

\$~R-12-15

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

Judgment reserved on: 2nd August, 2019

Judgment pronounced on: 20th September, 2019

+ CRL.A. 1175/2018 & CRL.M.(BAIL) 1815/2018

RUNEET GULATHI

..... Appellant

Through: Mr. Maninder Singh, Ms. Smriti
Asmita and Mr. Sarthak Garg, Advs.

versus

STATE

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State
with Insp. Madan Mohan, PS
Maurya Enclave

AND

CRL.A. 1268/2018 & CRL.M.(BAIL) Nos. 1997/2018, 536/2019

ABHAY DEWAN alias GAPPY

..... Appellant

Through: Mr. Hrishikesh Baruah and
Mr. Siddhant Kaushik, Advs.

versus

STATE

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State
with Insp. Madan Mohan, PS
Maurya Enclave

AND

CRL.A. 27/2019

MAHIMA DEWAN

..... Appellant

Through: Mr. Maninder Singh, Ms. Smriti
Asmita and Mr. Sarthak Garg, Advs.

versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State
with Insp. Madan Mohan, PS
Maurya Enclave

AND

CRL.A. 60/2019 & CRL.M.(BAIL) 107/2019

JATIN

..... Appellant

Through: Mr. Ajay Kr. Pipaniya and
Ms.Pallavi Pipaniya, Advs.

versus

STATE

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State
with Insp. Madan Mohan, PS
Maurya Enclave

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J

1. Present appeals arise out of a common judgment dated 15.09.2018 and order on sentence dated 19.09.2018 passed by the learned Additional Sessions Judge, North West, Rohini Courts, Delhi in Sessions case No. 52223/2016, in FIR No. 180/2012, registered under Sections 302/201/364/120B of the Indian Penal Code (hereinafter referred to as 'IPC') read with Sections 25/27 of the Arms Act at Police Station Maurya Enclave, whereby the Learned Sessions Judge found the Appellants guilty and sentenced them as follows:

“Keeping in view all the facts and circumstances of the case and the mitigating circumstances as mentioned above, all the convicts are sentenced to:-

i. undergo rigorous imprisonment for life each and pay fine of Rs.30,000/- (each), in default of payment of fine, to undergo SI for 06 months (each) for the offence punishable u/s 120B IPC.

ii. *undergo rigorous imprisonment for 09 years (each) and pay fine of Rs.15,000/- (each), in default of payment of fine, to undergo SI for 03 months for the offence punishable u/s 364/120B IPC.*

iii. *undergo rigorous imprisonment for life (each) and pay fine of Rs.30,000/- (each), in default of payment of fine, to undergo SI for 06 months (each) for the offence punishable u/s 302/120B IPC.*

iv. *undergo rigorous imprisonment for 07 years (each) and pay fine of Rs.10,000/- (each), in default of payment of fine, to undergo SI for 02 months (each) for the offence punishable u/s 201/120B IPC.*

The convict no. 1 is also sentenced to:

'rigorous imprisonment for a period of 05 years and pay fine of Rs.5000/- in default of payment of fine, to undergo SI for 01 month for the offence punishable u/s 27 Arms Act.'

Benefit of section 428 Cr.P.C be given to all the convicts"

2. Cause title of the CRL.A. 1175/2018 shows 'Runeet Gulathi vs State', whereas in the impugned judgment, the name of appellant has been referred as 'Runeet Gulati'. For the purpose of disposal of the present appeal, we will refer the appellant as 'Runeet Gulati'. The brief facts necessary for disposal of the present appeals are that in the intervening night of 17.07.2012 and 18.07.2012 at about 10:30 p.m., Shivam (since deceased) and PW-19/Vishal Verma met Appellant/Abhay Dewan and Appellant/Runeet Gulati, who were in white colour Swift Car bearing registration No. DL-2CAN-3335, at Malka Ganj Chowk, Delhi. Appellant/Runeet Gulati insisted that Shivam should meet him alone. Shivam dropped PW-19/Vishal Verma at his residence and returned after telling him that he was going to meet Appellant/Runeet Gulati. Shivam did not return home

till 11:00 p.m. His brother Deepak called him on his mobile No. 8586807081 and Shivam told him that he would return within 15 minutes. Since, Shivam did not come back and his phone was switched off, Deepak Kapoor along with his father and cousin started contacting the friends of Shivam. At about 11:30 p.m., Deepak Kapoor called PW-19/Vishal Verma and inquired about the whereabouts of Shivam. At about 11:40 pm, Deepak Kapoor along with his father and cousin visited the house of PW-19/Vishal Verma, who disclosed about their meeting with Appellant/Runeet Gulati. Thereafter, they visited the house of Appellant/Runeet Gulati but did not find him there but met his mother, who gave them his mobile number. They tried to contact Appellant/Runeet Gulati on his mobile number but the same was found to be switched off. They searched for Shivam at different places. In the meanwhile, Sanjeev Kapoor, father of Shivam found the scooter of Shivam without key, parked at Gurudwara Chowk, Malkaganj and informed the same to Deepak Kapoor. On 18.07.2012, at about 2:45 a.m., when they failed to trace Shivam, they reported the matter at Police Station - Sabzi Mandi and a missing report Ex.PW3/A was registered.

3. On 18.07.2012, at about 4:30 am, a call was received at Police Control Room regarding dead body lying near VIPS College. Investigating Officer as well as Crime Team reached at the spot. Spot was inspected and photographed. Nothing was recovered to identify the deceased and the dead body was sent to mortuary. Later, the body was identified as Shivam Kapoor @ Pandey S/o Sanjeev Kapoor. During the course of the investigation, Appellants were

arrested and they got recovered various articles pursuant to their disclosure statements.

4. As per the case of the prosecution, when Shivam met Appellant/Abhay Dewan and Appellant/Runeet Gulati, they took him in a Swift car bearing registration no. 3335 and on their way, asked him about the money kept at his home. Shivam expressed his reluctance to which they inflicted injuries on his body with a paper cutter and Appellant/Abhay Dewan shot a bullet on his abdomen. Subsequently they arrived at the residence of Appellant/Abhay Dewan at Sector-15, Rohini where Appellant/Abhay Dewan asked his wife Appellant/Mahima Dewan for the keys of their Accent Car bearing registration No. DL-4CAJ-9666. Appellant/Abhay Dewan also contacted Appellant/Jatin, resident of Faridabad. Appellant/Abhay Dewan and Appellant/Mahima Dewan went to Faridabad in the said Accent Car to pick Appellant/Jatin. In the meanwhile, Appellant/Runeet Gulati remained at Sector-15, Rohini and was in constant touch with Appellant/Abhay Dewan on phone. While returning Delhi from Faridabad, Appellant/Mahima Dewan purchased bandages and Suthol liquid from Apollo Pharmacy at Sector-9, Rohini, Delhi. Since by that time, Shivam was alive, Appellant/Jatin fired a bullet on his temple region. A combined effect of two bullet injuries resulted in death of Shivam. Eventually, they took the dead body of deceased in Swift Car to Ekta Camp Jhuggi, AU Block, Near VIPS College, Delhi where they threw the dead body and set the same on fire.

5. To bring home the guilt of the accused persons, the prosecution has examined 52 witnesses in all. The incriminating evidence and circumstances were put to the Appellants under Section 313 of Code of Criminal Procedure wherein they denied all of them and pleaded to have been falsely implicated in the case and examined six witnesses in their defence.

Submissions of Appellant/Runeet Gulati & Appellant/Mahima Dewan

6. Mr. Maninder Singh, learned counsel for the **Appellant/Runeet Gulati in Crl.A. 1175/2018 & Appellant/Mahima Dewan in Crl.A. 27/2019** opened his submissions by contending that the impugned judgment dated 15.09.2018 is based on conjectures and surmises and the same is against the facts and the settled proposition of law.
7. He further contended that the learned Trial Court has ignored and omitted the material evidence and has disregarded the cogent evidence in favor of the Appellants and has failed to appreciate the basic issue, as to how the Appellants have been categorized as the actual perpetrators of the crime because the entire case is based on circumstantial evidence and there is no direct evidence on record to establish the involvement of the Appellant/Runeet Gulati & Appellant/Mahima Dewan in the commission of the alleged offence.
8. He further contended that since the case of the prosecution is based on circumstantial evidence, the entire chain of events had to be proved in a manner to arrive at a just conclusion of guilt of the accused persons without any hypothesis of guilt, which has not been done in the present case and if the chain of events is broken, in that case the benefit of doubt has to be given to the accused/Appellants.

In support of his contention he relied on the case of Anant Chintamanlagu Vs State of Bombay reported in AIR 1960 SC 500, Hanumant and Others Vs . State of Madhya Pradesh reported in AIR 1952 SC 343 and Sharad Birdhichand Sarda Vs State of Maharashtra, reported in AIR 1984 SC 1622.

9. Learned Counsel for the Appellants further contended that the learned Trial Court failed to take note of the fact that PW-23 (Indal) did not support the case of the prosecution and he categorically stated in his examination-in-chief as well as in his cross examination that he had never witnessed the alleged offence committed by the Appellants, as set up by the prosecution.
10. Learned counsel for the Appellants further contended that the learned Trial Court erred in relying upon the testimony of PW-19 (Vishal), who cannot be termed as last seen witness as he never saw Appellant/Runeet and Deceased/Shivam together. He further contended that deceased neither called Appellant/Runeet in his presence nor saw the deceased travelling with the Appellant/Runeet in his car. Learned counsel labored hard to contend that as per the case of the prosecution, PW-19 (Vishal) also accompanied PW-18 (Sanjeev Kapoor) to search for the deceased but the missing report **Ex. PW-3/A** lodged by PW-18 (Sanjeev Kapoor) nowhere disclosed that he had met PW-19. He further contended that there are various contradictions in the testimony of PW-19 (Vishal) with regard to identification of the alleged swift car and also the mobile phone number of the Appellant/Runeet Gulati. Hence the testimony of PW-19 (Vishal) cannot be relied upon. In support of his contention he

relied on the case of **Kanhaiya Lal Vs State of Rajasthan** reported in **(2014) 4 SCC 715.**

11. Learned Counsel for the Appellants further contended that as per the Post mortem report (*Ex. PW-37/A*) which was conducted on 19.07.2012 from 12:45 pm to 06:40 pm, the probable time of death was one day prior and the death occurred after 2-3 hours of the last meal and as such the time of death was 12:45 pm on 18.07.2012 instead of 12:00 midnight to 02:45 am on 18.07.2012.
12. Learned counsel for the Appellants further contended that the learned Trial Court failed to take note of the fact that there was no motive on the part of the Appellants to commit the alleged offence. As per the prosecution, the Appellants had conspired to abduct the deceased for a ransom of Rs. 25 lacs, however, the prosecution failed to prove any ransom call at the instance of the Appellants and had also failed to prove any enmity between the deceased and the Appellants, as such the prosecution had miserably failed to prove the motive for commission of the alleged offence. In support of his contention he relied on the case of **Pankaj Vs State of Rajasthan** reported in **(2016) 16 SCC 192.**
13. Learned counsel for the Appellants further contended that learned Trial Court erred in relying on the testimonies of material witnesses being PW-16 (Deepak Kapoor), PW-17 (Shruti Kant Kapoor), PW-18 (Sanjeev Kapoor) and PW-19 (Vishal) as there were various contradictions in their testimonies and the evidence of PW-16 (Deepak Kapoor), PW-17 (Shruti Kant Kapoor), PW-18 (Sanjeev Kapoor) and PW-19 (Vishal) was all hearsay evidence. In support of

his contention he relied on the case of *Md. Abdul Sufan laskar and Ors. Vs State of Assam* reported in 2008(9)SCC 333, *Mousam Singha Roy and Others Vs State of W.B.* reported in (2003) 12 SCC 377, and *Namdeo Daulata Dhayagude & ors Vs State of Maharashtra* reported in (1976) 4 SCC 441.

14. Learned Counsel for the Appellants further contended that, it is the duty of the police to investigate fairly and thoroughly and collect all the evidence whether they are for or against the suspect, however, in the present case, there are serious discrepancies in the investigation which go to the root of the matter and the learned Trial Court erred in ignoring the effect of the defective investigation. Learned counsel highlighting the lacunae in the investigation pointed out: -

- That as per the prosecution a plastic bottle with petrol was found at the spot but the same was missing in the site plan (*Ex.PW-49/B*) and there was no investigation pertaining to the purchase of the petrol.
- That no justification was given by the investigating officer as to how he came to know about the number of the alleged vehicle as 3335 contrary to vehicle no. 4654 mentioned in PCR Form (*Ex. PW-8/A*).
- That the local police station was not informed while effecting recovery of the car at the instance of the Appellants.
- That there is no site plan of place of alleged recovery of purse or keys of the deceased and recovery of clothes of Mahima.

- That no memo was prepared by the Investigating Officer regarding handing over the seal to PW-25 (HC Manoj) at the time of sealing of purse and keys (*Ex. PW25/L*) and again no memo was prepared when PW-25 handed over the seal back to the Investigating officer.
- That the CDR of the mobile phone of Vishal Verma/PW19 was not collected and produced by the Investigating Officer who was the main link between the deceased and the Appellant/Runeet.
- That no independent witnesses were called by the Investigating officer at the time of alleged recoveries and as such the recoveries cannot be relied upon.

15. Learned counsel for the Appellants further contended that no Test Identification Parade of the Appellants was conducted and they were identified by the witnesses PW-19 (Vishal), PW-23 (Indal) and PW-25 (HC Manoj) for the first time in Court and as such the identification of the Appellants in the Court for the first time becomes completely inadmissible in law. In support of his contention he relied on the case of *State of U.P. Vs Ashok Dixit & anr* reported in *(2000) 3 SCC 70* and *Kanan and others vs. State of Kerala* reported in *(1979) 3 SCC 319*.
16. Learned counsel for the Appellants further contended that the footage obtained from Apollo Pharmacy which was produced by the prosecution in order to show the involvement of Appellant/Mahima in the commission of crime is not admissible in the eyes of law as the

certificate stipulated under Section 65-B of the Evidence Act was not furnished by the prosecution. In support of his contention, the learned counsel for the Appellants relied upon the case of Anvar P.V. vs. P.K. Basheer and Ors reported in (2014) 10 SCC 473. He further contended that authenticity of the alleged CCTV footage is also doubtful as the CD of the CCTV footage was neither sent for FSL examination nor the original DVR was seized by the Investigating Officer.

17. While concluding his arguments, learned counsel for the Appellants contended that learned Trial Court erred in convicting Appellant/Mahima for the offence punishable under Section 302 of the IPC as no charge was framed against her under Section 302 of the IPC.
18. Lastly, it was urged by the learned counsel for the Appellants that in view of the aforesaid facts and circumstances, the prosecution has failed to prove the case against the Appellants beyond reasonable doubt and had failed to complete the chain of events and sought acquittal of the Appellants.

Submissions of Appellant/Abhay Dewan

19. Mr. Hrishikesh Baruah, learned counsel for the **Appellant/Abhay Dewan in CRL.A. 1268/2018** submitted that the present case is based on circumstantial evidence and in such cases it is a well settled law that prosecution must establish a complete chain of events which is conclusive in nature and consistent with the hypothesis of guilt of the accused and the prosecution in the present case has not been able

to prove the guilt and incriminate Appellant/Abhay Dewan in the commission of the alleged offence.

20. He further contended that the case of prosecution revolves around two-star witnesses, i.e. PW-19 (Vishal Verma) and PW-23 (Indal). With regard to the testimony of PW-23 (Indal), he has categorically denied going to the 'Nahar' around 3:45 - 4:00 am on 18.07.2012 and his testimony is of complete denial. To substantiate his arguments learned counsel for the Appellant relied upon the case of ***Raja Ram Vs. State of Rajasthan*** reported in **2005 (5) SCC 272** and the case of ***Girdhari Vs. State NCT of Delhi*** reported in **2011 (15) SCC 373**.
21. Learned counsel for the appellant further contended that no Test Identification Parade was conducted and the Appellant/Abhay Dewan was identified for the first time by the star witness, PW-19 (Vishal Verma) in Court, which has no value and cannot be relied upon. He further contended that PW-19 (Vishal Verma) is a planted witness and the testimony of the said witness is purely hearsay evidence and the same cannot be relied upon for convicting the Appellants in the present case as: -
 - there was no mention of PW-19 (Vishal Verma) in the missing report (***Ex. PW3/A***).
 - that the statement of PW-19 (Vishal Verma) recorded under Section 161 Cr.P.C. was only recorded on 23.07.2012 which proves that he was introduced as last seen witness at a later stage.

- that PW-19 (Vishal Verma) had disclosed the registration number of Swift car as DL2C AN 3335 only on 23.07.2012, however, PW-49 (Inspector Anil Sharma) deposed that he came to know about the non-involvement of Swift car bearing registration no. **DL CAN 4654** only on 25.07.2012, which proves that the statement of PW-19 (Vishal Verma) under Section 161 Cr. P.C. was not even recorded on 23.7.2012.

22. In support of his contention, learned counsel for the Appellant relied upon the case of *V.C. Shukla & ors Vs. State (Delhi Administration)* reported in *1980 (2) SCC 665*; *Rameshwar Singh vs. State of Jammu & Kashmir* reported in *1971 (2) SCC 715*; *Sheikh Hasib vs. State of Bihar* reported in *1972(4) SCC 773* and *Girdhari vs. State (NCT of Delhi)* reported in *(2011) 15 SCC 373*.
23. The learned counsel for the Appellant further contended that there is no motive for the Appellant to commit the alleged offence. He contended that as per the case of the prosecution the alleged offence had been committed by the Appellant in order to extort an amount of Rs.25 lacs by way of ransom from the father of the deceased, however, the prosecution failed to produce any documentary evidence that the parents of the deceased were having money out of the sale proceeds of a property, situated in Malkaganj. He further contended that the allegation of motive was based on the testimony of PW-18 (Sanjeev Kapoor), however, the witness in his statements dated 19.07.2012, 30.07.2012 and 15.10.2012 recorded under Section 161 of the Cr.P.C and in his examination-in-chief failed to

raise any allegation of motive and the same has been introduced only for the first time on 06.10.2016 during his cross examination. He further contended that the importance of motive in a case of circumstantial evidence is paramount and the absence of motive in a case of circumstantial evidence is critical to the version of the prosecution and since no motive has been proved by the prosecution in the present case, the Appellant deserves acquittal. To substantiate his arguments learned counsel for the Appellant relied upon the case of *Surinder Pal Jain Vs. Delhi Administration* reported in **1993 Supp. 3 SCC 681**; *Arjun Marik Vs. State of Bihar* reported in **1994 Supp 2 SCC 372** and *Sukhram Vs. State of Maharashtra* reported in **2007 (7) SCC 502**.

24. He further contended that the Appellant/Abhay Dewan, Appellant/Mahima Dewan and Appellant/Jatin were apprehended from Nepal Border on 23.07.2012 and kept in illegal detention from 25.07.2012 to 26.07.2012, even, the Call Detail Records of Appellant clearly depicts that at the relevant time they were at Nepal Border which proves that the documents prepared by the Investigating Agency i.e. arrest memos, search memos and seizure memos were all fabricated documents and were an afterthought. He further contended that the learned Trial Court erred in not giving equal weightage to the defence witnesses, which evidently sustains the fact that the prosecution has manipulated the records of arrest. To substantiate his arguments, learned counsel for the Appellant relied upon the case of *Adambhai Sulemanbhai Ajmeri and Others vs. State of Gujarat* reported in **2014 (7) SCC 716**.

25. Learned counsel for the Appellant further contended that it is important to point out that a person cannot be convicted on the sole basis of recovery effected pursuant to disclosure statement made by the Appellant/accused. He further contended that as per Section 25 & Section 26 of the Indian Evidence Act any confession made before a police officer is not admissible and the recoveries pursuant to disclosure are also barred under Section 27 of the Evidence Act, if the fact discovered, are not in consequence of the statement of the accused; and also, if the fact discovered, are not otherwise accessible to all and sundry. Learned counsel further contended that the recoveries effected at the instance of the Appellant are doubtful as: -

- there were 31 documents being arrest memos, disclosure statements and seizure memos which were executed on 25.07.2012 but only three police witnesses i.e. PW49 (Anil Sharma), PW25 (Manoj Raghav) and Pyarelal have signed these documents and out of these three police witnesses, Pyarelal was never examined which proves that the documents have been fabricated.
- That at the time of recovery of pistol and clothes from the house of Abhay Dewan (C2/16, Sector 15, Rohini, Delhi) despite the family members being present, none of them were made witness to the recovery.
- That no local police were informed and nor were they made part of the investigation during the recovery proceedings from the areas (Amar Colony, Rohini,

Prem Bari) wherein the investigating officer of P.S Maurya Enclave had no territorial jurisdiction.

- That no site plan during the recovery proceedings was prepared and the only site plan which is available on record was of the place from where the dead body of the deceased was recovered vide Ex.PW4/A and place from where the mobile phone of the deceased was recovered vide Ex. PW25/Z.
- That the disclosure statement and the recovery memo clearly depict that no blood-stained clothes were recovered. However, while describing the clothes of the accused persons at S. No. 10 'a' and 'b' of the DNA Report (*Ex.PW-1/B*), it erroneously brings forth that the clothes are blood stained, pointing to the conclusion that evidence and records had been manipulated by the police authorities.
- That the recovery from the Maruti Swift car no. 3335 from DMC Booth, opposite H.No.B-140/141, Amar Colony, Lajpat Nagar-4, Delhi is doubtful as various articles(*one clip of bandage, one bandage, one empty cartridge case lying in the middle of both front seats, one front pellet lying inside the adjacent seat of the driver seat of the car, some coins, three SIM cards, one paper cutter and one water bottle*) were recovered from the aforesaid swift car and the same were planted against the Appellant because the smaller

window pane on the right rear side of the swift car was broken.

