regard, reliance can be placed upon **Kulwinder Singh and another Vs. State of Punjab, (2015) 6 SCC 674**

wherein it was held as under:-

"23.When the evidence of the official witnesses is trustworthy and credible, there is no reason not to rest the conviction on the basis of their evidence".

62. So far as contention of Ld. Counsel for the applicants regarding non examination of any independent witness to the incident and non joining of public witnesses at the time of arrest of appellants and at the time of recovery of alleged weapon of offence and car bearing No. UP-16-5363 is concerned, we are of the view that non-joining of public witnesses is not fatal to the prosecution if there is ocular evidence duly supported by medical as well as forensic evidence on record. We are further of the view that joining of public witnesses is necessary only for corroboration purpose but

if eye-witnesses to the incident are available and their testimonies are reliable and they have fully supported the case of the prosecution beyond any reasonable doubt as in the present case, the issue of non examination of public witnesses does not demolish the prosecution version. We are also of the view that one cannot ignore the fact that generally the witnesses to the incident of crime are not willing to come forward for deposing before the police or court. There is a general tendency on the part of public persons not to become a witness so that one has not to attend the court by leaving his work and suffer monetary loss. The Hon'ble Supreme in case '**Jai Yodhad v State, 2014 SCC OnLine Del 458**', while highlighting the reluctance of common men to join as public witnesses, has observed as under:

'11. As regards public witnesses not being joined, it has come in the deposition of prosecution witnesses that a number of persons present on the bus stops on the way to the place where the appellant was apprehended as well as several members of the public present on the spot were requested to join the police team but no one agreed to be associated with them. It cannot be disputed that the public does not want to get dragged in police and criminal case and wants to avoid them, because of long drawn trials and unnecessarily

harassment. Similar view was taken in Manish v. State (NCT of Delhi) and in Appabhai v State of Gujarat. We can't be oblivious to the reluctance of common men to join such raiding parties organised by the police, lest they are compelled to attend Police Station and Courts umpteen times at the cost of considerable inconvenience to them, without any commensurate benefit. Hence, no adverse inference on account of failure to join public witnesses in such raids despite genuine efforts should be drawn'.(Emphasis supplied).

63. It was next argued by learned counsels for the appellants Aarti, Rishi Kumar Bhati and Praveen @ Kalu that there are contradictions in the testimonies of prosecution witnesses/police officials regarding preparation of site plan, arrest of appellants and recovery of case properties i.e. mobile phones and weapon of offence. We are of the view that minor contradictions cannot be considered when there is ocular evidence on record proving the commission of offence. The contradictions as pointed out by learned counsels for the appellants do not go to the root of the case and, therefore, cannot be said to be such so as to demolish the case of the prosecution. In this regard, we are supported by the judgment of Hon'ble Supreme Court in case '**Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796**' wherein it was held:-

'28. As is evincible the High Court has also taken note of certain omission and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission. (emphasis supplied)

64. We do not find any major contradiction which may warrant rejection of the testimonies of the witnesses. The discrepancies appearing in the statements of witnesses are minor in nature and do not demolish the prosecution version.

65. So far as citations relied upon by learned counsels for the appellants Aarti, Rishi Kumar Bhati and Praveen @ Kalu are concerned, we have gone through all the judgments. There is no dispute with regard to the law laid down in the said judgments. However, in the present case, as discussed above, it has been proved

on record on the basis of evidence of the witnesses as well as call record and other material evidence appearing on record that all the appellants were actively involved in the commission of offence and in the criminal conspiracy of murder of deceased Naveen. In our view, the facts of judgments cited by Ld. Counsels for the appellants are clearly distinguishable on the basis of the facts and circumstances stated therein.

66. In view of the above discussions, we are of the view that the learned Trial Court has rightly appreciated the evidence appearing on record. The prosecution has successfully proved the charges levelled against all the four appellants. The offence of criminal conspiracy and committing murder of deceased by appellant Aarti, Rishi Kumar Bhati, Praveen @ Kalu and Sumit stands duly proved by way of cogent and reliable evidence of witnesses as well as by way of medical and forensic evidence on record. We find no infirmity or illegality in the judgment passed by the learned Trial Court and we see no reason to interfere with the same. The conviction of the appellants under Section 302/120B IPC is, therefore, upheld.

67. All the four appeals, therefore, fail and are dismissed. The copy of this judgment be sent to the Superintendent Jail. A copy of the judgment be placed in all the appeal files.

68. Trial Court record be sent back.

BRIJESH SETHI
(JUDGE)

SIDDHARTH MRIDUL
(JUDGE)

OCTOBER 23, 2019
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