26. He further contended that the abovementioned recoveries are not admissible as evidence in the eyes of law because no genuine and sincere efforts were made by the investigating officer to validate the recoveries with the presence of any Independent/Public witnesses. To substantiate his arguments, learned counsel for the Appellant relied upon the case of ***Surendra vs. State of Rajasthan*** reported in ***2011(15) SCC 78*** and ***Mohmed Inayatullah vs. State of Maharashtra*** reported in ***(1976) 1 SCC 828***.
27. Learned counsel for the Appellant further contended that the medical & scientific evidence is not corroborating with the version of the prosecution because there is a huge time gap between the recovery of ***Pistol and Bullets*** and their forensic examination. He further contended that the Ballistic expert Dr. N.P. Waghmare who prepared the report had not been examined and instead PW-52 (R. Enivyan) had proved the report, who was not the actual author of the ballistic analysis report. He further contended that there were two ballistic reports and both are contradictory to each other and had been wrongly relied upon by the Trial Court. To substantiate his arguments, learned counsel for the Appellant relied upon the case of ***Murarilal vs. State of M.P.*** reported in ***AIR 1980 SC 531*** and ***Santa Singh vs. State of Punjab*** reported in ***AIR 1956 SC 526***.
28. Counsel for the Appellant lastly urged that the Trial Court had not correctly appreciated the facts and circumstances of the case; hence, the impugned judgment was liable to be set aside.

Submissions on behalf of Appellant/Jatin

29. Mr. Ajay Pipaniya, learned counsel for the **Appellant/Jatin in CRL.A. 107/2019** adopted the arguments advanced by the learned counsel for the co-Appellants. In addition to the arguments addressed by other counsel, Mr. Pipaniya contended that as per the testimony of PW-45 (Amit Bhatia), Toll Officer, the Hyundai accent DL 4CAJ 9666 crossed the Faridabad toll way to Delhi at 01:57:23 and as per the Post mortem report (*Ex. PW-37/A*), Shivam Kapoor (the deceased) was dead by this time, which establishes the fact that Appellant/Jatin had been falsely implicated in the present case.
30. He further contended that the charge under Section 120-B IPC and 364 IPC are baseless as the record reveals that the case of the prosecution is that Appellant/Abhay Dewan and Appellant/Runeet Gulati conspired to abduct the deceased for ransom and during the course of commission of crime/abduction they fired one bullet in the stomach of the deceased which as per the testimony of PW-37 (Dr. Vijay Dhankar) was sufficient enough to cause death in ordinary course of nature, hence, the Trial Court erred in convicting Appellant/Jatin for the aforesaid offences.
31. Learned counsel for the Appellant relied on the impugned judgment passed by the Trial Court to the extent that the Trial Court has acquitted the Appellant for the offence punishable under Section 27 of the Arms Act on the ground that the prosecution failed to establish that the second bullet was fired by the Appellant and contended that since no charge is made under Section 27 of the Arms Act,

conviction of the Appellant – Jatin under Section 302 IPC rendered by the Trial Court, is illegal and arbitrary.

32. He further contended that the present case is based on circumstantial evidence and in such cases it is a well settled law that prosecution must establish a complete chain of evidence which is conclusive in nature and consistent with the hypothesis of guilt of the accused and the prosecution in the present case had not been able to prove the guilt and incriminate Appellant/ Jatin in the commission of the alleged offence and as such he deserves acquittal.

Submissions on behalf of the State

33. Ms. Aashaa Tiwari, learned APP for State, on the other hand, strongly refuted the submissions made by the counsel for the Appellants and submitted that the impugned judgment is based on proper appreciation of the facts and evidence, no interference in the impugned judgment is called for by this Court; that the statements of prosecution witnesses and medical/scientific evidence are corroborative in nature and the prosecution has been able to prove its case beyond reasonable doubt.
34. Ms. Tiwari, further submitted that the test identification parade is only a procedural aspect and failure to hold the said parade in the present case for the identification of the Appellants will not be fatal to the case of prosecution and it will not make the evidence of their identification in Court inadmissible. She further submitted that Appellant/Runeet Gulati was a childhood friend of PW-19 (Vishal Verma) and was specifically named as a suspect in the missing report (*Ex.PW3/A*), hence there was no need for conducting a TIP for the

identification of Appellant/Runeet Gulati. To substantiate her arguments learned APP for State relied upon the case of Mukesh vs. state(NCT of Delhi) reported in 2017 (6) SCC 1; Malkhan Singh vs. State of MP reported in JT 2003(5) SC 323; Anwar@Addha vs. State NCT of Delhi reported in 2017 LawSuit(SC) 1542; Rafikul Alam & Others Vs The State of West Bengal reported in 2008 Crl. L.J 2005 and Noor Ahammad & ors Vs State of Karnataka reported in (2016) 3 SCC 325.

35. Learned APP for State further submitted that the prosecution had placed on record the CCTV footage of Apollo Pharmacy, situated at A-16, Sector 9, Rohini, Delhi which clearly indicates that Appellant/Mahima Dewan in the intervening night of 17.07.2012 and 18.07.2012 had entered the said pharmacy at 2:43:30 hrs and had purchased certain items (*one liquid Suthol & four bandages*) and left at 2:46:29 hrs. The said fact is also corroborated with the testimony of the Pharmacist, PW-40 (Varun Kumar) who was on duty at the said outlet in the intervening night of 17.07.2012 and 18.07.2012. Subsequently, no objection has been raised to prove the CCTV footage neither at the time of exhibiting the CDs nor at any other stage prior to the pronouncement of judgment of the Trial Court. As such, the Appellants may not raise an objection to the mode of proof of the CCTV footage at the stage of appeal because the CCTV footage is admissible in the eyes of law. To substantiate her arguments learned APP for State relied upon the case of Kundan Singh Vs State reported in 2016(1) DLT (CRI), Sonu @ Amar vs.

State Of Haryana reported in 2017 8 SCC 570; *Shafhi Mohammad vs. State of Himachal Pradesh* reported in (2018) 2 SCC 801.

36. Learned APP for State further submitted that motive is a relevant factor in all criminal cases, whether based on direct or circumstantial evidence, but the inability to establish motive in a case of circumstantial evidence is not always fatal to the prosecution version. To substantiate her arguments learned APP for State relied upon the case of *State of Uttar Pradesh vs. Babu Ram* reported in AIR 2015 SC 1735; *State of Himachal Pradesh vs. Jeet Singh* reported in AIR 1999 SC 1293 and *Ranganayaki vs. State by Insp of Police* reported in (2004) 12 SCC 521.
37. She further submitted that the prosecution has relied upon various recoveries which were pointed out at the instance of the Appellants and there is no cogent reason to doubt the aforementioned recoveries on the ground that the same are effected in the presence of the police witnesses and the same are inadmissible as the same were not supported with the presence of an independent witness. To substantiate her arguments learned APP for State relied upon the case of *State Govt of NCT of Delhi Vs. Sunil & Anr* reported in (2001) 1 SCC 652 and *Gian Chand & ors vs. State of Haryana* reported in JT 2013(10) SC 515.
38. Ms. Tiwari, further submitted that the medical/scientific evidence are corroborating the testimony of prosecution witnesses, however, there is a minute variance between medical evidence and oral evidence in the present case because Dr. Vijay Dhankar (*who conducted the post mortem of the deceased*) has deposed in his cross examination that

the time of death of the deceased was 12:45 pm on 18.07.2012, which is contradictory to his own post-mortem report(*Ex.PW-37/A*), wherein it is stated that death occurred approximately 2-3 hours after the last meal. She points out that as per the oral evidence (*testimony of police witnesses*) the deceased had died in the intervening night of 17.07.2012 & 18.07.2012. She further submitted that it is a settled law that in case of a conflict between oral evidence and medical evidence, the former is to be preferred, wherein medical evidence is only suggestive and not conclusive in nature and to substantiate her arguments learned APP for State relied upon the case of **Umesh Singh vs. State of Bihar** reported in **(2013) 4 SCC 360** and **Rakesh & ors vs. State of Madhya Pradesh** reported in **(2011) 9 SCC 698;**)

39. Learned APP for State further submitted that there is no manipulation in the records pertaining to the arrest of the Appellants as the police witnesses *PW-25 (HC Manoj Raghav)*, *PW-43 (Ct Rakhi)* and *PW-49 (Insp. Anil Sharma)* who arrested the Appellants have consistently deposed on the same lines and there is no cogent reason to doubt the credibility of the alleged arrest memos. She further submitted that it is the case of the Appellants that Appellant/Abhay Dewan, Appellant/Mahima Dewan & Appellant/Jatin were apprehended at Nepal Boarder and were illegally detained in the police station from 24.07.2012 and Appellant/Runeet Gulati was illegally detained from 18.07.2012 to 25.07.2012 at PS Maurya Enclave. However, the Appellants are completely silent in their statements recorded under Section 313 Cr.P.C regarding their illegal detention and arrest from Nepal Border, which eventually

demolishes their version leading to an adverse inference against them. To substantiate her arguments learned APP for State relied upon the case of **Prahlad vs. State of Rajasthan** reported in **2018 SCC OnLine SC 2148** and **Raj Kumar vs. State of MP** reported in **2014(2) JCC 1217**.

40. She further submitted that it cannot be held as a rule of universal application that the testimony of prosecution witnesses becomes unreliable merely because there is a delay in recording the statement of prosecution witness under Section 161 Cr.P.C and in support of her argument she relied upon the case of **V.K Mishra and ors vs. State of Uttarakhand and ors**, reported in **(2015) 9 SCC 588**.
41. Learned APP for the State further contended that vide amended charge dated 05.02.2013, Appellant/Mahima was charged under Section 302 Cr. P.C. and was also charged under Section 120-B of the IPC hence no interference in the impugned order on sentence is called for by this Court.
42. Counsel for the state lastly urged that the evidence produced on record as well as the circumstances proved by the prosecution, form a complete chain pointing unequivocally towards establishing the guilt of the accused. Based on these submissions counsel for the State urged that this Court may not interfere with the well-reasoned order passed by the learned Trial Court convicting the Appellants for the alleged offence.

Credibility of Material witnesses/ Last Seen/ Testimonies

43. In the present case the police machinery was set into motion when the father of the deceased PW-18 (Sanjeev Kapoor) made a missing report at about 2:45 am (*Ex.PW3/A*) which was registered vide DD No. 8A at Police Station Subzi Mandi. English translation of the relevant portion of Missing report (*Ex.PW3/A*) registered vide DD No. 8A is reproduced herein below:

DD NO. 8A DATED 18.07.12 P.S. SUBZI MANDI, DISTT.
NORTH DELHI

*Sanjeev Kapoor S/o Shadi Lal Kapoor
R/o 14, Gandhi Square, Malka Ganj
Delhi-110007*

*Information regarding
Missing and handing over*

*Time: 2.45 AM: At this time, it is entered that the person mentioned in Column No.2 came present at the Police Station and got recorded to the following effect: "My son namely Shivam aged 20 years had left for an excursion at 9.30 PM in a usual manner by a Scooter No. DL ISS 2887 and had not returned till 12 O'Clock in the night. We, therefore, contacted him on his mobile no. 8586807081 but the same was switched off. We made a search of him and found parked his scooter near Malka Ganj Gurudwara. I could't know anything about my son. We kept on making a search of him in our own way till now. My report may be lodged and the whereabouts of my son may be ascertained. The description of my son is as follows: height 5' 7", complexion fair, stout body. He is wearing T-shirt and 'Pajama' and slippers of NIKE in his feet. My son is mentally fit. There is a cut mark on the right side of the forehead of my son. **Some people have told me that my son was seen in the company of Runeet who resides in our neighborhood at about 11.00 PM. I suspect him.** The information regarding missing was entered in the 'Rojnamacha' and a call was made at No. 100 which was attended on Channel No. 116 by Constable Ankur Tomar, No. 1914/ PCR. After lodging a report regarding missing, a copy of*

the same after having been separated is being handed over to SI Sombir as per the directions of the SHO who will initiate proper action in the said regard.

Scribed by: HC/DO

Note: It is a true copy.

*Sd/-Illegible
HC Bheem Singh
No. 394-N/(-sic-)
DO, P.S. Subzi Mandi*

44. It is relevant to point out here that perusal of the missing report, (**Ex.PW3/A**) shows that the complainant i.e PW-18 (Sanjeev Kapoor) father of the deceased raised suspicion against the accused/Appellant/Runeet Gulati in the complaint who resided in their neighborhood. The Missing Report has been proved by HC Bhim Singh, who stepped into the witness box as PW-3 and deposed as under:

“On 18.07.2012, I was posted at Police Station Subzi Mandi and was working as Duty Officer from 12 at Night to 8 AM. On that day, at about 2:45 (night) Sanjeev Kapoor S/o Shadi Ram R/o 14, Gandhi Square, Malkaganj, Delhi, came to the police station and gave a missing report of his son Shivam aged 20 years. I recorded the DD vide DD No. 8A dated 18.07.2012 at 2:34 AM and handed over the same to SI Somvir Singh. The copy of the said DD is Ex.PW3/A bearing my signatures at point A.”

45. At about 4:27 am, PW-8 (Constable Ravinder) received a call from the mobile phone number 9990787947 informing that “VIPS College ke samne Haider Pur Water Plant Ekta Camp Jhuggi ke pass AE Block Pitam Pura ek dead body padi hui hai”. The relevant portion of PCR form (Ex.PW-8/A) is reproduced herein below:-

“PCR. No. received 136

Report received from VAN

*18/07/2012 04:55:29 HALAT KE LIYE WAIT HAI
18/07/2012 05:11:59 CALL IS TRUE EK MALE AGE
ABOUT 28 YEAR HT 5 FOOT 7 INCH RANG GORA
HEALTHY BODY HAI FACE PER KAPDA BANDHA HAI
AUR HATH BANDH RAKHE HAI BLUE JEANS AUR
BLACK AND GREEN T SHIRT PAHNI HAI MITTI KA
TEL DALKAR JALANE KI KOSHISH KI HAI LEKIN HAL
KA JALA NAHI ISKE LEFT GARDAN AUR RIGHT SIDE
PATE ME KOI NUKILI CHIJJ MARI HAI EK CHOTA
BACHOHA NAME INDAL AGE 8 YEARS JO PADOSH KI
JHUGGI ME RAHTA HAI NE BATAYA EK WHITE
COLOUR KI GADI NO. 4654 ME ISKO FAKE KAR
MACHIS KI TILLI FAKE KAR BHAG GAYE QRT STAFF
MOKE PAR C/ROOM INF 18/07/2012 05:15:24 ACP
AND SHO WITH STAFF MOKE PAR C/ROOM INF
18/07/2012 05:39:27 MOKA HAWALE CRIME TEAM
BHI MOKA PAR C/ROOM INF.”*

46. The said PCR form (**Ex.PW8/A**) has been proved by PW-8 (Constable Ravinder), who deposed that:

“On the intervening night of 17/18.7.2012 I was posted as constable in PCR/PHQ from 8 PM to 8AM. On that day at about 4.27 AM, I received a call from mobile No. 9990787947 that VIP College ke samne Haiderpur water plant Ekta Camp Jhuggi ke paas AE Block Pitampura ek dead body padi hui hai.” I forwarded the said message through computer on commander net of PCR for circulation. On

01.09.2012 at 4 PM my statement was recorded by the IO. Copy of PCR form is Ex.PW8/A.”

47. As per the PCR Form the call was made from mobile phone number 9990787947 which was registered in the name of Munshi Singh Yadav, who was examined as PW-36. PW-36 (Munshi Singh Yadav) during his examination-in-chief deposed that:

“I had seen working in a Water Treatment Plant, Sonapat, Haryana in the year 2012. On 18.07.2012, I was at my said house and at about 4.00 AM one boy with the name of Inder (Court observation: name given by the witness has been cross-checked and witness reiterates that name was Inder) came to my jhuggi along with other persons and informed me that one dead body had been thrown from one car by someone near the gate of VIP College. I was at that time Pradhan of Jhuggies of Ekta Camp. I also went there and saw a dead body of a young male whose hands were found tied with the help of garam patti (crape bandage) and were above the head. His eyes and mouth were also similarly covered with white tape. That deceased was wearing jeans pants and T-shirt (half sleeves). I informed the police from my mobile number 9990787947. Police had reached at the spot in my presence. Police had also recorded my statement.”

48. Pursuant to the information given by PW-36 (Munshi Singh Yadav), PW-9 (HC Rishipal) received an information at 04:30 am from Control Room, North-West ‘that a dead body is lying at Water Tank Ekta Camp, AE Block, near the Jhuggis of Haiderpur, VIPS College’ and the same was registered as DD No. 6A (Ex.PW-9/A). English

translation of the relevant portion of DD No. 6A (*Ex.PW-9/A*) registered at PS Maurya Enclave is reproduced herein below: -

“DD No. 6A Dated 18.07.12 PS Maurya Enclave

Information received through

PCR Call and departure

Time 4.30 AM. At this time, it is entered that Control Room North West has informed through telephone that a dead body is lying at Water Tank Ekta Camp, AE Block, near the Jhuggis of Haiderpur, VIPS College. From Constable Ravinder No. 7547/PCR Tel. No. 9990787947. The information so received through PCR Call was entered into the Rojnamacha and a copy of the report was handed over to ASI Satdev who along with Constable Sandeep, No. 2101/NW left for the spot and will initiate proper legal action. Inspector Anil Kumar has also left for the place of occurrence.

Scribed by : HC/DO

*Sd/-Kapil
(In Hindi)
HC Kapil
332/NW”*

49. On receipt of DD No. 6A (*Ex.PW-9/A*), PW-42 SI Satya Dev alongwith Constable Sandeep went to the place of incident which was a cemented road near VIPS Institute and found a dead body of young male, who was wearing jeans and T-shirt of blue colour. PW-49 (Inspector Anil Sharma) joined the team of PW-42 (SI Satya Dev) at the spot, who in his testimony deposed that *“I found a male dead body lying there. The age of the deceased was approximately 20-25 years and height was 5 feet and 6 inches, wearing blue jeans and blue T-Shirt which were in semi-burnt condition. Both the hands of the deceased were found tied with crape bandage and his mouth and eyes*

were also found wrapped with doctor tape. The legs of dead body were facing towards the cemented road and the head was on the concrete. One burnt plastic bottle was also found lying on the spot. Its make was Kinley. Its cap was also lying separately at the spot. There were cut marks over the face, temple region and elbow of the said body. PCR team had reached at the spot before my arrival.” PW-49 (Inspector Anil Sharma) prepared the site plan (**Ex.-PW-49/B**) and also prepared rukka which was exhibited as (**Ex-PW49/A**). Relevant portion of Rukka (**Ex-PW49/A**) reads as under:-

“Note: It is true copy of original.

To

*The Duty Officer
P.S. Maurya Enclave
Delhi*

Sir,

It is submitted that while on government duty today on receipt of aforesaid DD No. 6A I, the Inspector, along with the accompanying staff left for the place of occurrence via Outer Ringh road, VIPS Institute, Pitampura towards the Jhuggis of Ekta Camp, AU Block Pitampura and reached the road at a distance of about 100 Mtrs. from the Outer Ringh Road where a male dead body aged about 25-30 years, height about 5 Ft. 6 Inches, stout build, round face, wheatish complexion was found. The deceased is wearing a blue coloured jeans (make Mufti) having a white coloured cloth belt on the buckle whereof, the words “Numero Uno” are written, a blue green coloured T-shirt, white vest and a brown underwear having a red coloured broad elastic bearing the words “Chromozome” in English. A ‘Kara’ made of steel and a red coloured thread are present on the right hand of the deceased and he is bare feet. The legs of the deceased are towards cemented road whereas the remaining portion of the body was lying in flat condition on the graveled ground. The hands of the deceased were

tied with crepe bandage and a white coloured doctor tape was present on the eyes and mouth of the deceased. The Pants, T-Shirt and vest of the aforesaid deceased were found to be in half burnt condition. A plastic bottle on the lid whereof the words "KINLEY" are written was found near the deceased in melted condition. The smell of burning and that of oil was emanating therefrom. The Crime Team was called at the spot and the same was got inspected and photographed. An inspection of the dead body was made. The hands, face and scalp of the deceased were found to be in half burnt condition. A punctured wound was found in the abdomen over the navel of the deceased along with a cut mark on the left forearm and many cut marks on the biceps of left arm of the deceased. When tape was removed from the mouth and eye of the deceased, a deep cut mark was found on the left temple and while removing the tape, blood started oozing out from there. The exhibits were lifted from the place of occurrence and those were taken into Police possession as a piece of evidence by means of this memo. The dead body has not yet been identified. The dead body has been got preserved in the mortuary of BJRM Hospital. No eye witness could be found at the spot. The inspection of the spot and the circumstances prevailing over there disclose the commission of an offence punishable under Sections 302/201 IPC. Hence, the aforesaid writing has been sent to the Police station through ASI Satyadev for the purpose of registration of a Case (FIR) and the number of the same may please be intimated after its registration. The information in the aforesaid regard may be sent to the higher officers through special messenger. I, the Inspector, am busy at the spot commencing investigations.

Date and time of offence: 18.07.12 time unknown'

Place of occurrence: Road leading towards Ekta Camp Jhuggi, AU Block, Pitampura from VIPS Institute (at a distance of about 100 Mtrs.), Outer Ring Road

Date and time of dispatch 18.07.12 at 7.50 AM

of writing:

*Sd/- Anil Sharma
(In English)
Insp. Anil Sharma
P.S. Maurya Enclave*

*DD No. 9A at 8.10 AM
FIR No. 180/12 u/s 302/201
IPC, P.S. Maurya Enclave
Dt. 18.04.12
Sd/- Illegible
HC/DO Anita, No. 44/NW
PIS NO. 28940602
P.S. Maurya Enclave”*

50. A message was transmitted from the control room to the Mobile Crime Team, North West District and on receipt of the aforesaid information, SI Ramesh Chand along with HC Sudhir (*photographer*) and Ct. Tinu Pal (*fingerprint proficient*) arrived at the spot and prepared a detailed crime team report (**Ex.PW-29/A**). English translation of the Crime Team Report (**Ex.PW29/A**) is reproduced herein below: -

“Brief of SOC and any other advice to IO: On receipt of the call, I reached the place of occurrence i.e. Near Ekta Camp, Ekta Camp Road where a male unknown dead body was laying aside the road leading towards camp from Ring Road. The age of the deceased was about 30 years and had a stout built. The hands of the deceased were tied with red crepe bandage (used in pain). White doctor tape was present on the head and eyes of the deceased and he was wearing blue coloured T-shirt and blue Jeans. The deceased was set ablaze by way of pouring inflammable material between the face and the legs as a result whereof the face and legs were charred. A ½ Ltr. Half burnt bottle

of KINLEY was lying near the deceased and its blue coloured lid and three coins of Rs. 2/- each was lying aside road. There was a small hole on the stomach of the deceased which seems to be a bullet injury. There was an injury mark on the head of the deceased on which doctor tape was tied. On removing the bandage, a sharp cut mark of about 7 CM was found on the left side of the forehead. Photographs of the spot were taken.

*Sd/- Illegible
SI Ramesh Chand
D-1537
PIS 16040055”*

51. Perusal of the Crime Team Report (*Ex.PW29/A*) reveals that the crime team reached at the spot and carried out the inspection during which, they took the photographs (*Ex.PW-30/A1 to A10*) and lifted the pieces of burnt clothes of the deceased, one semi burnt crape bandage (garam patti), white doctor tape stained with blood which was used for tying the mouth and eyes of deceased. Further various articles (*semi burnt plastic bottle along with its lid, bloodstained concrete, three coins of Rs. 2/*) lying near the dead body and earth control samples were lifted from the spot and were seized vide seizure memo (*Ex. PW-42/A*) and (*Ex. PW42/B*). Subsequently, one hue and cry notice (*EX. PW-49/C*) was also issued and a wireless message was also flashed regarding the details of dead body on ZIP net. PW-49 (Inspector Anil Sharma) received information that the dead body was identified as of Shivam Kapoor son of Sanjeev Kapoor and relatives of the deceased were called to identify the dead body. Corroborating the version of the aforesaid police witnesses,

PW-49 (Inspector Anil Sharma) investigating officer has deposed that: -

“PCR team had reached at the spot before my arrival. I informed my seniors about the recovery of abovesaid dead body and called staff from the PS. Inquiry was made from various people of that area to ascertain the identity of the deceased. I also tried to contact PCR but could not contact him. I also learnt through PCR officials that they had come to know that dead body had been thrown from a Swift car of white color. Crime team was also summoned. Crime team inspected the said spot and also took the photographs of the spot from various angles. Nothing was recovered from the clothes of the deceased for his identification. I collected the exhibits from the sports i.e., pieces of burnt clothes, piece of semi-burnt crape bandage, one blood smeared doctor tape, one plastic bottle along with its lid, bloodstained concrete, burnt concrete and earth control. Separate pullandas of these articles were prepared and sealed with the seal of “AS” and gave them serial no. 1 to 7. Same were seized vide seizure memo already Ex.PW42/A which bears my signatures at point B.

Three coins of two rupees each were also found lying at the spot. Same were kept in a plastic box which was sealed with the seal of “AS” and was taken into possession vide seizure memo already Ex.PW42/B which also bears my signatures at point B. Dead body was sent to the mortuary of BJRM hospital through Ct Sandeep to get it preserved at the mortuary.

I prepared rukka Ex.PW49/A which bears my signatures at point A and same was sent through ASI Daya to PS for registration of the case. I prepared site plan Ex.PW49/B which bears my signatures at

point A. I contacted CIPA operator for getting the details of any missing person matching to the said recovered dead body but identification of the dead body could not established at that time. Meanwhile, ASI Satya Dev, after getting registered the FIR, came back to the spot and handed over me copy of FIR and rukka. I mentioned the FIR number in the aforesaid seizure memos. I also got issued the Hue and Cry notice and tried to gather the local information about the deceased. The same is Ex.PW49/C. I also deposited the abovesaid exhibits seized from the spot in the malkhana of PS Maurya Enclave. Wireless message was flashed and also got uploaded the details of dead body on ZIP net. I also recorded the statement of ASI Satya Dev u/s 161 Cr.P.C.

Ct. Sandeep informed me that the said recovered dead body was identified as Shivam Kapoor. I also came to know that the missing report of deceased had been lodged vide DD No. 8A dated 18/07/2012 at PS Subzi Mandi which is already Ex.PW3/A. I also contacted the concerned IO SI Sombir of PS Subzi Mandi. The relatives of deceased were informed to reach the mortuary of BSA hospital next day.

Next day, Ct. Sandeep brought the dead body to said hospital from BJRM hospital. There are dead body was identified by his father and brother. Their identification statements were recorded. Inquest papers were also prepared which are Ex.PW49/D (nine pages) bearing my signatures at point X. Postmortem was got conducted and after post-mortem, the dead body was handed over to the father of deceased. Statement to that effect were also recorded.”

52. As per the testimony of PW-49 (Inspector Anil Sharma) during investigation, he made inquiries from PW-23 (Indal), eye witness, PW-

28 (Gautam Taneja) and also from Appellant/Runeet Gulati to ascertain the identification of the perpetrators of the crime. The relevant portion of his testimony is as under: -

“Thereafter, I made inquiries from eyewitness Indal, Gautam Taneja and also from suspect Runeet Gulati. I also obtained CDRs of mobile phones of suspect Runeet Gulati and deceased Shivam @ Shivam Pandey. I also made inquiries from the family members of the suspects alleged to have been with Runeet Gulati on the day of incident. Accused Abhay Dewan and Jatin were not found present at their respective addresses.

On 24.07.2012 accused Runeet, Jatin as well as Abhay came to PS and were interrogated thoroughly and that they were confronted with regard to their locations on the date of incident. All three accused were interrogated separately and their versions were confronted with each other. Again on 25.07.2012, they were called at PS Maurya Enclave and sustained interrogation was conducted. Finally, they confessed about their involvement in the aforesaid case and having satisfied their role in the present case. I arrested them.”

53. Learned counsel for the Appellants contended that PW-19 (Vishal) cannot be termed as last seen witness as he has not seen Appellant/Runeet and Deceased/Shivam together. Learned counsel further contended that the child witness PW-23 (Indal) only identified a white car bearing No. 4654 moreover, PW-19 (Vishal Verma) had disclosed, the registration number of Swift car as DL2C AN 3335 only on 23.07.2012, however, PW-49 (Inspector Anil Sharma) deposed that he came to know about the non-involvement of

Swift car bearing registration no. 4654 on 25.07.2012, which prove that the statement of PW-19 (Vishal Verma) under Section 161 Cr. P.C. was not recorded even on 23.7.2012, hence, all the instances prove that there was nothing on record to prove the involvement of the Appellants in the commission of crime. At this stage, we deem it appropriate to peruse the testimonies of relevant witnesses. Deepak Kapoor (*brother of the deceased*) who stepped into witness box as PW-16 deposed that:

"I am doing BBA from Delhi Institute of Rural development at Nangli Puma and I am in the final year. Shivam Kapoor @ Pandey (since deceased) was my brother. On 17.07.2012 at about 10.30 PM my brother Shivam Kapoor @ Pandey went away on his two wheeler scooter in a usual way. He did not return to house upto 11 PM thereafter at about 11-11:15 PM I made a mobile phone to him by my mobile phone No. 9871410509 on the mobile phone number of my brother i.e. 8586807081. My brother Shivam told me that he was returning to house within 15 minutes. We waited for him upto 11:30 PM and at about 11:30 PM, I again made a call on his mobile phone by my mobile phone but his mobile phone was found switched off. Thereafter I made calls to his friends and also made call to his friend Vishal who informed me that Shivam was with him at last time upto 11 PM and he further informed me that Runeet met them on the way and thereafter Shivam went away with Runeet. Thereafter I along with my father went to the house of Vishal. He met me and thereafter I along with Vishal went to the house of Runeet. Runeet was not present at his house, his mother gave mobile number of Runeet to us. I made call at the mobile number of Runeet many times but the

same was found switched off. Thereafter I along with Vishal was going to search my brother in the areas of Vijay Nagar, Ashok Vihar, Model Town, NSP where my brother usually go. **When we reached at Vijay Nagar, then I received mobile call from my father and he informed me that the scooter of Shivam was found at Malkaganj Gurudwara without key.** Thereafter we searched my brother in the Vijay Nagar, Ashok Vihar, Model Town, NSP for about 2-3 hours with my other friends but my brother was not found and thereafter we returned back to our house. **At about 2:45 AM (midnight) my father and my cousin Shrutikant went to PS Subji Mandi for lodging the FIR about the missing of my brother Shivam and we have suspicion on Runeet.** I again searched my brother at the above said four places and I again returned back to our house at around 5-6 AM. My all family members had already gone to PS Subzi Mandi. I also reached at PS Subzi Mandi. **At about 3-4 PM we came to know that a dead body was found at the Jahangirpuri. My father and some relatives went to Jahangirpuri to identify the dead body. I also reached there and I also identified the dead body of my brother Shivam. I can identify the accused Runeet who is present in the Court today (Correctly identified by the witness)."**

54. Sanjeev Kapoor (father of the deceased) was examined as PW-18 who in his examination- in-chief deposed that:-

"I have a shop of utensils at Kamla Nagar. Shivam was my son who used to help me at my shop and he used to remained with me from 9AM to 9PM and he was studying through correspondence of BA Ist year. He was in habit of going to out of the house to meet his friends after taking dinner at about 9-9:30 PM on his scooter bearing No. DL 1 SS-2887.

On 17.07.2012 at about 9:45-10 PM Shivam went away from the house on his scooter after taking dinner. He did not return back upto 10:30 PM thereafter I asked my another son Deepak to call Shivam and thereafter Deepak made a call to the Shivam at about 10:45 PM and Shivam told that he was coming to the house within 15 minutes. He did not return back to the house to the next 25-30 minutes. Again Deepak made a call to Shivam but his mobile phone was found switched off. Mobile phone number of Shivam was 8586807081. We were worried as Shivam never switched off his mobile phone. Thereafter, we made call to his friends and inquired about his whereabouts and we also made a call to the Vishal who informed us that Shivam had left him at his house. Thereafter I along with Deepak, Shrutikant reached at the house of Vishal. Vishal told us that Shivam was with him upto 11-11:30 PM and Shivam had left him at his house and at the golechakkar of Gurudwara, Malkaganj Runeet met them with an another person who was not known to him, in a white color Swift Maruti car and Runeet was saying that he wanted to talk something with Shivam and Runeet further told him that to left Vishal at his house and thereafter they will talk. Thereafter we all including Vishal reached at the house of Runeet but he was not present at his house and his mother gave his mobile number and we made a call to Runeet for about 7-8 times but his mobile phone was found switched off. Runeet did not returned to his house at about 1:30-2 AM. Thereafter we searched Shivam in the area. I along with Shrutikant searched my son Shivam in the Malkaganj area on scooty. Deepak and Vishal were on motorcycle and they searched Shivam in the different area. We found the scooter of Shivam in the Malkaganj near the Gurudwara without key. Shivam was not found by us and

thereafter we all went to the PS Subzi Mandi for lodging the missing report at about 2:30-2:45 AM (midnight) and we suspected Runeet. Again we reached at PS Subzi Mandi at the morning time on 18.07.2012 but Shivam and Runeet were not traceable. At about 7:30 AM on 18.07.2012 Runeet came at PS Subzi Mandi. He was interrogated by the police but he did not disclose anything about Shivam. Thereafter we left the police station. At about 3PM police of PS Subzi Mandi informed me about the recovery of dead body and thereafter we went to the BJRM hospital Mortuary where I identified the dead body of my son Shivam which was brutally murdered. I identified the dead body of my son vide Ex.PW18/A bearing my signatures at point B and we conducted the last rites of my son.”

55. The statement of Vishal Verma, under Section 161 Cr. P.C., was recorded by the Investigating Officer on 23.07.2012, who stated as under:-

“I reside at the aforesaid address with my family and recently I have got admission in 1st year. I am acquainted with Shivam Kapoor @ Pandey for about one year and know Runeet since childhood who studies in Bangalore and for last few days has been roaming in Malka Ganj in Swift Car No. DL 2C AN 3335. On 17.07.2012 at about 11 PM, I along with Shivam was roaming on his Scooter while sitting on rear seat at Malka Ganj Chowk. Meanwhile, I met Runeet along with a boy in the aforesaid car while eating Maggi. Runeet was driving the car slowly. When he saw us on scooter, he stopped his car and told Shivam that he wanted to talk to him. Whereupon Shivam asked as to what he had to talk? Then he told that not right now, later. Thereafter, Runeet slowly moved his car and Shivam Dropped me at my home by his scooter. He

told me that he was going to meet Runeet and he immediately left. When he did not return home at night, his brother Deepak and some other people came at my home and enquired about Shivam. Whereupon, I told that I and Shivam had met Runeet at the Chowk who was in a white Swift Car with a boy and was asking Shivam to have some talk with him. Then Shivam had gone to meet Runeet while leaving me at my home by his scooter. Thereafter, I, Deepak and some other people went to Runeet's house for an enquiry. Runeet was not present at his home. His mother told that he comes late at night. Then Deepak made a telephonic call to Runeet while taking his mobile number from his mother. His mobile was switched off and Shivam's mobile was also switched off. Then we along with other people of the locality searched for Shivam and found Shivam's scooter parked at Malka Ganj, Gurudwara. But no information was found about Shivam. Thereafter, his family members got lodged a report regarding missing at Subzi Mandi Police Station in the night itself. In the later evening of 18th July, we came to know that Shivam's dead body has been found at Ekta Camp near Jhuggis, Pitampura and lying in Mortuary at Jahangirpuri. Today dated 23.7.2012, as per your instructions, I have come at Police Station, Maurya Enclave and told you all the circumstances. I have heard the statement and the same is correct."

Sd/-

23.07.2012

*Insp. Anil Sharma
P.S. Maurya Enclave"*

56. Vishal Verma (*friend of the deceased*), the star witness of the prosecution was examined as PW-19, wherein he deposed as under:-

"I am doing BA first year by correspondence. I knew Shivam Kapoor @ Pandey since one year as he also used to come for tuitions. On 17.07.2012 at about 10:30 PM Shivam Kapoor came at my house on his scooter. Thereafter I along with Shivam Kapoor to hand over the camera to the brother of our friend at Metro Station Pulbangash and thereafter we reached at Vijay Nagar and we ate sandwich there. Thereafter we reached at Malkaganj and at the chowk of Gurudwara, Runeet Gulati met us and he was in a Swift car and Abhay Dewan was sitting with him in the Swift car whose name came to know me later on. I already knew Runeet Gulati since my childhood and he was studying at Bangalore. Runeet Gulati and Abhay Dewan were taking Maggie inside of the Swift car. Runeet Gulati told Shivam Kapoor that he wanted to talk with him but he insisted that he will talk with Shivam Kapoor in my absence. Thereafter Shivam Kapoor left me at my house at about 11 PM and he went away from there by saying that he was going to talk with Runeet Gulati. At about 11:30 I received phone call from the brother of Shivam Kapoor and asked me about the whereabouts of Shivam Kapoor then I informed him that Shivam Kapoor had left me at my house. After some time at about 11:40 PM father and brothers of Shivam Kapoor came at my house and asked me about the whereabouts of Shivam Kapoor, then I informed them that Shivam Kapoor had left me at my house and Shivam Kapoor went away by saying that he was going to meet Runeet Gulati and Runeet Gulati met us at the gole chakkar Chowk Gurudwara where Runeet Gulati asked Shivam as he wanted to talk with Shivam Kapoor. Thereafter we reached at the house of Runeet Gulati but he was

not present at his house and his mother gave mobile number of Runeet Gulati to Deepak, brother of Shivam Kapoor. Deepak made a call on the mobile phone of Runeet Gulati but the same was found switched off. I along with Deepak searched Shivam Kapoor in the area of Vijay Nagar on the motorcycle but he was not found there. Thereafter we came to know from the father of Shivam Kapoor that scooter of Shivam Kapoor without key was found at the Gurudwara Malkaganj. We searched the Shivam Kapoor the whole night but he was not traceable. On the next day on 18.07.2012 at about 3-4pm, I came to know from the father of Shivam Kapoor that dead body of Shivam Kapoor was recovered. At this stage the witness states he has been threatened by two person on motorcycle in front of Mandir at G-Block, Malka Ganj on 30.3.2013 at evening time by saying that 'Apni Gawahi Tod De Warna Jaan Se Maar Denge'. I made a complaint to SHO PS Subji Mandi on 31.03.2013. Photocopy of the same is Ex. PW-19/B hearing my signatures at point A."

57. During cross-examination PW-19 (Vishal Verma) deposed as under:-

"My three statements were recorded in this case but I do not remember the dates when the said statements were recorded. I knew deceased Shivam since about one year prior to the incident. I and Shivam were taking tuitions from the same Tuition Center. I knew family of deceased Shivam as well. I was doing B.A. 1st Year (Correspondence) from the same college from Shivam was doing B.A. IInd Year (Correspondence).

It took us five minutes by scooter to reach Pulbangash Metro Station from my house. We met Shalu at Publbangash Metro Station and handed over camera to him. It took us about 5 to 10 minutes to go from Pulbangash Metro Station to Vijay Nagar

where we ate sandwich. The scooter belonged to Shivam. Shivam was not wearing helmet at that time. When we finished eating sandwich, it was about 10 minutes to 11:00 pm.

I do not remember when my first statement was recorded by the police. It was probably 4-5 days after the incident. During the said period of 4-5 days, police met me and made inquiries from me but my statement was not recorded by the police.....

I had mobile phone number of Runeet Gulati but it was in my other mobile phone. I had given the said mobile number to the police on the night of 17/18.07.2012 when I was with the family of Shivam searching for him. The Swift car was being driven by Runeet Gulati. I had told the police in my statement u/s 161 Cr. P.C. that Runeet Gulati told Shivam Kapoor that he wanted to talk with him but he insisted that he will talk with Shivam Kapoor in my absence. Confronted with statement u/s 161 Cr.P.C dated 23.07.2012 where it is not so recorded but it is recorded that 'phir Shivam ko kaha tumse kuch baat karni hai, jab Shivam ne kaha ha bol, tab usne kaha ab nahi, phir aur uske bad Runeet ne dhire dhire gadi aage bada di'. It is wrong to suggest that I have deposed before the Court on 09.04.2013 that Runeet Gulati told Shivam Kapoor in my absence, at the instance of Police and the family of the deceased or that due to this reason, this fact does not find mentioned in my statement u/s 161 Cr.P.C dated 23.07.2012 that he wanted to talk with him but insisted that he will talk with Shivam Kapoor in my absence...

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At 11:40 pm, only father and one brother of Shivam Kapoor came to my house. I do not remember my phone number, on which, I had received call from brother of Shivam Kapoor at

11:30 pm. I have changed the said number. I also do not remember the number from which, the call was made at my mobile phone at 11:30 pm. My number at that time, was perhaps from Vodafone company and I surrendered it either about 10 days of the phone call. I do not remember, for how long, I continued with the said phone number. I do not remember, on whose name, the said connection was, which I was using. Shivam Kapoor was having my above mentioned number and he used to give me calls on it. I had perhaps spoken to Shivam Kapoor on my mobile phone on the day of the incident i.e., 17.07.2012

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When we went to the house of accused Runeet after 11:45 pm on 17.07.2012, at that time, I, brother and father of Shivam had gone there. The phone number of Runeet was given to us by the mother of Runeet, which was written by us. I do not remember, as to what time, the missing report was lodged at the Police Station Subzi Mandi. We found the scooter of Shivam before lodging of the missing report with the police. I do not know, if family members of Shivam had given a call at 100 number, when the Shivam's scooter was found, but I did not given any such call. I do not remember the time, when the scooter was found. Vol. we were busy in searching for Shivam, so I did not keep track of time. It is wrong to suggest that I am unable to give the time, when the Shivam's scooter was found or that when the report was filed, as I was not present with the brother and father of Shivam. It is further wrong to suggest that I am a planted witness. I do not know, if family members of Shivam had mentioned Runeet's phone number in the DD as I had not accompanied them to PS for lodging the report”

58. From the perusal of the aforesaid testimonies, it is evident that when the deceased did not return home by 10:30 PM, Deepak (brother of the deceased) made a call to Shivam at 10:45 pm who informed that he will be getting back in 15 minutes. Since, the deceased did not return to his house for the next 25-30 minutes and mobile phone of the deceased bearing no. 8586807081 was switched off, the family members started searching for the deceased. As per the testimony of PW-18, (Sanjeev Kapoor), he deposed: ‘we made call to his friends and inquired about his whereabouts and we also made a call to the Vishal who informed us that Shivam had left him at his house. Thereafter I along with Deepak, Shrutikant reached at the house of Vishal. Vishal told us that Shivam was with him upto 11-11:30 PM and Shivam had left him at his house and at the gole chakkar of Gurudwara, Malkaganj. Runeet met them with an another person who was not known to him, in a white color Swift Maruti car and Runeet was saying that he wanted to talk something with Shivam and Runeet further told him that to left Vishal at his house and thereafter they will talk.’ PW-19 (Vishal) also corroborated the testimony of PW-18 (Sanjeev Kapoor) and deposed that ‘After some time at about 11:40 PM father and brothers of Shivam Kapoor came at my house and asked me about the whereabouts of Shivam Kapoor, then I informed them that Shivam Kapoor had left me at my house and Shivam Kapoor went away by saying that he was going to meet Runeet Gulati and Runeet Gulati met us at the gole chakkar Chowk Gurudwara where Runeet Gulati asked Shivam as he wanted to talk with Shivam Kapoor. Thereafter we reached at

the house of Runeet Gulati but he was not present at his house and his mother gave mobile number of Runeet Gulati to Deepak, brother of Shivam Kapoor. Deepak made a call on the mobile phone of Runeet Gulati but the same was found switched off.’.

59. Learned counsel for the Appellants labored hard to contend that PW-19 (Vishal) was a planted witness. PW-19 (Vishal) was cross examined at length by the defence counsel to establish that the witness was not present at the spot and has been introduced later by the prosecution. It is evident from the testimony of PW-19 (Vishal) that he had not seen the deceased in the company of Appellant/Runeet Gulati & Appellant/Abhay Dewan after the deceased had dropped him at his residence. But a close scrutiny of the cross-examination of the PW-19 (Vishal) reveals that he deposed on same lines what has been deposed by him in his examination-in-chief and the same corroborates with the version of the PW-16, Deepak Kapoor (*brother of the deceased*) and PW-18, Sanjeev Kapoor, (*father of the deceased*). Further, in order to establish that PW-19 (Vishal) was a planted witness, learned counsel for the Appellants laid great emphasis on the missing report (*Ex.PW3/A*). From the perusal of the record we find that the name of the PW-19 (Vishal) has not been mentioned in the missing report (*Ex.PW3/A*). However, we cannot ignore the testimony of PW-16, Deepak Kapoor (*brother of the deceased*) and PW-18, Sanjeev Kapoor, (*father of the deceased*) who have categorically deposed that PW-19 (Vishal) was with them the whole night searching for the deceased (Shivam) and even went to the house of the Appellant/Runeet Gulati where they

met Appellant/Runeet Gulati's Mother who gave them Runeet's phone number. As such the fact that the name of PW-19 (Vishal) was not mentioned in the missing report does not discard the story of the prosecution that at 11:00 pm on the intervening night of 17/18.07.2012, the deceased dropped PW-19 (Vishal) at his house and left after saying that he is going to meet Runeet Gulati. Moreover, the main ingredient of the missing report is the description of the person who is missing and the details relating to the disappearance, the last contact with the individual, what they were wearing when they disappeared and any details relating to possible reasons behind their disappearance. Missing report is not a catalogue to mention each and every detail and it is not possible for a complainant to give each and every detail in the missing report. As such the reliance placed by the learned counsel for the Appellant on the missing report (**Ex.PW3/A**) holds no ground.

60. 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 Hon'ble Supreme Court of India in the case of **Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr.**, reported at (2013) 12 SCC 796, has held as under:

"28. As is evincible, the High Court has also taken note of certain omissions 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 defense 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 (See *Leela Ram vs. State of Haryana and another, Rammi alias Rameshwar v. State of M.P. and Shyamal Ghosh v. State of West Bengal*).*

(emphasis supplied)

61. In the present case nothing has been brought on record to prove that the evidence of the prosecution witnesses cannot be believed and relied upon or they have falsely implicated the Appellants due to some personal vengeance or have implicated the Appellants in the present case at the instance of the prosecution. In all criminal cases, normal discrepancies are bound to occur in the depositions of the witnesses due to normal errors in observations, namely, error of memory due to lapse of time or due to mental disposition such as shock and horror at the time of the incident. Hence, the argument of the counsel for the Appellant with regard to the contradictions in the testimonies of material prosecution witnesses holds no ground.

Arrest of Accused Persons

62. As per the deposition of PW-49 (Inspector Anil Sharma) Appellants/Runeet, Jatin as well as Abhay came to Police Station on 24.07.2012 and were interrogated thoroughly and were confronted about their location on the date of incident. All three accused were interrogated separately and their versions were later confronted with each other. Again on 25.07.2012, they were called to Police Station Maurya Enclave and sustained interrogation was conducted. Finally, they confessed to their involvement in the murder of the deceased Shivam and after being satisfied about their involvement they were arrested. From the perusal of the Arrest memos (*Ex, PW-25/A*), (*Ex. PW-25/D*) and (*Ex. PW-25/G*), we find that Appellant/ Runeet Gulati was arrested on 25.07.2012 at 05:15 pm at Police Station, Maurya Enclave (*Ex, PW-25/A*) in the presence of HC, Manoj Raghav and Ct. Pyare Lal; Appellant/ Abhay Dewan was arrested on 25.07.2012 at 05:30 pm at Police Station, Maurya Enclave (*Ex, PW-25/D*) in the presence of HC, Manoj Raghav and Ct. Pyare Lal; Appellant/ Jatin was arrested on 25.07.2012 at 05:45 pm at Police Station, Maurya Enclave (*Ex, PW-25/G*) in the presence of HC, Manoj Raghav and Ct. Pyare Lal and Appellant/Mahima Dewan was arrested on 26.07.2012 at 07:00 am from House no. C-2/16, Sector-15, Rohini, Delhi (*Ex, PW-25/Z-4*) in the presence of Ct. Rakhi and HC, Manoj Raghav.
63. Learned counsel for the Appellants did not dispute the presence of the Appellants on the intervening night of 17th - 18th July, 2012 in Delhi. However, they contended that the Appellant/Abhay Dewan,

Appellant/Mahima Dewan & Appellant Jatin were apprehended from Nepal Border when they were enjoying their vacations and were brought to Delhi on 24.07.2012 where they were kept in illegal detention. Their arrests were shown on 25.07.2012 and 26.07.2012. In order to establish the arrest of the Appellants from the Nepal Border, learned counsel for the Appellants relied on the testimony of DW-5 (Bharat), who deposed that:-

“I was on business trip in Chhattisgarh in July 2012. There I got a telephonic call from my home informing me that police has taken my younger son Ankush at Police station. At that time, my son Ankush was sleeping at the residence of Govind Dewan. IN response thereto, I came back to Delhi. Thereafter, I visited PS Maurya Enclave. There I met one police official namely Paliwal and inquired from him as to why he had picked my son. He asked for the whereabouts of Abhay Dewan and stated that only thereafter, he would leave my son. I informed him that the accused Abhay Dewan and Mahima Dewan had taken my Civic Car registration no. 6589 from my son Ankush and had gone to Nepal for outing.

XXXX XXXX XXXX
On 23.07.2012, when I was coming from Rohini towards PS Maurya Enclave, near Sachdeva Public School, I got a call who inquired about me and asked me whether I knew Abhay Dewan and Mahima

Dewan. I said yes and asked about the identity of the said person. He replied he was one SI Kunsal from Nepal Border and he had called as my car no. No. 6589 was parked for the last two days. My mobile no. is 9312252885 and the same is my name.”

64. From the testimony of DW-5 it emerges that some inquiries about Honda Civic Car registration no. 6589 were made as the same was found parked at Nepal border by one SI Kunsal from Nepal Border, beyond which neither DW-5 gave any information nor the accused persons produced any credible evidence for substantiating their claim of illegal detention from Nepal Border.
65. To the contrary, as per the case of the prosecution, the Appellants i.e. Abhay Dewan, Runeet Gulati and Jatin came to the police station on 24.07.2012 and were again called on 25.07.2012, wherein they were interrogated and confessed about their involvement in the present case. These Appellants were arrested vide arrest memo Ex.PW25/A, Ex.PW25/D and Ex.PW25/G and their personal search was conducted vide memo Ex.PW25/B, Ex.PW25/E and Ex.PW25/H and Appellant/Mahima Dewan was arrested from her residence at Sector-15, Rohini, Delhi vide arrest Memo Ex.PW25/Z4. In this context, we find from the record that the prosecution has examined, PW-49 (Inspector, Anil Sharma) who during his examination-in-chief deposed that:-

“On 24.07.2012 accused Runeet, Jatin as well as Abhay came to PS and were interrogated thoroughly and they were confronted with regard to

their locations on the date of incident. All three accused were interrogated separately and their versions were confronted with each other. Again on 25.07.2012, they were called at PS Maurya Enclave and sustained interrogation was conducted. Finally, they confessed about their involvement in the aforesaid case and having satisfied their role in the present case, I arrested them.”

66. PW-25 (HC Manoj Raghav), during his examination-in-chief deposed as under:-

“On 25.07.2012 I was posted at PS Maurya Enclave and on that day I joined the investigation of this case with IO-Insp. Anil Sharma at PS. Other police officials had also joined the investigation. IO arrested accused Runeet Gulati present in Court today (correctly identified) and prepared arrest memo Ex.PW25/A. IO took the personal search of accused Runeet Gulati. One visiting card, three passport size photograph of accsed Abhay Dewan and Rs.100 were recovered from the personal search of accused Runeet Gulati. IO prepared personal search memo which is Ex.PW25/B. It bears my signature at point A. One mobile phone made Samsung of silver color (dual sim) was also recovered from the personal search of accused Runeet Gulati. IO kept the said mobile phone on a piece of cloth and after preparing pullanda duly sealed with the seal of AS and was taken into possession through separate seizure memo Ex.PW25/C which also bears my signatures at point A. Thereafter, IO arrested accused Abhay Dewan @ Gappy present in Court today (correctly identified) in this case and prepared arrest memo Ex.PW25/D which also bears my signature at point A. IO took personal search of accused Abhay Dewan and one voter ID card, one credit card of

*HDFC Bank, visiting card casino Nepal and one metro card and cash Rs.1000/-. One mobile phone make Nokia E-63 was also recovered. IO prepared the personal search memo in this regard. Same is Ex.PW25/E which also bears my signatures at point A. Aforesaid mobile phone was separately kept in a piece of cloth and after preparing pullanda and sealed with the seal of AS was taken into possession through seizure memo Ex.PW25/F which also bears my signatures at point A. **Thereafter, IO arrested accused Jatin present in Court today (correctly identified) and prepared arrest memo Ex. PW25/G.** IO took the personal search of accused Jatin in which two visiting cards and cash Rs.500/- and two mobile phones, one make Samsung of white color and one make spice of black color were recovered. IO prepared the personal search memo. Same is Ex.PW25/H. Aforesaid two mobile phones were kept in piece of cloth and after preparing pullanda duly sealed with the seal of AS and was taken into possession through seizure memo Ex.PW25/J which bears my signatures at point A. IO thoroughly interrogated all the three accused persons separately and recorded their disclosure statements. Same are Ex.PW25/K1, Ex.PW25/K2 & Ex.PW25/K3 of accused Runeet Gulati, Abhay Dewan and Jatin respectively.*

67. Further as far as arrest of Appellant/Mahima Dewan is concerned, she was arrested vide arrest Memo (**Ex.PW-25/Z4**), wherein the deposition of PW-43 (Ct. Rakhi) corroborates the testimonies of PW-25 (HC Manoj Yadav) and PW-49 (Inspector, Anil Sharma). Relevant portion of the testimony of Ct. Rakhi is as under:-

“On 26.07.2012, I was posted at PS Maurya Enclave. I joined investigation of the case with IO Inspector Anil Sharma. At about 6:00 am, IO his

team and myself had gone to H.No. C-2/16, Sector 15, Rohini in official gypsy. We had gone to second floor where accused Mahima Dewan, present in Court (correctly identified), was found present with her parents-in-law. IO made interrogations from accused and arrested her at about 7:00 a.m. As per the instructions of IO, I took her personal search by taking her to another room. Nothing was recovered from her such personal search. Her arrest memo is already Ex.PW25/Z4. Her personal search memo is already Ex.PW25/Z3.

She also handed over her white color mobile phone to the IO which also contained SIM. IO seized the same and prepared a pullanda and sealed the same with the seal of "AS". Seizure memo in this regard is already Ex.PW25/Z6. Her disclosure statement was also recorded which is already Mark .PW25/Z5.

Accused Mahima also taken out one white color top having blue color (cheenth) design and black color lower from wardrobe of her second floor house claiming that she had been wearing the same at the time of the incident. These were also seized by IO in the similar manner vide memo already Ex.PW25/Z7. All these memos were signed by me also as attesting witness."

68. It is pertinent to mention here that during the trial the Appellants moved an application before the Trial Court for production of Call Detail Records of the members of Investigating Team. However, on 06.02.2018 all the Appellants withdrew their prayers for providing the Call Detail Records of PW-49 (Inspector Anil Sharma). On 15.02.2018 the following order was passed: -

"8. In the present case, the accused moved an application under Section 91 Cr. P.C. seeking

preservation of the CDR data of the above mentioned persons. Vide order dated 04.07.2013, Ld. Predecessor of this Court directed the preservation of the CDR data of the persons mentioned in the above list from 18.07.2012 to 26.07.2012. Simultaneously, it was clarified that whether or not permission to summon the said record be given and the conditions therefore and also the issue whether the same could be relied upon by the accused persons in their defence evidence would be seen at the appropriate stage. Hence, vide the said order, only the CDE data of the said police officials was directed to be preserved and the issue of their relevancy/admissibility in defence evidence was left upon. Therefore, it can be held that mere preservation of the CDR data shall not amount to grant of permission to the accused to lead the same in their defence evidence.

9. *Now the question arises whether the CDR data of the police officials mentioned at serial no. 6 to 10 of the above list can be summoned by the accused in their defence.*

10. *In the judgment passed by Hon'ble Delhi High Court in Attar Singh (supra), the petitioner herein sought direction for the supply of the call details of the calls made from the mobile phone of the Investigating officer. The grievance of the petitioner was that the calls made from the mobile of the investigating officer would indicate the presence, location and the activities of the investigating officer. The Hon'ble Delhi High Court rejected the said submission holding that the details of personal telephone of IO of the case would amount to intrusion in the privacy of the investigating officer.*

11. *In view of the above mentioned judgment, it can be held that the CDR of the Investigating Officer cannot be summoned for the reason that the*

same shall amount to intrusion in the privacy of the Investigating Officer. On the same analogy, it can be held that the CDR data of the other police officials i.e. the said police officials who helped him in arrest of the accused no. 1, 2 and 4 as alleged by the said accused, cannot be summoned for the purpose of the defence evidence as the same shall amount to intrusion in their privacy. Therefore, the prayer of the accused to summon the CDR data of the police officials mentioned at serial no. 3 and 4 when they were out of Delhi on 24.07.2012.”

69. Against the above mentioned order dated 15.02.2018, the Appellants preferred CrI. M.C. 2018/18 before the High Court of Delhi, which was dismissed vide order dated 28.05.2018, and the order attained finality with regard to production of CDR details of the Investigation Team.
70. Though, learned counsel for the Appellants vehemently argued that the Appellants Abhay Dewan, Mahima Dewan and Jatin were arrested from Nepal Border, but the deposition made by the Appellants, during their statements recorded under Section 313 of Code of Criminal Procedure, failed to disclose about their visit to Nepal, which needs to be examined threadbare. The Appellants deposed as follows:-

APPELLANT/ABHAY DEWAN

"Question 43 : Further that on 24.07.2012 you accused Abhay Dewan and your co-accused Runeet and Jatin came to PS and were interrogated thoroughly and you and your co-accused were confronted with regard to your locations on the date of incident and you and your co-accused were

interrogated separately and versions of you and your co-accused were confronted with each other and again on 25.07.2012, you and your co-accused were called at PS Maurya Enclave and sustained interrogation was conducted and you and your co-accused confessed your involvement in the present case vide disclosure statements Ex.PW25/K1, Ex.PW25/K2 and Ex.PW25/K. What do you have to say?

Answer : Police took me to the police station Maurya Enclave on 25.07.2012 only. No interrogation was made from me on 24.07.2012. I did not made any discloure statement. I do not know about Runit and Jatin whether they made any disclosure statement. I do not know about Runit and Jatin whether they made any disclosure statement or not.

Question 44 : Further that you and your co-accused were arrested vide arrest memos Ex.PW25/A, Ex.PW25/D & Ex.PW25/G and personal search memos of you and your co-accused are Ex.PW25/B, Ex.PW25/E and Ex.PW25/H. What do you have to say?

Answer : Police arrested myself and Runit and Jatin. Police searched me.

Question 65 : Further that your co-accused Mahima was arrested vide arrest memo Ex.PW25/Z4 and she disclosed her involvement in the present case vide disclosure statement Mark PW25/Z5. What do you have to say?

Answer : Police arrested Mahima Dewan.

APPELLANT / MAHIMA DEWAN

Question 44 : Further that your said co-accused were arrested vide arrest memos Ex.PW25/A, Ex.PW25/D & Ex.PW25/G and personal search memos of you and your co-accused are Ex.PW25/B, Ex.PW25/E and Ex.PW25/H. What do you have to say?

Answer : I do not know.

Question 65 : Further that you accused Mahima were arrested vide arrest Memo Ex.PW-25/Z4 and you disclosed your involvement in the present case vide disclosure statement Mark PW25/Z5. What you have have to say?

Answer : Police took myself, my husband Abhay Dewan and Jatin to the police station and kept all of us for 2 to 3 days in the police station. Thereafter, police arrested us. I did not make any disclosure statement.

APPELLANT/RUNEET GULATI

Question 44 : Further that you and your said co-accused were arrested vide arrest memos Ex.PW25/A, Ex.PW25/D and Ex.PW25/G and personal search memos of you and your said co-accused are Ex.PW25/B, Ex.PW25/E and Ex.PW25/H. What do your have to say?

Answer : It is correct. I was kept in the PS Sabji Mandi on 18.07.2012 in the evening I came back to my house. Next morning I visited the PS Sabji Mandi and police made inquiries from me and I again came back to my house. Thereafter, I was taken to PS Maurya Enclave and was arrested on 19.07.2012 itself.

APPELLANT / JATIN

Question 44 : Further that you and your said co-accused were arrested vide arrest memos Ex.PW25/A, Ex.PW25/D and Ex.PW25/G and personal search memos of you and your said co-accused are Ex.PW25/B, Ex.PW25/E and Ex.PW25/H. What do you have to say?

Answer : I was arrested but not in the manner as stated by the police. I was brought from Nepal Border. I do not remember the date when I brought from Nepal Border.

71. Perusal of the statement of Appellant/Abhay Dewan recorded under section 313 of the Code of Criminal Procedure reveals that he remained silent on this issue for the reasons best known to him. Similarly, Appellant/Mahima Dewan denied having knowledge of the arrest of her co-accused and in the same breath, she claimed that she along with other accused persons was detained by the police for 2-3 days and were shown as arrested in the record, wherein she failed to disclose anything with regard to her arrest from the Nepal Border
72. While answering the questions under Section 313 of Code of Criminal Procedure, the Appellant/Jatin though claimed that he had been arrested from Nepal Border but failed to disclose the date of arrest. Hence, the defence took up a vague plea and failed to bring any substantial piece of evidence on record to suggest that the Appellants Abhay Dewan, Mahima Dewan and Jatin were arrested from Nepal Border.
73. Section 313 Cr.P.C. provides direct interaction of the Court with an accused to personally enable him to explain each and every incriminating evidence and circumstances appearing against him.

Though every accused has a right to keep silent or deny the incriminating circumstance emerged against them in evidence, but in such circumstances an adverse inference could be drawn against them.

74. The Apex Court in the case of ***Prahlad vs. State of Rajasthan*** reported in ***2018 SCC Online SC 2548*** held that silence of the accused in the statement recorded under Section 313 Cr.P.C about matters he/she is expected to explain leads to an adverse inference against them. Germane portion of the judgment is extracted below -

*“9. No explanation is forthcoming from the statement of the accused under Section 313 Cr.P.C. as to when he parted the company of the victim. Also, no explanation is there as to what happened after getting the chocolates for the victim. **The silence on the part of the accused, in such a matter wherein he is expected to come out with an explanation, leads to an adverse inference against the accused.**”*

(emphasis supplied)

75. According to the prosecution, the Appellants were arrested on 25.02.2018 and 26.02.2018 in Delhi as the prosecution has proved the following documents (***Ex, PW-25/A***), (***Ex. PW-25/D***), (***Ex. PW-25/G***) and (***Ex.PW25/Z4***). Though the Appellants took up a plea that they have been arrested from Nepal Border for the reasons best known to them, it is clear and evident that in their statements recorded under Section 313 Cr. P.C., they chose to remain silent about their

apprehension and arrest in Nepal Border, rather, Appellant/Mahima Dewan stated that Appellant/Abhay Dewan and Appellant/Jatin were taken to the police station and were kept in the Police Station for 2-3 days, nowhere, she has mentioned about their illegal detention from Nepal Border, even Appellant/Jatin stated that he was produced from Nepal Border but failed to give the details of the same. The Appellants though took up a plea that they were apprehended/arrested from Nepal Border but despite opportunity provided to them they failed to raise any defence and as such the case set up by the prosecution in relation to the arrest of the Appellants cannot be disbelieved.

Recovery of Material Objects

76. Learned counsel for the Appellants labored hard to bring forth that the recoveries effected at the instance of the Appellants are doubtful as there were 31 documents being arrest memos, disclosure statements and seizure memos which were executed on 25.07.2012 and only three police witnesses i.e. PW49 (Anil Sharma), PW25 (Manoj Raghav) and Pyarelal have prepared these documents in a short while and out of these three police witnesses, Pyarelal was never examined which proves that the documents have been fabricated; that the disclosure statement and the recovery memo clearly depicts that no blood stained clothes were recovered. However, while describing the clothes of the accused persons at S. No. 10 'a' and 'b' the DNA Report (*Ex.PW-1/B*) erroneously bring forth that the clothes are blood stained, indicating that evidence and records have been manipulated by the police authorities; that the

recovery from the Maruti Swift car no. 3335 from DMC Booth, opposite H.No.B-140/141, Amar Colony, Lajpat Nagar-4, Delhi is doubtful as various articles (*one clip of bandage, one bandage, one empty cartridge case lying in the middle of both front seats, one front pellet lying inside the adjacent seat of the driver seat of the car, some coins, three SIM cards, one paper cutter and one water bottle*) were recovered from the aforesaid swift car and the same were planted against the Appellant because the smaller window pane on the right rear side of the swift car was broken.

77. Thus, on the basis of disclosure statement & pointing out memo, recovery of material objects as well as the weapon of the offence was effected. However, according to Section 25 of the Indian Evidence Act 1860, no credence can be placed upon the confession made by the accused which reads as under:

“25. Confession to police officer not to be proved

No confession made to a police officer shall be proved as against a person accused of any offence.”

78. However, Section 27 of the Indian Evidence Act is in the nature of a proviso or an exception which partially lifts the prohibition imposed by Section 25 and reads as under:

“Section 27 of the Indian Evidence Act:

27. How much of information received from accused may be proved.--Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any

offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

79. In the light of Section 27 of the Indian Evidence Act, 1872 whatever information is given by the accused in consequence of which a fact is discovered only that would be admissible in the evidence, regardless of the fact that such information amounts to confession or not. The basic idea embedded under Section 27 of the Evidence Act is the doctrine of confirmation by the subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from an accused; such a discovery is true and admissible. *The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes reliable information.*
80. Further, the Division Bench of this Court in ***Rakesh Kumar Jha vs. State of NCT of Delhi (2013) 1 DLT (Cri) 79*** has extensively dealt with the admissibility of the confession made by the accused to the police. Relevant portion is reproduced hereunder:

“5. Before we proceed further, we need to decide to what extent confession made by the Appellant, recorded under DD Entry No. 11A, or the alleged extra judicial confession to Srinivas Kumar (PW-20) is admissible. On record, Appellant’s case is that he made no extra judicial confession to PW-20, over the telephone. However, statement of PW-20 needs to be deliberated upon only if we hold that Sections 25 and 26 of the Evidence Act do

not prohibit or bar admission of the alleged extra judicial confession.

xxxxx xxxxxxxxxxx xxxxx

7. In *Aghnoo Nagesia v. State of Bihar* AIR 1966 SC 119, the accused had himself gone to the police station and lodged a report, which was in the form of a confession. The principal question which arose was whether the said statement, or any portion thereof, was admissible in evidence. The Supreme Court reproduced the entire First Information Report and divided it into 18 parts. Sections 24 to 30 of the Evidence Act were elucidated upon and explained. **The term “confession” was interpreted to mean a statement made by an accused suggesting that he had committed the crime. Confession is an admission made by the person who admits the offence or substantially all the facts which constitute the offence. It is a statement made by a person suggesting that he has committed a crime. Whether a statement which is partly self-exculpatory amounts to a confession or not, is a question which need be examined in the present appeal.** It was observed that although a confession may consist of several parts, and some parts may not relate to actual commission of offence, but some may relate to the motive, the cooperation, the opportunity, the provocation, the weapon used, the intention, concealment of the weapon and the subsequent conduct of the accused. **Elucidating upon the scope and whether the bar of Sections 25 and 26 of the Evidence Act will apply to such statements, it was held as under:-**

"15. If proof of the confession is excluded by any provision of law such as s. 24, s. 25 and s. 26 of the Evidence Act, the entire confessional statement in all its parts including the admissions of minor incriminating facts must also be excluded, unless proof of it is permitted by some other section such as s. 27 of the Evidence Act. Little substance and content would be left in

Sections 24, 25 and 26 if proof of admissions of incriminating facts in a confessional statement is permitted.

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18. A little reflection will show that the expression "confession" in Sections 24 to 30 refers to the confessional statement as a whole including not only the admissions of the offence but also all other admissions of incriminating facts related to the offence. **Section 27 partially lifts the ban imposed by Sections 24, 25 and 26 in respect of so much of the information whether it amounts to a confession or not, as relates distinctly to the fact discovered in consequence of the information, if the other conditions of the section are satisfied. Section 27 distinctly contemplates that information leading to a discovery may be a part of the confession of the accused and thus, fall within the purview of Sections 24, 25 and 26. Section 27 thus shows that a confessional statement admitting the offence may contain additional information as part of the confession. Again, s. 30 permits the Court to take into consideration against a co-accused a confession of another accused affecting not only him but the other co-accused. Section 30 thus shows that matters affecting other persons may form part of the confession.**

xxxxx

8. Accordingly, the statement recorded in the First Information Report was admissible, in respect of the identity of the accused as the maker of the same i.e. his name, address and other details and the fact that he had come to the police station to make the report, which was recorded and read over to him. **The other portions of the statement recorded in the First Information Report were not admissible, save and except the portions which**

come within the purview of Section 27 of the Evidence Act. Therefore, the other portions had to be excluded.

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13. In *Bheru Singh v. State of Rajasthan (1994) 2 SCC 467*, there are some observations which purport that the motive recorded in the self-implicating First Information Report are admissible and not hit by Section 25 of the Evidence Act, as they do not amount to confession of committing any crime. However, as clarified by a Division Bench of this Court in *Mukesh v. State Crl. Appeal No. 615/2008* decided on 4.5.2010, in *Aghnoo Nagesia (supra)* three Judges of the Supreme Court have firmly held that confession not only includes admission of the offence but also other admissions of incriminating facts relating to the offence. Motive, therefore, has to be excluded.

14. Read in this manner, we have to completely ignore and discard the extra judicial confession allegedly made to PW-20 on telephone, on 14th May, 2006 at 1.15 -1.20 P.M., i.e. after the Appellant had gone to Police Station, Lajpat Nagar and DD entry No. 11A (Ex. PW1/A) was recorded at 1.00 P.M. The alleged extra judicial confession to PW-20 is hit by Section 26 of the Evidence Act. DD entry No. 11-A (Ex. PW1/A) is admissible to the limited extent that it discloses identity of the Appellant, address and details of the maker of the First Information Report. This portion is admissible under Section 8 of the Evidence Act. Other portions of DD entry 11A have to be excluded, except the portion(s) which comes under the purview of Section 27 of the Evidence Act. This portion, noticed below, will consist of Appellant's statement that dead body of Suman Rai was lying in flat No. E-20, First Floor, Gautam Nagar, New Delhi, and the knife used and blood stained clothes of the accused were lying in the same flat.

15. Head Constable Raghubir Prasad(PW-1) was the duty officer at the Police Station, Lajpat Nagar and had first interaction with the accused, at Police Station,

Lajpat Nagar, where he had recorded his confessional statement, vide DD entry No. 11A(Ex. PW1/A). The DD entry reads as:

"I reside at 50 E, First Floor, Gautam Nagar, New Delhi in the Flat of Smt. Suman Roy and loved her. I came to know about her illicit relations with some other persons, on which some hot arguments took place between us. As a result whereof I became furious and today at about 8:00 o'clock in the morning I finished her by giving knife blows. I had kept the blood stained knife and clothes at the locale itself. I have locked the flat and the key of the flat is in my possession. I have come here at Lajpat Nagar Police Station to inform you, because I knew about the Lajpat Nagar Police Station only. (The underlined portion of the DD entry is admissible)"

(emphasis supplied)

81. In view of the law discussed above it is clear that, Section 27 of the Indian Evidence Act, 1872 is applicable, if confessional statement leads to discovery of some new facts. It is further not in dispute that a fact discovered on an information supplied by an accused in his disclosure statement is a relevant fact and that is admissible in evidence if something new is discovered or recovered from the accused which was not within the knowledge of the police before recording the disclosure statement of the accused (**Ref:Kamal Kishore Vs. State (Delhi Administration), (1997) 2 Crimes 169 (Del).**
82. From the perusal of the record, we find that the prosecution in the present case has relied upon various recoveries which were pointed out at the instance of the Appellants. The version of the prosecution

is also corroborated with the testimony of police witnesses, HC Manoj Raghav (PW-25) and Insp Anil Sharma (PW-49). At this stage, it is relevant to peruse the testimony of PW-49 (Inspector, investigating officer) which reads as under: -

*“Thereafter, I along with all the three accused in muffled faces went to Prem Bari Pul in official vehicle TATA 407 with other staff. At the instance of accused Runeet the vehicle was stopped there. **Runeet pointed out towards the place which was situated at a distance of 100 mtrs from Prem Bari Pul where he had thrown purse and key of scooter of deceased.** Such purse and keys were recovered from the bushes from the same space towards accused and pointed out.*

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*From there, all the three accused led us to the spot where they had thrown the body. It was a pace near **Haider Pur Water Works** near Vivekanand Institute of Professional Studies (VIPS) adjacent to AU Block Jhuggies.*

xxxx xxxx xxxx xxxx

*Accused Abhay Dewan led us to **third floor his house C-2/16, Sector-15, Rohini,** and he pointed out the cistern of the unused bathroom of said third floor. Cistern was without any water and one pistol was recovered from such cistern. It was found wrapped in a black polythene. It was opened and checked. **Pistol was containing one live cartridge in its chamber. Sketch of pistol as well as cartridge and magazine was prepared which is already Ex.PW25/N bearing my signature at point B.***

xxxx xxxx xxxx xxxx

He also got recovered keys of the car from one almirah of same room from its lower shelf. He claimed that the key of the car number DL2CAN3335 make Swift and also revealed that said car was used in the commission of crime. Accused Abhay Dewan also handed over another key of Accent car bearing no. DL4CAJ9666 which was used to bring co-accused Jatin from Faridabad during the commission of crime.

xxxx xxxx xxxx xxxx

Thereafter, we all police officials along with all three said accused reached Ring Road Lajpat Nagar near Double Storey Market where at the instance of accused Jatin and Abhay Dewan, we stopped our official vehicle. Both the accused led us to the gutter/sewer and got recovered one mobile phone make Samsung of white color of deceased. Such mobile phone was lying on a dry place within the gutter.

xxxx xxxx xxxx xxxx

Accused Jatin took us to a place where they had washed said Swift car and had thrown one car seat cover, two head rests and three shades/jaali in the drain. At the instance of accused Jatin, all the aforesaid articles were recovered. Same was put in a plastic katta and sealed with the seal of AS.

xxxx xxxx xxxx xxxx

Thereafter, accused Abhay and Jatin led us to the place where they had parked said Swift car near DMS Booth (adjacent to Pump House wall), Amar colony, Lajpat nagar. Said Swift car was found parked at the said place. I opened the gate of the said car with the help of its key and found that there was bloodstains inside the car. Since the same was required to be examined by the crime team expert, I

locked the said car and took the same in possession vide seizure memo already Ex.PW25/Z2 which bears my signature at point B.

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I along with HC Manoj Raghav, Ct. Pyare Lal and other staff and accused Jatin and Abhay had gone to Naraina Flyover and made efforts to trace out the slippers of deceased and other articles as disclosed by accused persons but the same could not be recovered. Thereafter, we had gone to Amar Colony, Lajpat Nagar where said Swift Car was left in the safe custody of HC Devender. Crime team was called. SI Sanjeev Verma, I/C Crime team along with his team reached there and inspected the car and also took the photographs of the same. From said car, one bandage clip, one bandage, one empty cartridge case etc were recovered. Empty cartridge case was lying on the rear floor behind the front left side. Fired bullet was lying on the space between two front seats. Clip was over the dashboard. Bandage was inside the dashboard and some coins were also found lying on the floor of the car in front of the rear seat. Three SIMs were also recovered from said car which were lying in the slot of front left side door. One separate memo was prepared with respect to all the said SIMs which is already Ex.PW25/Z10 and remaining articles were seized vide memo Ex.PW25/Z9 ”

83. HC Manoj Raghav stepped into the witness box as PW-25 and deposed that:

“Thereafter, I along with IO and other police officials and all the three accused had gone to Prem Bari Pul in TATA 407 bearing Regn. No. 9989. At that time, all the accused were in muffled face. At the said place, vehicle was stopped on the pointing out of accused Runeet

Gulati. I along with IO, accused Runeet and Ct. Pyare Lal got down from the tempo and accused Runeet had led us on the left side of the road towards Kanhiya Nagar side at a distance of about 100 mtrs from the flyover and pointed out the place where he had thrown the purse, key of scooter of deceased Shivam @ Pandey. We made search of the said place with the help of torchlight. One leather purse of black color and one key ring containing two keys were found lying there which accused Runeet had handed over to IO. On checking the purse, driving license of deceased of Shivam and some visiting cards were found. Same were again kept in the said purse and IO kept the said purse and key ring along with keys in a piece of cloth and after duly sealing with the seal of AS were taken into possession through seizure memo Ex.PW25/L which also bears my signatures at point A. Then we all came back in the tempo and then all the three accused persons led us at outer ring road near Haider Pur Water Works Bus Stand, VIPS Institute. On the pointing out of accused persons, tempo was stopped and accused persons had pointed out the place that was the left side of the road where they had thrown dead body of Shivam. IO asked public persons to joint he investigation but none agreed to join us. All the three accused one by one in sequence of Runeet, Abhay Dewan and Jatin had pointed out the exact place where they had thrown the body of Shivam and also put petrol on the dead body and set the same on fire. IO prepared separate pointing out memos in this regard. Same are Ex. PW25/M1, Ex. PW25/M2 & Ex. PW25/M3 respectively. Thereafter, all the three accused had led us at H. No.C2/16, Sector-15, Rohini, Delhi. I along with SI Pushpinder, Ct. Pyare

Lal, IO and accused Abhay Dewan got down from the tempo and remaining police officials and other two accused remained in the said tempo and accused Abhay Dewan had led us at third floor of his house C2/16, Sector -15, Rohini, Delhi. Accused Abhay Dewan had led us in unused bathroom of the said third floor and had taken out one pistol which he had hidden inside the cistern in a black color polythene. IO checked the said pistol and separated the magazine from said pistol and one live cartridge was found in it. IO prepared the sketch memo of the said recovered pistol, live cartridge and magazine after putting the same on a plain paper. Same is Ex.PW25/N which also bears my signatures at point A. IO measured the size of the said pistol. "Only for USA Joen" was engraved on the barrel and "Only for Army Supply Use USA" was engraved on the upper side of the barrel. IO again put the said magazine in the aforesaid pistol kept in the same polythene and covered the same with the piece of clothe and prepared pullanda. Said live cartridge was separately kept in a small plastic container and same was also covered with a piece of cloth and prepared pullanda. Both the pullandas were duly sealed with the seal of AS and seal after use was handed over to me. Both the sealed pullanda were taken into possession through seizer memo Ex. PW25/P which bears my signatures at point A. Thereafter, accused Abhay Dewan had led us at the second floor of aforesaid house in the room adjacent to lobby and from the said room, he took out one blue color jeans and one green color T-shirt from one cloth bundle (gathari) and stated that these were the same clothes which he was wearing at the time of incident. IO kept said jeans and T-shirt in a piece of cloth

and after preparing pullanda and sealed with the seal of AS, after obtaining the same from me and were taken into possession through seizure memo Ex.PW25/Q which bears my signatures at point A and seal after use was again handed over to me. Accused Abhay Dewan had also taken out key of Swift car no. DL-2CAN-3335 from the almirah of the said room and handed over to IO. IO took into possession through seizure memo Ex. PW25/R which also bears my signatures at point A. Thereafter, accused Abhay Dewan had also handed over another key of Ascent Car bearing no. DL-4CAJ-9666 to IO. Then accused had led us on the ground floor in front of his house where he had parked his Ascent car. IO took into possession the same through seizure memo Ex. PW25/S which also bears my signatures at point A. IO instructed Ct. Sandeep to take the said car to PS. Accused Abhay Dewan had also pointed out the place in front of his house where he along with his associate Runeet had parked Swift car along with Shivam. IO prepared the pointing out memo in this regard. Same is Ex.PW25/T which also bears my signatures at point A. Accused Abhay Dewan was again taken in said TATA 407 and then accused Runeet had led us at the aforesaid place and pointed out the place where they had parked the Swift Car after putting Shivam on the back seat of said car. IO prepared pointing out memo in this regard. Same is Ex.PW25/U which also bears my signatures at point A.

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We all police officials along with all the three accused persons reached at KP complex, Pitam Pura. At the said place, accused Runeet and Abhay Dewan had pointed out the place which

was opposite Nursing SewaSadon, near KP Complex i.e., the place where accused Abhay Dewan had caused bullet injury to Shivam in the car. IO prepared separate pointing out memos in this regard. The same are Ex.PW25/V in respect of accused Abhay Dewan and Ex.PW25/W in respect of accused Runeet Gulati which bears my signatures at point A.

After that, we police officials along with all the three accused persons had gone to Malka Ganj Gurudwara, where accused Runeet Gulati and Abhay Dewan had got down from the TATA 407 and pointed out the place where they had kidnapped the accused Shivam @ Pandey in the car. Such pointing out memo is already exhibited as Ex.PW25/T (Court observation: it seems that due to some oversight, said pointing out memo was exhibited wrongly and therefore, in order to obviate any confusion, this number is not changed and the pointing out memo prepared at the instance of accused Abhay Dewan whereby he had indicated towards the parking of Swift car in front of his house is now exhibited as Ex.PW25/T1. Witness has also confirmed the aforesaid fact and proxy counsel for accused and accused have also no objection in this regard). Separate pointing out memo of accused Runeet was also prepared by the IO. The same is Ex.PW25/X.

Thereafter, we all along with all the three accused persons reached at Ring Road, Lajpat Nagar near double storey market, where at the instance of accused Jatin and Abhay Dewan, we stopped our vehicle and both the accused had led us to the gutter (sewer) and got recovered one mobile phone claiming that it was of deceased. Such mobile was lying on a dry place

within the gutter. It was seized by the IO and a pullanda was prepared. It was sealed with the seal of "AS". Pointing out cum seizure memo is Ex.PW25/Y which also bears my signatures at point A. A sketch of the place was also prepared by the IO.

Court Q: Did you sign that sketch?

Ans: No.

Such sketch is Ex.PW25/Z.

Then, accused Jatin revealed that a short distance from there, they had washed the car and had thrown the car seat cover, two head rest and three shades in drain. A their pointing out, all the aforesaid articles were also recovered. All these articles were put in a plastic katta and were sealed in the similar manner with the seal f "AS". Pointing out cum seizure memo Ex.PW25/Z1 bears my signatures at point A.

Then, accused Abhay and Jatin led us to the place where they had parked the car after that. That car i.e., Swift car was also found parked near DMS booth. It was seized vide pointing out cum seizure memo Ex.PW25/Z2 which bears my signatures at point A. HC Devender was left there to ensure that such Swift car was not tampered with by anyone. IO was already having the key of the same as it was got recovered by accused Abhay Dewan from his house. Car was opened and checked also and IO wanted the same to be kept under vigil as he wanted the same to be examined through forensic experts as there were some blood spots inside the car.

From there, we went to Naraina Flyover, Ring Road for recovery of slippers and clothes of deceased at the instance of accused Abhay and

Jatin. We searched for those but those articles could not be recovered either beneath the flyover or on the flyover. From there, we returned to the PS.

Q: Whether the accused persons were muffled or unmuffled?

Ans: They were muffled throughout during that period.

IO deposited the recovered case property with the malkhana. Accused persons were put in lock-up. IO had handed over the seal to me after use and after the case property was deposited in malkhana, I returned the seal to IO.

Then, we associated W/Ct Rakhi in further investigation. I along with IO and Ct.Pyare Lal and W/Ct Rakhi along with driver, in a gypsy, went to the house of accused Abhay Dewan at Sector-15, Rohini. We met accused Mahima Dewan present in Court(correctly identified) at said house and IO interrogated her and thereafter arrested her through said lady constable. Her personal search memo is Ex. PW25/Z3 and arrest memo is Ex. PW25/Z4 which bear my signatures at point A. IO also recorded disclosure statement of accused Mahima Dewan. Same is Mark PW25/Z5 (Objected to by learned defence counsel). Accused Mahima Dewan had also produced one mobile phone make I phone on the demand of IO. IO prepared a separate pullanda of said mobile phone with the seal of "AS" and seized the same vide memo Ex. PW25/Z6 which bears my signatures at point A. **On the demand of IO, accused Mahima Dewan had also taken out one Top and lower which she was wearing at the time of incident. IO prepared pullanda of the said recovered Top and lower**

with the seal of “AS” and seized the same vide memo Ex. PW25/27 which bears my signatures at point A.

After that, accused Mahima Dewan had led us at North-Ex Mall, Sector-9, Rohini, where accused had pointed out the Apollo Pharmacy, from where, she had purchased the bandage and Suthol on the said night of incident. IO prepared pointing out memo in this regard. The same is Ex PW25/Z8 and bears my signatures at point A.

After that, accused Mahima Dewan led us to outer Ring Road near VIPS Institute, the place where they had thrown the dead body. IO prepared pointing out memo. Then, we came back to PS and accused Mahima Dewan, who was in muffled throughout was put in the lock-up and IO deposited the case property in the malkhana.

After that, IO had taken out accused Jatin and Abhay Dewan from the lock-up and I along with CtPyare Lal with IO, in TATA 407, had gone to Naraina Flyover and we made efforts to trace out the clothes and slippers of deceased once again but the same could not be recovered.

After that, we had gone to Amar Colony, Lajpat Nagar, where the Swift car was found parked. HC Devender was present there. Crime team officials who were already informed, had reached at the spot and they had inspected the car and had also taken the photographs of the car. One clip of bandage, one bandage, one empty cartridge case, which was found lying on the middle of both seats, one front pellet, which was found lying inside the adjacent seat of the driver of the car and some coins were also recovered. IO kept the said recovered coins in an empty

matchbox. The bandage was kept in a piece of cloth and total five pullandas of the recovered articles were prepared with the seal of "AS" and were taken into possession through seizure memo Ex. PW25/Z9 which bears my signatures at point A. Three SIMs of mobile phone were also found lying in the said car. There were kept in a small plastic container and it was sealed with the seal of "AS" and was taken into possession vide memo Ex PW25/Z10 which bears my signatures at point A. One paper cutter and one water bottle, on which, blood spot was found, which were not separately seized and were kept inside the car for the purpose of FSL inspection. The crime team officials had thoroughly inspected the car and then the car was taken to PS with the help of crane and the same was deposited by the IO in the malkhana. After that, all the four accused persons who were muffled, were taken to Court and produced before the Court. IO obtained the police custody remand of accused Jatin and Abhay and remaining two accused persons were sent to J.C. IO also recorded my statement."

84. Keeping in view the testimonies of PW-25 HC Manoj Raghav and PW-49 Insp Anil Sharma, various material objects were recovered at the instance of the Appellant/Abhay Dewan, Appellant/ Mahima Dewan, Appellant/Runeet Gulati & Appellant/ Jatin.

a) Recovery Effected at The Instance of Appellant/Abhay Dewan

- Case of the prosecution is that the Appellant/Abhay Dewan led the police officials to the unused bathroom on the third floor of his house situated at C2/16, Sector 15, Rohini, Delhi and got recovered one pistol, along with its magazine and a live cartridge,

which was hidden inside the cistern in a black color polythene and was seized vide seizure memo **Ex.PW25/P**.

- He also led them to the room adjacent to the lobby on the second floor of aforesaid house and got recovered a blue color jeans and a green color T-shirt from one cloth bundle (*gathari*) and stated that these were the same clothes which he was wearing at the time of the incident, which were seized vide seizure memo **Ex. PW25/Q**.
- Further one key ring containing the key of the swift car and the key of the accent car were recovered from the almirah of the same room which were seized vide seizure memo Ex. PW25/R and **Ex. PW25/S**.

b) Recovery Effected at The Instance of Appellant/ Mahima Dewan

- Case of the prosecution is that Appellant/ Mahima Dewan got recovered one Top and (Pyjama) which she was wearing at the time of the incident and the same were seized vide seizure memo **Ex. PW25/Z7**. The top and (Pyjama) of the Appellant/Mahima Dewan were recovered from the Almirah of the second floor of the H.No. C2/16, Sector 15, Rohini, Delhi and the same were identified as **Ex. P-12 & Ex.P-13**.

c) Recovery Effected at The Instance of Appellant/Runeet Gulati

- In pursuance to the disclosure statement made by the Appellant Runeet Gulati, the police party was led to Kanhiya Nagar, Delhi wherein he pointed out the place where a purse of black color and one key ring containing two keys were recovered. The driving

license of the deceased and some visiting cards were also found in the purse which were seized vide seizure memo **Ex. PW25/L**.

d) Recovery Effected at The Instance of Appellant/ Jatin & Appellant/Abhay Dewan

- Case of the prosecution is that the Appellant/Abhay Dewan & Appellant/Jatin had led the police officials to the sewer (*gutter*) situated at Ring Road, Lajpat Nagar, near double storey market and got recovered one mobile phone of the deceased which was seized vide pointing out cum seizure memo **Ex.PW25/Y**.
- Further they led them to Lajpat Nagar Flyover and then to a park opposite Evergreen Medicos, wherein Jatin got recovered one underwear/burmuda from the corner of the park which was kept beneath the bushes. The blood-stained underwear/burmuda was seized and sealed vide memo **Ex. PW35/B**. Further one seat cover, two head rest covers and three window jaali (*shades*) were recovered from the drain and were seized vide pointing out cum seizure memo **Ex. PW25/Z1**
- Later on, the Swift car bearing registration no. DL2CAN3335 which was used in the commission of the offence was recovered at the instance of the Appellant/ Jatin & Appellant/Abhay Dewan in pursuance to their disclosure statements(Ex.PW-25/K2 and K3) from DMC Booth, opposite H.No.B-140/141, Amar Colony, Lajpat Nagar-4, Delhi and were seized vide pointing out cum seizure memo **Ex.PW25/Z2**
- From the swift car, various articles (*one clip of bandage, one bandage, one empty cartridge case lying in the middle of both*

front seats, one front pellet lying inside the adjacent seat of the driver seat of the car and some coins) were seized vide seizure memo **Ex. PW25/Z9**. Three SIM cards were also found lying in the said car which were seized vide seizure memo **Ex. PW25/Z10** and certain articles (*One paper cutter and one water bottle*) on which blood was detected were not separately seized and were left inside the car for the purpose of FSL inspection.

85. Learned counsel for the appellants argued extensively to prove that the recoveries made at the instance of the Appellants are all fabricated and tampered. We find from the record that the recoveries were made in the presence of police officials i.e. PW-20, PW-25, PW-48 as well as PW-49. There is no ambiguity in the arrest memo, pointing out memo and seizure memo. Testimonies of all the material police officials are corroborative and highlight the involvement of the Appellants in the commission of the crime.
86. As far as possession and control of the swift car no. DL-2CAN-3335 which was used in commission of crime is concerned; we deem it appropriate to rely on the testimony of PW-15 (Ajay Kumar Taneja) registered owner of the car, which clearly depicts that the alleged car was in exclusive control and possession of the appellant/Abhay Dewan. Relevant portion of his testimony reads as under:-

“Abhay Dewan @ Gappy is friend of my son Gautam Taneja. My Son Gautam Taneja used to brought the car of Abhay Dewan to take me to the hospital whenever we needed the same. On

15.03.2011 I purchased a Maruti Swift Car bearing no. DL-2CAN-3335 which was financed by HDFC Bank. My son Gautam used to drive the above said Swift car. In the month of November-December, 2011 my son Gautam took about two lacs through Abhay Dewan @ Gappy from his known person on interest basis. Five six months after taking the loan the said money were completely refund. On 26.05.2012 Abhay Dewan @ Gabby came at our house and took away our above said Maruti Swift car bearing no. D-2CAN-3335 from my son Gautam but thereafter he did not return our Maruti Swift car to us and on our demand he made one pretext or the other and thereafter he did not respond our mobile phones.”

87. In relation to recovery of articles at the instance of the Appellants, the Apex Court by way of a catena of judgments has held that the recovery and the pointing out memo which directly link with the commission of the alleged offence is relevant and is admissible in the eyes of law. While dealing with such a case, the Hon’ble Supreme Court of India in the case of ***Debapriya Pal vs. State of West Bengal*** reported at ***(2017) 11 SCC 31*** has held as under: -

“7. ...Under Section 27 of the Evidence Act only so much of recovery, as a result of the disclosure statement, which directly pertains to the commission of crime is relevant. Otherwise, such an evidence is

barred Under Section 25 of the Evidence Act. Recovery of laptop does not have any bearing. It is neither the weapon of crime nor it has any cause of connection with the commission of crime. The law on this aspect is succinctly said in the case "Jaffar Hussain Dastagir v. State of Maharashtra: (1969) 2 SCC 872 in the following manner:

5. Under Section 25 of the Evidence Act no confession made by an Accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 which makes a confessional statement made before a Magistrate admissible in evidence against an Accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement. Section 27 is a proviso to Section 26 and makes admissible so much of the statement of the Accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient of the Section is that the information given by the Accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence."

(emphasis supplied)

88. The Apex Court in *Asar Mohammad and Ors vs. The State of U.P.* reported in *AIR 2018 SC 5264*, while discussing the admissibility of the discovery of a fact under Section 27 of the Evidence Act, 1872 had stated that the word "**fact**" as contemplated in Section 27 of the Indian Evidence Act is not limited to the "**actual physical possession**

of material object”, wherein the same also includes the ‘*mental awareness and the knowledge*’ of the accused persons. The germane portion of the judgment is extracted below:

“14. It is a settled legal position that the facts need not be self-probatory and the word “fact” as contemplated in Section 27 of the Evidence Act is not limited to “actual physical material object”. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place. It includes a discovery of an object, the place from which it is produced and the knowledge of the accused as to its existence. It will be useful to advert to the exposition in the case of Vasanta Sampat Dupare v. State of Maharashtra²², in particular, paragraphs 23 to 29 thereof. The same read thus:

“23. While accepting or rejecting the factors of discovery, certain principles are to be kept in mind. The Privy Council in Pulukuri Kotayya v. King Emperor²³ has held thus: (IA p. 77)

“... it is fallacious to treat the ‘fact discovered’ within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that ‘I will produce a knife concealed in the roof of my house’ does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that

a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

24. In *Mohd. Inayatullah v. State of Maharashtra*²⁴, while dealing with the ambit and scope of Section 27 of the Evidence Act, the Court held that: (SCC pp. 831-32, paras 11-13)

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

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

12. The expression 'provided that' together with the phrase 'whether it amounts to a confession or not' show that the section is in the nature of an exception to the

preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. **It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only 'so much of the information' as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded.** The word 'distinctly' means 'directly', 'indubitably', 'strictly', 'unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase 'distinctly relates to the fact thereby discovered' is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest

of the statement which may be indirectly or remotely related to the fact discovered.

13. At one time it was held that the expression 'fact discovered' in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see Sukhan v. Emperor²⁵; Ganu Chandra Kashid v. Emperor²⁶). Now it is fairly settled that the expression 'fact discovered' includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Pulukuri Kotayya v. King Emperor²⁷; Udai Bhan v. State of U.P.²⁸).”(emphasis in original)

25. In Aftab Ahmad Anasari v. State of Uttaranchal²⁹ after referring to the decision in Pulukuri Kotayya³⁰, the Court adverted to seizure of clothes of the deceased which were concealed by the accused. In that context, the Court opined that (Aftab Ahmad Anasari case, SCC p. 596, para 40)

“40. ... the part of the disclosure statement, namely, that the Appellant was ready to show the place where he had concealed the clothes of the deceased is clearly admissible under Section 27 of the Evidence Act because the same relates distinctly to the discovery of the clothes of the deceased from that very place. The contention that even if it is assumed for the sake of argument that the clothes of the deceased were recovered from the house of the sister of the Appellant pursuant to the voluntary disclosure statement made by the Appellant, the prosecution has failed to prove that the clothes so recovered belonged to the deceased and therefore, the recovery of the

clothes should not be treated as an incriminating circumstance, is devoid of merits.”

26. *In State of Maharashtra v. Damu*³¹ it has been held as follows: (SCC p.283, para 35)

“35. ... It is now well settled that recovery of an object is not discovery of a fact as envisaged in [Section 27 of the Evidence Act, 1872]. The decision of the Privy Council in Pulukuri Kotayya v. King Emperor³² is the most quoted authority for supporting the interpretation that the ‘fact discovered’ envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.”

The similar principle has been laid down in State of Maharashtra v. Suresh³³, State of Punjab v. Gurnam Kaur³⁴, Aftab Ahmad Anasari v. State of Uttaranchal³⁵, Bhagwan Dass v. State (NCT of Delhi)³⁶, Manu Sharma v. State (NCT of Delhi)³⁷ and Rumi Bora Dutta v. State of Assam³⁸.

27. In the case at hand, as is perceptible, the recovery had taken place when the Appellant was accused of an offence, he was in custody of a police officer, the recovery had taken place in consequence of information furnished by him and the panch witnesses have supported the seizure and nothing has been brought on record to discredit their testimony.

28. Additionally, another aspect can also be taken note of. The fact that the Appellant had led the police officer to find out the spot where the crime was committed, and the tap where he washed the clothes eloquently speak of his conduct as the same is admissible in evidence to establish his

conduct. In this context we may refer with profit to the authority in *Prakash Chand v. State (Delhi Admn.)*³⁹ wherein the Court after referring to the decision in *H.P. Admn. v. Om Prakash*⁴⁰ held thus: (*Prakash Chand case*, SCC p.95, para 8)

“8. ... There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a police officer in the course of an investigation which is hit by Section 162 of the Criminal Procedure Code. What is excluded by Section 162 of the Criminal Procedure Code is the statement made to a police officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a police officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a police officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act.”

29. In *A.N. Venkatesh v. State of Karnataka*⁴¹ it has been ruled that: (SCC p.721, para 9)

“9. By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of

the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand v. State (Delhi Admn.). Even if we hold that the disclosure statement made by the Appellants-accused (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act.” (emphasis supplied)

15. Applying the principle expounded by this Court, we have no hesitation in affirming the finding of guilt recorded against Appellant No. 1 - Asar Mohammed.”

(emphasis supplied)

89. Keeping in view the facts of the present case and applying the principles laid down by the Hon’ble Apex Court as well as on the basis of corroborative testimonies of the material police witnesses,

we find no cogent reason to disbelieve the recoveries made by the Investigating team at the instance of the Appellants.

90. The testimonies of the prosecution witnesses in relation to the recoveries made pursuant to the disclosure statement are consistent, trustworthy and corroborative; as such the ground raised by learned counsel for the Appellants in relation to inadmissibility of the recoveries made at the instance of the Appellants holds no ground.

a) Effect Of No Independent Witness Present At The Time Of Recovery

91. It was further contended by learned counsel for the appellants that the recoveries which were effected in the presence of police officers are unworthy of acceptance and are inadmissible because the same do not find support & corroboration with the presence of any independent witness. In support of their contentions, learned counsel for the Appellants relied upon ***Akhilesh Kumar & Anr v. State, 2016 SCC online All 253.***
92. Learned APP for the State, strongly refuted the submissions made by the learned counsel for the Appellant and submitted that there is no cogent reason to doubt the aforementioned recoveries on the ground that the same are effected in the presence of police witnesses and no independent witness has attested the same. To substantiate her arguments learned APP for State relied upon (***State Govt of NCT of Delhi Vs. Sunil & Anr, (2001) 1 SCC 652; Gian Chand & ors vs. State of Haryana, JT 2013(10) SC 515.***)

93. Subsequently there is no good reason for this Court to disbelieve the said recoveries merely because the recovery witnesses PW-25(HC Manoj Raghav) and PW-49(Insp Vijay Kumar) happen to be police officers. In this context, we may profitably refer to the case of **Baldev Singh vs. State of Haryana** reported as (2015) 17 SCC 554, wherein the Hon'ble Supreme Court held as follows: -

“10. There is no legal proposition that evidence of police officials unless supported by independent evidence is unworthy of acceptance. Evidence of police witnesses cannot be discarded merely on the ground that they belong to police force and interested in the investigation and their desire to see the success of the case. Prudence however requires that the evidence of police officials who are interested in the outcome of the result of the case needs to be carefully scrutinised and independently appreciated. Mere fact that they are police officials does not by itself give rise to any doubt about their creditworthiness.

*11. Observing that no infirmity is attached to the testimony of police officials merely because they belong to police force and that conviction can be based on the testimony of police officials in **Girja Prasad v. State of M.P.**, (2007) 7 SCC 625, it was held as under:-*

“25. In our judgment, the above proposition does not lay down correct law on the point. It is well settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a given case, a Court of law may not base conviction solely on the evidence of the complainant or a police official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is

corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a police official as any other person. No infirmity attaches to the testimony of police officials merely because they belong to police force. There is no rule of law which lays down that no conviction can be recorded on the testimony of police officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence.

26. It is not necessary to refer to various decisions on the point. We may, however, state that before more than half-a-century, in **Aher Raja Khima v. State of Saurashtra AIR 1956 SC 217**, Venkatarama Ayyar, J. stated:

“40. ... The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect him without good grounds therefore. Such an attitude could do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration.”

27. In **Tahir v. State (Delhi) (1996) 3 SCC 338**, dealing with a similar question, Dr A.S. Anand, J. (as His Lordship then was) stated:

‘6. ... Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form the basis of conviction and the absence of some independent witness of the locality to lend corroboration to their

evidence, does not in any way affect the creditworthiness of the prosecution case.”
(emphasis added)

94. The aforesaid principle was reiterated by the Hon’ble Apex Court in a very recent judgment titled as ***Kripal Singh v. the State of Rajasthan*** reported in **(2019) 5 SCC 646**. The germane portion of the judgment is extracted below:

*“17. The submission of the learned senior counsel for the Appellant that recovery has not been proved by any independent witness is of no substance for the reason that in the absence of independent witness to support the recovery in substance cannot be ignored unless proved to the contrary. **There is no such legal proposition that the evidence of police officials unless supported by independent witness is unworthy of acceptance or the evidence of police officials can be out rightly disregarded.**”*

(emphasis supplied)

95. We are thus of the opinion that in the instant case, non-joining of any public witness at the time of recovering the material objects is not a sufficient ground to doubt the truthfulness of the testimonies of the police witnesses on the above aspect or discard their evidence completely. Their testimony inspires confidence and the conviction of the Appellants in the present case is not based solely on the

testimonies of police witnesses as the same find's corroboration from the other independent sources as well.

b) Defective Investigation

96. Another argument raised by the Appellants is that the police while conducting the investigation failed to follow the procedure prescribed under the Code of Criminal Procedure and further contended that the recoveries effected in the presence of police officers are unworthy of acceptance and are inadmissible. Relying on the following grounds, the learned counsel for the Appellant contended that the investigation conducted in the present case was not fair & transparent:

- a) No information was given to the local police nor were they summoned to participate at the time, the recovery of articles from the areas (*Amar Colony, Rohini, Prem Bari*) was effected. Importantly when, the investigating officer had no territorial jurisdiction.
- b) The investigating officer made no endeavor to take the photographs and videographs of the alleged recoveries and no genuine and sincere efforts were made by the investigating officer to validate the recoveries with the presence of any Independent/Public witnesses.
- c) Further no site plan of the place of recovery was prepared and the only site plan available on record was that of the place from where the dead body was recovered vide EX.PW4/A and place from where the mobile phone of the deceased was recovered vide

EX PW25/Z and for validating the said recoveries no independent witness had joined the recovery proceedings.

d) As per the information recorded in the PCR form Ex. PW-8/A, the body of the deceased was thrown out from car bearing registration number 4654, but this aspect was not investigated in depth. The car involved in the crime was actually found to be swift car bearing registration no.3335.

97. A fair investigation is a *sine qua non* of Article 21 of the Constitution of India, wherein an investigation has to be unbiased, and without any prejudice for or against the accused because if the same is partial and unfair then the whole criminal justice system will be at stake and the same will erode the confidence of the common citizen. To discuss the law with regard to defective investigation, reliance can be placed on *State of Karnataka v. K. Yarappa Reddy* reported in **1999 8 SCC 715** wherein, Supreme Court occasioned to consider the similar question of defective investigation and observed that criminal justice should not be made a casualty for the wrongs committed by the investigating officers. Supreme Court, in Paragraph 19, held as follows:

“19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the Court be influenced by the machinations demonstrated by the Investigating Officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial

scrutiny in a criminal trial, the conclusion of the Court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The Court must have predominance and pre-eminence in criminal trials over the action taken by the investigation officers. Criminal Justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the Court is convinced that the testimony of a witness to the occurrence is true the Court is free to act on it albeit the investigating officer's suspicious role in the case."

(emphasis supplied)

98. The Apex Court in the case of ***Ram Bali v. State of Uttar Pradesh*** reported in (2004) 10 SCC 598, reiterating the judgment of ***Karnel Singh v. State of M.P*** reported in (1995) 5 SCC 518 had observed as under: -

"in case of defective investigation the Court has to be circumspect while evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective"

(emphasis supplied)

99. As a general principle, it can be stated that error, illegality or defect in investigation cannot have any impact unless miscarriage of justice is brought about or serious prejudice is caused to the Appellant. If the prosecution case is established by the evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful. If direct evidence is credible then failure, defect or negligence in investigation cannot adversely affect the prosecution case, though the Court should be circumspect in evaluating the evidence. Hence, the plea of the counsel for the Appellant is bereft of merit inasmuch as no defective investigation has occurred in the present case.

CCTV Footage

100. Learned counsel for the Appellants vehemently argued that the involvement of the Appellant/Mahima in the alleged offence of kidnapping & murder of the deceased Shivam has not been proved by the prosecution. It was further emphasized that the best case of the prosecution can be that the Appellant/Mahima Dewan was hand in glove with her husband as he had asked her to give him the keys of their Accent Car bearing registration no. DL-4CAJ-9666, and accompanied him to Faridabad after leaving Runeet Gulati with the deceased in Swift Car Registration no. DL-2CAN-3335 and after picking up Jatin from Faridabad, purchased bandages and Suthol liquid from Apollo Pharmacy at Sector-9, Rohini, Delhi.
101. Herein it is relevant to highlight that the prosecution has placed on record the CCTV footage of Apollo pharmacy situated at, A-16,

Sector 9, Rohini, Delhi which shows that Appellant/Mahima Dewan in the intervening night of 17.07.2012 and 18.07.2012 had entered the said pharmacy at 2:43:30 hrs and had purchased certain items (*bandages and Suthol liquid*) and left at 2:46:29 hrs. The aforesaid fact is also corroborated by the testimony of Varun Kumar/PW-40 (*Pharmacist*) who was on duty at the said outlet on the night of 17.07.2012 and 18.07.2012 and he also correctly identified Appellant/Mahima Dewan. Varun Kumar stepped into the witness box as PW-40 and deposed that: -

*“I was on duty at said outlet on the night interviewing 17.07.2012 and 18.07.2012. One lady customer had come at **about 2:43 am**. She purchased **one liquid suthol and four bandates**. She looked to be in hurry and was also looking outside. She brought the same and paid total sum of **Rs. 50 and left the shop**. She must have remained in the shop for approximately Four minutes.*

X X X

I can identify the Lady customer. She is present in Court(correctly identified)

(At this stage CD Ex.P-11 has been run and witness states that it contains the footage of same lady customer i.e. accused Mahima Dewan) ”

102. Subsequently, it is relevant to highlight that during the recording of statement, of Appellant/Mahima Dewan, under Section 313 Cr. P.C,

she was questioned about her presence at the chemist shop during odd hours on the intervening night of 17.07.2012 and 18.07.2012 but she failed to offer any plausible or cogent explanation and chose to remain silent in order to avoid the incriminating evidence placed by the prosecution against her, hence an adverse inference against her can be drawn. Relevant portion of her statement under Section 313 Cr. P.C. reads as under:

Q98. Further that on the intervening night of 17.07.2012 and 18.07.2012 PW40 Varun Kumar was working as Pharmacist at Apollo Pharmacy, A-16, Sector – 9, Rohini, Delhi and your co-accused Mahima had come at about 2.43 AM and had purchased one liquid Suthol and four bandages and your co-accused Mahima was looking to be in hurry and was also looking outside the said outlet and your co-accused Mahima paid Rs.50/- for such articles. What do you have to say?

Ans. I do not know.

Q101. Further that on 07.09.2012 PW49 Insp. Anil Sharma along with PW46 HC Baljeet visited Apollo Pharmacy, North-Ex Mall, Sector -9, Rohini and met PW38 Sunder Singh and PW40 Varun Kumar and PW38 Sunder Singh had given CCTV footage which was played there and PW40 Varun Kumar had also seen such footage and identified your co-accused Mahima in such footage claiming that she was the one who had purchased four bandages and one Suthol spray from their pharmacy on the night intervening 17.07.2012 & 18.07.2012 and PW40 Varun Kumar was also shown dossier of you co-accused Mahima and he identified that the CCTV footage contained image of your co-accused Mahima. CD of such footage was taken into

possession vide memo Ex.PW38/A. CD is Ex. P11.

What do you have to say?

Ans. I do not know.

103. In the case of ***Raj Kumar vs. State of M.P.*** reported in ***2014 Cri. LJ 1943***, the Apex Court observed that where the accused fails to give any explanation in his statement recorded under Section 313 Cr.P.C. regarding any incriminating material that has been produced against him, the Court will be entitled to draw such adverse inference against the accused as may be permissible in law. Relevant Para of the said judgment is reproduced as under: -

"The accused has a duty to furnish an explanation in his statement Under Section 313 Code of Criminal Procedure regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the Court, then the accused may choose to maintain silence or even remain in complete denial when his statement Under Section 313 Code of Criminal Procedure is being recorded. However, in such an event, the Court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law."

104. As discussed earlier, Section 313 Cr.P.C. provides direct interaction of the Court with an accused to personally enable him/her to explain

each and every incriminating evidence and circumstances appearing against him/her. Though every accused has a right to keep silent or deny the incriminating circumstance emerged against him/her in evidence, but in such eventualities an adverse inference could be drawn against Appellant/Mahima Dewan because despite opportunity provided to her, she failed to raise any defence in her behalf.

**Electronic Evidence & Relevance Of Producing In The Present
Case A Certificate Under Section 65B Of The Indian Evidence
Act**

105. Further, during the course of argument, an apprehension was expressed by the learned counsel for the Appellants, that the Electronic Evidence on record (Compact Disc) is not admissible in the eyes of law because the certificate under Section 65B of the Indian Evidence Act was not handed over by PW-39 KK Jha (*Manager Information technology, Apollo Pharmacy*) at the time of handing over the CD to the investigating officer PW-49 Insp. Anil Sharma on 07.09.2012.
106. Section 65-B of the Indian Evidence Act being an important aspect, deals with the admissibility of the electronic record and the purpose of these provisions is to sanctify the source and authenticity of the secondary evidence, generated by a computer. While discussing the credibility of electronic evidence and the relevance of producing the certificate under Section 65B of the Indian Evidence Act, our view is fortified by the recent judgment of the Hon'ble Apex Court, in the

case of *Shafhi Mohammad V. The State of Himachal Pradesh* reported at **(2018) 2 SCC 801**. The germane portion of the judgment is extracted below:

*“(7) Though in view of Three-Judge Bench judgments in **Tomaso Bruno and Ram Singh (supra)**, it can be safely held that electronic evidence is admissible and provisions under Sections 65A and 65B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65B(h).*

*(8) Sections 65A and 65B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In **Anvar P.V. (supra)**, this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65A and 65B of the Evidence Act. Primary evidence is the document produced before Court and the expression “document” is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.*

*(9). The term “**electronic record**” is defined in Section 2(t) of the Information Technology Act, 2000 as follows:*

‘Electronic record’ means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.’

(10). Expression “data” is defined in **Section 2(o) of the Information Technology Act** as follows.

“Data” means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer’

(11). The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the Court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory.

12. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce

certificate under Section 65B (4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.”
(emphasis supplied)

107. From the above extracted portion of the judgment of the Hon'ble Supreme Court, it is evidently established that the requirement of producing the certificate under Section 65B of the Indian Evidence Act is a procedural aspect and the requirement of its production can be relaxed whenever required and justified, in the interest of justice. In any event in the present case certificate under Section 65B was produced. Therefore, the argument raised by Learned Counsel for the Appellants that the aforesaid CD is not admissible as the same was not supported by a certificate under Section 65B of the Indian Evidence Act, holds no ground.
108. Keeping in view the facts of the present case and applying the principles laid down by the Hon'ble Apex Court, the Compact Disc (CD) exhibited by the prosecution was perused in the Court room and as per the footage face of Appellant/Mahima Dewan was clearly visible in Ex.P11, which eventually proves that appellant/Mahima Dewan had purchased medicine/Bandages at about 2:45 am on 18.07.2012.

Call Details Record

109. As per the case of the prosecution, on 17.07.2012 at about 11:00 p.m., Appellant/Abhay Dewan and Appellant/Runeet Gulati, who were in white color Swift car met the deceased and his friend PW19/Vishal Verma at Gurudwara Chowk, Malka Ganj, Delhi.

Appellant/Runeet Gulati insisted the deceased to talk in the absence of PW19/ Vishal Verma and accordingly the deceased dropped Vishal at his house and told him that he was going to meet Appellant/Runeet Gulati. Thereafter, none had seen the deceased and his dead body was found on 18.07.2019 at about 4:00 a.m.

110. Admittedly, mobile phone Nos. 9999994129, 9811149379 and 9716444448 were issued in the name of the Appellant/Abhay Dewan, however, mobile phone No. 9811149379 was used by his wife i.e. Appellant/Mahima Dewan. The prosecution has been able to bring on record that mobile No. 9999294987 was issued in the name of Seema, mother of Appellant/Runeet Gulati. DW-4 during cross examination deposed that *"Accused Runeet Gulati was carrying his mobile phone having mobile No. 9999297987 during stay at my home on 17.07.2012."*
111. As far as mobile phone No. 9990626272 used by the Appellant/Jatin is concerned, Appellant/Abhay Dewan, admitted in his statement recorded under Section 313 of Code of Criminal Procedure that mobile phone of Appellant/Jatin was seized by the police officials in his presence vide seizure memo Ex.PW25/J. The said seizure memo depicts the IMEI of the phone as 357125041750930 and CDR of mobile phone number Ex.PW6/C reveals that the mobile phone No. 9990626272 was also being used in the same mobile set.
112. The prosecution has been able to prove the CDR (Ex.PW2/C) of mobile phone No. 9999994129 being used by the Appellant/Abhay Dewan and perusal of the said CDR (Ex.PW2/C) reveals that Appellant/Abhay Dewan was in constant touch with his wife

Appellant/Mahima Dewan through his mobile phone and made about fifteen calls within an hour i.e. between 11:30:45 Hrs. (17.07.2012) to 00:27:20 Hrs. (18.07.2012) having location at Sector-15, Rohini, Delhi. The relevant extract of the Ex.PW2/C showing communication between mobile No. 9999994129 (mobile of Appellant/ Abhay Dewan) and mobile No. 9811149379 (mobile No. of Appellant/Mahima Dewan) from 23:30:45 Hrs. (17.07.2012) to 00:27:20 (18.07.2102) is as under:

A Number	B Number	Date	Time (Hrs.)	Location
9811149379	9999994129	17.07.2012	23:30:45	Sector-15, Rohini, Delhi
9811149379	9999994129	17.07.2012	23:31:09	Sector-15, Rohini, Delhi
9999994129	9811149379	17.07.2012	23:31:19	Sector-15, Rohini, Delhi
9811149379	9999994129	17.07.2012	23:32:48	Sector-15, Rohini, Delhi
9811149379	9999994129	17.07.2012	23:37:37	Sector-15, Rohini, Delhi
9811149379	9999994129	17.07.2012	23:38:28	Sector-15, Rohini, Delhi
9811149379	9999994129	17.07.2012	23:43:29	Sector-15, Rohini, Delhi
9811149379	9999994129	17.07.2012	23:46:03	Sector-15, Rohini, Delhi
9811149379	9999994129	18.07.2012	00:12:07	Sector-15, Rohini, Delhi

9811149379	9999994129	18.07.2012	00:17:21	Sector-15, Rohini, Delhi
9811149379	9999994129	18.07.2012	00:18:34	Sector-15, Rohini, Delhi
9811149379	9999994129	18.07.2012	00:19:51	Sector-15, Rohini, Delhi
9811149379	9999994129	18.07.2012	00:21:25	Sector-15, Rohini, Delhi
9999994129	9811149379	18.07.2012	00:26:49	Sector-15, Rohini, Delhi
9999994129	9811149379	18.07.2012	00:27:20	Sector-15, Rohini, Delhi

113. Admittedly, both the Appellants (*Abhay Dewan & Mahima Dewan*) were residing at Sector-15, Rohini, Delhi, wherein they failed to tender any plausible reply as to what made them contact each other so frequently within such a short span of time. Further, perusal of the CDR (Ex.PW2/C) reveal that mobile Nos. 9999994129 and 9716444448 (both registered in the name of the Appellant/Abhay Dewan) were in constant touch on 18.07.2012 from 00:40:24 hrs. to 02:31:00 hrs. as per details given below:

A Number	B Number	Date	Time (Hrs.)	Location
9999994129	9716444448	18.07.2012	00:40:24	Badli, Delhi
9999994129	9716444448	18.07.2012	00:41:32	Bhalswa Dairy, Delhi
9999994129	9716444448	18.07.2012	00:52:43	Majnu Ka Tila, Delhi

9999994129	9716444448	18.07.2012	01:06:49	DND Flyover
9716444448	9999994129	18.07.2012	01:27:32	Badarpur, Delhi
9716444448	9999994129	18.07.2012	01:31:36	Faridabad, Sector-27
9999994129	9716444448	18.07.2012	01:36:26	Faridabad, Sector-27
9716444448	9999994129	18.07.2012	01:42:14	Faridabad, Sector-28
9999994129	9716444448	18.07.2012	01:51:44	FBD Sari Chowk
9716444448	9999994129	18.07.2012	01:54:17	FBD Sari Chowk
9716444448	9999994129	18.07.2012	01:55:39	FBD Sari Chowk
9716444448	9999994129	18.07.2012	01:58:18	FBD Sari Chowk
9716444448	9999994129	18.07.2012	01:59:38	FBD Sector 27 Market
9716444448	9999994129	18.07.2012	02:03:34	SD MCYE Airtel
9716444448	9999994129	18.07.2012	02:09:54	New Friends Colony
9716444448	9999994129	18.07.2012	02:19:05	Gole Market
9716444448	9999994129	18.07.2012	02:22:18	SP Mukherjee Market
9716444448	9999994129	18.07.2012	02:27:06	Ganeshpura
9716444448	9999994129	18.07.2012	02:31:10	City Park Hotel

114. The CDR (Ex.PW2/C) further reveals that the location of mobile No. 9999994129 (mobile of Appellant/Abhay Dewan) kept on changing from Delhi at 00:40:24 hrs. (18.07.2012) to Faridabad Sector - 37 Market (01:59:38 hrs) which returned to Pitam Pura, Delhi at 02:34:14 Hrs. Thereafter, the said mobile phone was switched off. Appellant/Abhay Dewan failed to tender any plausible reply as to how his phone as per the CDR was in Faridabad. Further, a joint reading of the CDR Ex.PW2/C of mobile No. 9999994129 and CDR Ex.PW6/C of mobile No. 9990626272 reveals that the location of both mobiles was same i.e. Sector-21, Faridabad at 01:37:15 (18.07.2012). The aforesaid call detail records corroborate and strengthen the story set up by the prosecution that Appellants (*Abhay Dewan & Mahima Dewan*) accompanied each other to Faridabad and after picking up Jatin from Faridabad, around 01:30 am, Mahima purchased bandages and Suthol liquid from Apollo Pharmacy at Sector-9, Rohini, Delhi.

Test Identification Parade

115. The learned counsel for the Appellants vehemently argued that the identification of the Appellants (*Runeet Gulati; Abhay Dewan; Mahima Dewan; Jatin*) in commission of crime is of paramount importance and the same should not be ignored.
116. It was further contended by the learned counsel for the Appellants that the Investigating Officer failed to conduct the TIP of the Appellant/Runeet Gulati at the instance of Vishal Verma (PW-19)

who had allegedly met him along with the deceased at Gurudwara Malkaganj Chowk. It was further emphasized that the other Appellant/Abhay Dewan was for the first time identified in the Court and no test identification parade was conducted by the investigating officer during the investigation, rendering his identification as unreliable. To substantiate their arguments learned counsel for the Appellants relied upon (*V.C. Shukla Vs. State* reported in 1980 (2) SCC 665; *Rameshwar Singh Vs. State of Jammu & Kashmir* reported in 1971 (2) SCC 715; *Sheikh Hasib Vs. State of Bihar* reported in 1972 (4) SCC 773; *Girdhari Vs. State* reported in 2011 (15) SCC 373; *State of UP vs. Ashok Dixit*, (2003) 3 SCC 70; *Kanan and Others vs. State of Kerala* reported in (1979) 3 SCC 319).

117. Test Identification Parades do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure and the procedural law does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade.
118. The Apex Court in the case of *Kanta Prashad v. Delhi Administration* reported in AIR 1958 SC 350 has held as under: -.

“As for the test identification parade, it is true that no test identification parade was held. The Appellants were known to the police officials who had deposed against the Appellants and the only persons who did not know them before were the persons who gave evidence of association, to which the High Court did not attach much importance. It would no doubt have

been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification would be a matter for the Courts of fact and it is not for this Court to reassess the evidence unless exceptional grounds were established necessitating such a course.”
(emphasis supplied)

119. The aforesaid judgment was followed by the Apex Court in the case of **Raju Manjhi vs. State of Bihar** reported in **AIR 2018 SC 3592**. The relevant para is reproduced as under:

“15. The identification parade belongs to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroborati on [See: Kanta Prashad v. Delhi Administration, 1958 CriLJ 698 and Vaikuntam Chandrappa and Ors. v. State of Andhra Pradesh, AIR 1960 SC 1340].”
(emphasis supplied)

120. Keeping in view the facts of the present case and applying the principles laid down by the Hon’ble Apex Court, it was not

necessary to conduct a Test Identification Parade of the Appellant/Runeet Gulati because it is evident from the record, that Appellant/Runeet Gulati was known to PW-19 (Vishal Verma) from childhood and was specifically named as a suspect in the missing report (Ex.PW-3/A). In any event, the failure to hold the TIP could be a mere irregularity and not fatal to the prosecution case.

Motive in a Case of Circumstantial Evidence

121. During the course of argument, an apprehension was expressed by the learned counsel for the Appellants that the motive in a case of circumstantial evidence is paramount and the absence of motive in a case of circumstantial evidence is critical to the version of the prosecution. To substantiate their arguments learned counsel for the Appellants relied upon (*Pankaj vs. State of Rajasthan*, (2016) 16 SCC 192; *State of Punjab vs. Sucha Singh and Others*, (2003) 2 SCC 153; *Hakam Singh vs. State of Rajasthan*, 2005 SCC Online Raj 358; *Surinder Pal Jain Vs. Delhi Administration* reported in 1993 Supp. 3 SCC 681; *Arjun Marik Vs. State of Bihar* reported in 1994 Supp 2 SCC 372; *Sukhram Vs. State of Maharashtra* reported in 2007 (7) SCC 502;)
122. It is settled law that motive is not a necessary element in deciding culpability but it is equally an important missing link which can be used to corroborate the evidence where conviction is based on circumstantial evidence. The Apex Court on several occasions has considered the law regarding basing of conviction by the Court on circumstantial evidence. It is useful to refer to the judgment of the

Apex Court in ***Gambhir v. State of Maharashtra 1982 (2) SCC 351***, wherein the Apex Court had laid down that circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Referring to the above judgment of ***Gambhir v. State of Maharashtra (supra)***, principles were again reiterated by the Supreme Court in ***K.V. Chacko v. State of Kerala 2001 (9) SCC 277***, wherein following law was laid down in paragraph 5:

“5. The law regarding basing a conviction by the Courts on circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be

consistent with the guilt of the accused but should be inconsistent with his innocence.”

(emphasis supplied)

123. With regard to the importance of establishing motive in a case of circumstantial evidence, the Hon’ble Supreme Court of India in a very recent judgment titled as ***Sukhpal Singh Vs State of Punjab*** reported in ***2019 SCC Online SC 178***, has held that the inability of the prosecution to establish motive in a case of circumstantial evidence is not always fatal to the prosecution case. Relevant part from the aforesaid judgment is extracted below:

“15. The last submission which we are called upon to deal with is that there is no motive established against the Appellant for committing murder. It is undoubtedly true that the question of motive may assume significance in a prosecution case based on circumstantial evidence. But the question is whether in a case of circumstantial evidence inability on the part of the prosecution to establish a motive is fatal to the prosecution case. We would think that while it is true that if the prosecution establishes a motive for the accused to commit a crime it will undoubtedly strengthen the prosecution version based on circumstantial evidence, but that is far cry from saying that the absence of a motive for the commission of the crime by the accused will

irrespective of other material available before the Court by way of circumstantial evidence be fatal to the prosecution. In such circumstances, on account of the circumstances which stand established by evidence as discussed above, we find no merit in the appeal and same shall stand dismissed.”

(emphasis supplied)

124. Herein it is relevant to highlight that in the case based on circumstantial evidence, proof of motive will be an important corroborative piece of evidence but the inability of the prosecution to establish motive in a case of circumstantial evidence is not always fatal to substantiate their version

Medical Evidence: Time Since Death

125. Learned counsel for the Appellants contended that as per the Post mortem report (*Ex. PW-37/A*) which was conducted on 19.07.2012 from 12:45 pm to 06:40 pm, the probable time of death was one day prior and the death occurred after 2-3 hours of the last meal and as such the time of death was 12:45 pm on 18.07.2012 instead of 12:00 midnight to 02:45 am on 18.07.2012.
126. To put a rest to this controversy, it is necessary to go through the testimony of the doctor who conducted the post mortem on the body of the deceased. Dr. Vijay Dhankar (PW-37) Specialist & HOD, BSA Hospital, Rohini proved the report as *Ex. PW37/A* wherein he opined that the '*death was due to combined effect of cranio-cerebral damage and hemorrhagic shock consequent to the firearm injury to the head*

and abdomen'. The relevant portion of his statement recorded on 04.09.2015 is reproduced below-

“On 19.07.2012 I was on duty and on that day I conducted post-mortem on the body of one Shivam Kapoor @ Pandey, 19 years male on the request of Insp. Anil Sharma, PS Maurya Enclave. I started post-mortem at 12:45 PM and concluded the same at 6:40 PM same day. The body was of a well built and nourished adult male and I also noticed burn marks present at places all over the body with singeing of hair at places. There were stain marks over the skin indicating contact with corrosive liquid. The base of the burn was pale and dry friable blisters were present at places. However, there was no evidence suggestive of vital reaction with the burns or the margins.

Rigour mortis was complete and evident at the joints. The probable time since death was about one day. Body was preserved in cold storage. I also observed that the approximate time since death was two three hours after the last meal and such meal included pieces of potato.

On examination, I found following external injuries:

- (i) Punctured wound 0.7 cm x 0.6 cm present over the left side of front of forehead. The margins are inverted and abraded. Tattooing could not be ascertained due to burns present in the area.*
- (ii) Cruciate laceration 2cm x 1cm present over the front of middle of forehead, 5cm to the right of injury no. 1. The margins are everted.*
- (iii) Punctured wound 0.5cm x 0.5cm with contused and abraded margins present over the front of middle of abdomen just above the umbilicus. No blackening or tattooing was present around the wound.*

- (iv) ***Incised wound 8cm x 2.5cm present over the left temporal region.***
- (v) ***Multiple parallel superficial incised wounds present over the front of middle of left arm.***
- (vi) ***Laceration 3cm x 1cm present over the back of left forearm just above the wrist.***
- (vii) ***Incised wound 1cm x 0.5cm present over the back of left forearm just above the wrist.***
- (viii) ***Incised wound 1cm x 0.5cm present over the back of right little finger.***
- (ix) ***Superficial to deep burn injuries present over the front of forehead, top of head, right cheek, parts of face, front and back of right arm and forearm, front and back of left arm, forearm and hand, public region, inner aspect of right and left thigh and leg, lateral aspect of right and left side of abdomen. The base is pale and there is no evidence of vital reaction at the margins. There is burning and singeing of hair at places mainly on face and scalp. There are dry fragile blisters at places on both upper limbs measuring 2mm to 5mm in size.***

As per my examination, injury no. 1 is entry wound which made its exit through injury no. 2. Track of such injury has been given in detail in para – xi(1) of my report. Injury No. 3 was also entry wound of a bullet and track of injury has been mentioned in para (xi)(2) of my report and such bullet could not exit and during the post-mortem, a jacketed bullet around 7mm in diameter was found lodged in paraspinal muscle such bullet was preserved, sealed and handed over to the police and such aspect is also mentioned in my report in relation to internal examination of abdomen.

Internal examination of head, neck, chest, abdomen, pelvis and vertebral column are also correctly mentioned in my report in para (x).

In my opinion, death was due to combined effect of craniocerebral damage and hemorrhagic shock consequent to the firearm injury to the head and abdomen. All injuries were anti-mortem and fresh at the time of death. Injury No. 1 to 3 and corresponding internal injuries were caused by a projectile discharged through some firearm. Injury No. 1 to 4 were sufficient to cause death in the ordinary course of nature individually as well as combined with other injuries present on the body. All burn injuries were post-mortem in nature. My detailed post-mortem report is Ex.PW37/A (running in eight pages) and bears my signatures on each page. I also handed over the sealed pullanda as detail mentioned in my post-mortem report to the police. On 23.08.2012 I was asked by the police to give opinion regarding the weapon used and a parcel having seven seals of AS was produced before me. Seals were found intact. I was opened and found containing a knife. I had also prepared the sketch of the knife and gave opinion that injury No. 4 to 8 as mentioned in my said report as Ex.PW37/A were possible with such knife. After such examination, the weapon was sealed with seal of the department and handed over to the concerned police official with sample seal. My such report is Ex.PW37/B which bears my signatures at point A. My both the reports are correct.

(At this stage one sealed pullanda having seal of FSL VSN DELHI has been produced. Opened up. It contains one open envelope which further contains one paper cutter/knife. Same is shown to witness who states that his is the same cutter which was produced before him and after examining the same, he prepared report Ex.PW37/B). Cutter is exhibited as Ex.P-10.

Q. What you mean by word approximate as mentioned by you in your post-mortem report Ex.PW37/A with respect to the fact that the time since death was two-three hours from the last meal?

Ans. Most likely it was within two-three hours of last meal. It is because of the presence of the potatoes and the state in which they were found. It is not an exact science. It can be more than three hours also.

Court Q. What would be the outer limit in the context of present case and observation noted by you?

Ans. There can be further margin of one hour.”

127. PW-37 (Dr. Vijay Dhankar) during his cross-examination deposed as under: -

“I examined the weapon on the basis of request of the police. Such application is Ex.PW37/DA (two pages). Police might have mentioned that the injury was possible with such knife in said letter. (Vol. I gave opinion on the basis of my observations). Total length of the knife was 22 cms. I cannot comment whether the police had shown the length of knife as 21.5 cm when they seized it.

It is correct that one day as mentioned in the probable time since death by me would mean 12.45 PM on 18.07.2012.”

128. After examining the testimony of Dr. Vijay Dhankar and the post mortem report (***Ex.PW37/A***) it is observed that the version of the aforesaid doctor with regard to the time of death of deceased has a lot of astonishing infirmities from its inception. As per his examination-

in-chief he has deposed that the deceased had died after 2-3 hours of his last meal, thus assuming that the time of the death could have been between 02:00-03:00 am on 18.07.2012. Contradicting his own post-mortem report (**Ex.PW-37/A**) he has deposed in his cross examination that the time of death of the deceased was 12:45 pm on 18.07.2012

129. However as per the oral evidence (*testimony of police witnesses*) the deceased had died in the intervening night of 17.07.2012 & 18.07.2012; PW-9 (HC Rishipal) received an information at about 04:30 am from Control Room, North-West '*that a dead body is lying at Water Tank Ekta Camp, AE Block, near the Jhuggis of Haiderpur, VIPS College*' and the same was registered vide DD No. 6A (**Ex.PW-9/A**). Further on receipt of DD No. 6A (**Ex.PW-9/A**), PW-42 (SI Satya Dev) alongwith Constable Sandeep went to the place of incident and found a dead body of young male, who was wearing jeans and T-shirt of blue & green colour. PW-49 (Inspector Anil Sharma) joined the team of PW-42 (SI Satya Dev) at the spot, who in his testimony deposed that '*I found a male dead body lying there. The age of the deceased was approximately 20-25 years and height was 5 feet and 6 inches, wearing blue jeans and blue T-Shirt which were in semi-burnt condition.* Subsequently a message was transmitted from the control room to the Mobile Crime Team, North West District and on receipt of the aforesaid information, SI Ramesh Chand along with HC Sudhir (*photographer*) and Ct. Tinu Pal (*fingerprint proficient*) arrived at the spot and prepared a detailed

crime team report (*Ex.PW-29/A*) and carried out the inspection during which they took the photographs (*Ex.PW-30/A1 to A10*).

130. Keeping in view the facts of the present case, the photographs (*Ex.PW-30/A1 to A10*) were perused in the Court room and as per the photographs which were taken by the crime team during 05:10 am to 06:40 am on 18.07.2012, it was evidently established that the deceased Shivam had died in the intervening night of 17.07.2012-18.07.2012.
131. With regard to the evidentiary value of the medical evidence, the Hon'ble Supreme Court of India in a very recent judgment titled as *Balvir Singh Vs State of Madhya Pradesh* reported in **2019 SCC Online SC 233**, has held that oral evidence always has supremacy over medical evidence as the latter can only be considered as opinionative in nature. Relevant part from the aforesaid judgment is extracted below:

“26. It is well settled that the oral evidence has to get primacy since medical evidence is basically opinionative. In Ramanand Yadav v. Prabhu Nath Jha and others (2003) 12 SCC 606, the Supreme Court held as under: -

“17. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the

medical evidence specifically rules out the injury as is claimed to have been inflicted as per the oral testimony, then only in a given case the Court has to draw adverse inference.”

The same principle was reiterated in State of U.P. v. Krishna Gopal and another (1988) 4 SCC 302, where the Supreme Court held “that eyewitnesses’ account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.”

(emphasis supplied)

132. The Hon’ble Apex Court in the case of **Menoka Malik and Ors. vs. The State of West Bengal and Ors** reported at **AIR 2018 SC 4011**, it has been held that the medical evidence is only corroborative in nature and not conclusive. The germane portion of **Menoka Malik** (Supra) is extracted below:

“21. With regard to the conflict between the ocular testimony and the medical evidence, in our considered opinion, the High Court has ignored the fact that lathis were also used while assaulting along with sharp edge weapons. Moreover, it is by now well settled that the medical evidence cannot

override the evidence of ocular testimony of the witnesses. If there is a conflict between the ocular testimony and the medical evidence, naturally the ocular testimony prevails. In other words, where the eye witnesses account is found to be trustworthy and credible, medical opinion pointing to alternative possibilities is not accepted as conclusive [See State of U.P. v. Krishna Gopal, (1988) 4 SCC 302]. We do not wish to comment further on the merits of the matter at this stage since the matter needs remittance to the High Court.”

(emphasis supplied)

133. Hence, relying on the dicta of the Apex Court, we are of the view that the aforesaid contradiction in the post mortem report and the testimony of PW-37 does not demolish the version of the prosecution as the same are countered by the ocular testimonies which have a better standing than the medical evidence and prove that the deceased Shivam had died in the intervening night of 17.07.2012-18.07.2012.
134. Moreover, as per the PCR Call (*Ex.PW8/A*) Constable Ravinder (PW-8) received a call that “*VIP College ke samne Haiderpur water plant Ekta Camp Jhuggi ke paas AE Block Pitampura ek dead body padi hui hai*”. Post Mortem Report(*Ex.PW37/A*) reveals that the death has occurred three hours from the last meal that is in between 11:00pm to 03:00am on the intervening night of

17.07.2012-18.07.2012, which strengthens the case of the prosecution that when Appellant/Abhay Dewan and Appellant/Mahima Dewan picked up Jatin at about 01:30 pm from Faridabad the deceased(Shivam) was alive.

Scientific Evidence

135. As per the version of the prosecution, the Appellants had burnt the dead body of the deceased after murdering him, to conceal his identity which fact is corroborated from the post mortem report (*Ex.PW.37/A*) wherein it was opined that “*there were burn mark present at places all over the body with singeing of hair at places. Also there were stain marks over the skin indicating contact with corrosive liquid. The base of burns was pale and dry friable blisters were present at places.*”
136. Further substantiating the version of the prosecution, PW-32, Dr. Lingaraj Sahoo, SSO (Chemistry), FSL Rohini carried out the chemical examination and proved his report as *Ex. PW32/A* wherein he opined that the residue of kerosene was detected on exhibit no. 2 (*black burnt clothes stated to be of deceased*), exhibit no. 3 (*partially burnt crape bandage*) and exhibit no. 4 (*partially burnt, melted bulged plastic bottle*). Relevant portion of FSL.2012/C-6650 (*Ex.PW.32/A*) is reproduced below:

Results of Examination Report

On Chemical TLC & GC examination

(i) Exhibits 2, 3 & 4 were found to contain residue of kerosene.

(ii) *Metallic poisons, ethyl and methyl alcohol, cyanide, phosphide, alkaloids, barbiturates, tranquilizers and pesticides could not be detected in Exhibits 1A, 1B, 1C & 1D.*

(iii) *Petrol Kerosene Diesel or its residue could not be detected in Exhibits 5 & 6.*

**Exhibit 2 Brownish black burnt cloth pieces stated to be burnt clothes of deceased.*

**Exhibit 3 Brownish black partially burnt crape bandage stated to be burnt crape bandage*

**Exhibit 4 one partially burnt, melted bulged plastic bottle, stated to be one semi-burnt plastic bottle*

137. PW-37 (Dr. Vijay Dhankar) conducted the post mortem on the body of the deceased and handed over 9 (Nine) Inquest Papers, Sealed Viscera along with blood sample, Sealed Scalp hair along with sealed bullet and DNA Samples of the deceased to PW-49 (Inspector Anil Sharma). Relevant portion of the post mortem report is reproduced herein below:-

*“Department of Forensic Medicine
Dr. Baba Saheb Ambedkar Hospital
(Govt. of NCT of Delhi)
Rohini, Delhi – 110085*

Post Mortem Examination Report

*POST MORTEM NO. 391/2012 Dated: 19 July 2012
of Shivam Kapoor @ Pandey S/o Sanjeev Kapoor of P.S. Maurya Enclave*

After the post-mortem examination the dead body was handed over to the I.O P.M. Report in original in 8 (Eight) pages along with:

- 1. 9 (Nine) Inquest Papers.*
- 2. Sealed Viscera along with blood sample.*
- 3. Sealed Scalp hair.*
- 4. Sealed clothes.*
- 5. Sealed Nail clipping*
- 6. Sealed Teeth for DNA.*
- 7. Sealed Bullet.*

8. Sample seal of the department.

Handed over to Police personnel

Signature

Name - Sunil Kumar

Rank & P.S. – Constable M/Enclave

Date and Time – 27/7/2012 at 4:00 pm.

P.M. Report handed over by - Surender Tanwar”

138. The facts mentioned by PW-37 (Dr. Vijay Dhankar, Specialist and HOD, Forensic Medicine, BSA Hospital, Rohini) in the Post Mortem Report (*Ex.PW-37/A*) in relation to handing over blood and DNA samples of the deceased to PW-49 (*Inspector Anil Sharma*) has also been reiterated by PW-37 in his testimony which is reproduced as under:-

“.....My detailed post-mortem report is *Ex.PW37/A (running in eight pages)* and bears my signatures on each page. I also handed over the sealed pullanda as detail mentioned in my post-mortem report to the police.

On 23.08.2012 I was asked by the police to give opinion regarding the weapon used and a parcel having seven seals of AS was produced before me. Seals were found intact. It was opened and found containing a knife. I had also prepared the sketch of the knife and gave opinion that injury no. 4 to 8 as mentioned in my said report Ex. PW37/A were possible with such knife. After such examination, the weapon was sealed with seal of the department and handed over to the concerned police official with sample seal. My such report is Ex. PW37/B which bears my signatures at point A. My both the reports are correct.”

139. Corroborating the aforesaid version, the investigating officer PW-49 (Inspector Anil Sharma) has deposed that:

“After post-mortem, the doctor had handed over sealed pullandas containing viscera, clothes of the deceased, blood gauze, left and right nail clippings and bullet which was recovered from the body of deceased during the post-mortem along with sample seal. All these pullandas were taken into possession vide seizure memos already Ex.PW47/A1 to A5. All said memos bear my signatures at point X. These exhibits were deposited in the malkhana of PS Maurya Enclave.”

140. Perusal of the testimony of the investigating officer reveals that ‘blood gauze and clothes of the deceased, left and right nail clippings and the bullet’ which was recovered from the body of the deceased during the post mortem were sealed in pullandas vide seizure memos **Ex.PW47/A1 to A5** and the same were deposited in the malkhana of Police Station Maurya Enclave. HC Madan Lal stepped into witness box as PW-11 and deposed that:

*“On 19.07.20102 Inspector Anil Sharma again deposited two plastic boxes and **five envelopes in sealed condition with the seal of DEPT.OF FM DR BSAH, GOVT OF DELHI with sample seal in the malkhana***

and I deposited the same in the malkhana vide serial no. 1288/12 of register no. 19. The entry was made by me at Ex.PW11/B.”

141. English translation of **Ex. PW-11/B** whereby the aforesaid envelope containing '**Blood Gauze of the deceased**' which was sealed with the Seal of '**DEPT.OF FM DR BSAH, GOVT OF DELHI**' by PW-49 (Inspector Anil Sharma) and was deposited in the malkhana vide serial no. 1288/12 (Ex.PW11/B) on 19.07.2012, is reproduced below:-

*“.....In the presence of the witnesses mentioned hereinafter, the **Doctor at mortuary of Dr. B.S.A. Hospital, Rohini** after conducting the Post-Mortem Examination of deceased Shivam Kapoor, R/o 14, Gandhi Square, Malka Ganj, Delhi, produced an envelope duly sealed with the seal of '**DEPT. of FM DR. B.S.A. H. GOVT. OF DELHI**' containing '**Blood on Gauze**' and a sample seal of '**DEPT. OF FM DR. B.S.A. H. GOVT. OF DELHI**'. The same has been taken into police possession as a piece of evidence by means of this memo. The seizure memo has been prepared.....”*

142. PW-49 (*Inspector Anil Sharma*) also recovered the clothes of the appellants at the instance of the appellants, which were sent for biological examination to the FSL. Relevant portion of the testimony of PW-49 (*Inspector Anil Sharma*) whereby the recoveries which were effected from Appellant/Abhay Dewan, is reproduced as under:-

“Thereafter, accused Abhay led us to the second floor of same building. There was one gathari of clothes in a room. He took out one blue jeans and green color T-shirt from such Gathari claiming that he was wearing those at the time of incident. There were blood stains marks over those. These were also taken into possession vide memo Ex. PW25/Q which bears my signature at point B. He also got recovered keys of the car from one almirah of same room from its lower shelf. He claimed that the key of the car number DL2CAN-3335 make Swift and also revealed that said car was used in the commission of crime....”

143. PW-1 (*Manisha Upadhaya, Senior Scientific Officer (Biology) FSL, Rohini*) examined the 24 parcels deposited by PW-49 (*Inspector Anil Sharma*) and deposed that:-

“On 05.09.2012 24 parcels in sealed condition were received in our office in case FIR No. 180/12 of PS Maurya Enclave. The seal was found intact and tallied with the sample seal. I marked the parcel as parcel no. 1 to 24.

On opening the parcel No. 1, I found a dirty blackish brown cloth tape alongwith the hair kept in a plastic container described

a blood stain medical/doctor tape and I marked the same as Ex. 1 . On opening the parcel No. 2, I found blood stain concrete and I marked the same as Ex. 2. On opening the parcel No. 3, I found brownish blackish banyan and one brownish blackish underwear and I marked the same as Ex. 3a, Ex. 3b, Ex. 3C, Ex. 3d respectively. **On opening the parcel No. 4, I found blood on gauge and I marked the same as Ex. 4.** On opening the parcel No. 5, I found nail clippings (left) and I marked the same as Ex.5. On opening the parcel no. 6, I found nail clippings (right) and I marked the same as Ex. 6. On opening the parcel No.7, I found bunch of hairs and I marked the same as Ex. 7. On opening the parcel No. 8, I found a dirty metallic piece described as fired bullet and I marked the same as Ex. 8. On opening the parcel No. 9, I found a dirty metallic piece containing in a plastic contained described as fired bullet (front side of round) and I marked the same as Ex.9. **On opening the parcel No. 10, I found one T shirt and one pant (Jeans) and I marked the same as Ex. 10a and Ex. 10b respectively.** ON opening the parcel No.,11 found one lady's top and one pajama (lower) and I marked the same as Ex. 11 and Ex. 11b respectively. On opening the parcel No. 12, I found one pant and I marked the same as Ex. 12. On opening the parcel No. 13, I found one dirty nicker described as Barmuda/Kacha and I marked the same as Ex.13.....

XXXX

XXXX

XXX

I examined the above said exhibits and blood was detected on all the above said

exhibits. My detailed biological report is Ex. PW1/B (three pages) bearing my signatures at point A on each page.”

144. Relevant portion of Serological report (**Ex.PW-1/B**) prepared by PW-1 (*Manisha Upadhaya, Senior Scientific Officer (Biology) FSL, Rohini*) reads as under:-

“RESULTS OF ANALYSIS

Parcel ‘4’ : One sealed envelope sealed with the seal of “Dr. BSAH Dept of FM GOVT. OF Delhi” containing exhibit ‘4’.

XXX

XXXX

XXXX

Parcel ‘10’ : One sealed cloth parcel sealed with the seal of “AS” containing exhibits ‘10a’ & ‘10b’.

Exhibit ‘10a’: One T-shirt having very few light brown stains.

Exhibit ‘10b’ :One pant (jeans) having very few dark brown stains.

XXXX

XXXX

XXXX

Exhibit ‘11b’ :One pyjama (lower) having very few dark brown stains.

Parcel ‘12’ : One sealed cloth parcel sealed with the seal of “AS” containing exhibit ‘12.’

Exhibit ‘12’ :One pants having dirty brown stains

Parcel ‘13’ : One sealed cloth parcel sealed with the seal of “AS” containing exhibit ‘13.’

Exhibit ‘13’ :One dirty Nikker described as Barmuda/Kachha.

Parcel ‘14’ : One sealed plastic bag sealed with the seal of “AS” containing exhibits ‘14a’, ‘14b’ & ‘14c’.

Exhibit ‘14a’:Few dirty muddy netted covers described as removable sun shade (Jali.)

Exhibit '14b':Two pieces of dirty muddy seat cover described as head rest cover.

Exhibit '14c':Pieces of dirty muddy seat cover described as car seat cover.

XXXX

XXXXXX

XXXX

RESULTS OF ANALYSIS

1. Blood was detected on exhibits '1', '2', '3a', '3b', '3c', '3d', '4', '5', '6', '7', '8', '9', '10a', '10b', '11a', '12', '13', '14a', '14b', '14c', '15', '16', '17', '18', '19', '20', '21', '22', '23' & '24'.

2. Report of serological analysis in original is attached herewith."

145. PW41 (V. Shankarnarayanan, SSO, Regional Forensic Laboratory) carried out the biological examination of the clothes of the accused persons which they were wearing at the time of the incident and proved his report as ***Ex.PW41/A*** wherein he opined that as per the DNA/STR Analysis report blood of the deceased from the source exhibit '4'(Blood stained gauze cloth piece of deceased) was detected on 'exhibit 10'(T-Shirt of accused Abhay Dewan), 'exhibit 11b'(Pyjama of accused Mahima Dewan), 'exhibit 12'(Pants of accused Runeet Gulati) and 'exhibit 13'(Knickers of accused Jatin). Relevant portion of the FSL-2012/B-6661(***Ex.PW-41/A***) is reproduced herein below: -

"RESULT OF ANALYSIS

Blood was detected on exhibits '4', '10a', '10b', '11a', '11b', '12', '13', '14', '19' & '24'.

DNA EXAMINATION

The DNA examination on the Exhibit '4' i.e., Blood stained gauze cloth piece of deceased, exhibits '10a' (i.e., T-Shirt of accused, Abhay Dewan), '10b' (i.e. Pants of accused, Abhay Dewan), '11a' (i.e. lady top of accused, Mahima Dewan), '11b' (i.e. Pyajama of accused, Mahima Dewan), '12' (i.e. Pants of accused, Runeet Gulati), '13' (i.e. Knickers of accused, Jatin) & '24' i.e. Paper Cutter, were subjected to DNA isolation. DNA were isolated from Exhibit '4', Exhibit '10a', Exhibit '10b', Exhibit '11a', Exhibit '11b', Exhibit '12', Exhibit '13' & Exhibit '24' and were amplified using Amp F/STR Identifier Plus Kits and these data were analysed by using GeneMapper IDx software. DNA profile was generated from Exhibit '4', Exhibit '10a', Exhibit "11b", Exhibit '12', Exhibit '13'. A complete DNA profile could not be generated from Exhibit '10b', Exhibit '11a' and Exhibit '24' due to inhibitors/degradation of samples. However, DNA could not be isolated from Exhibit '14' i.e., exhibit said to be recovered from uncovered Nala & Exhibit '19' said to be recovered from car due to degradation of samples.

RESULTS

Alleles from exhibit '4' (i.e. Blood stained gauze cloth piece of deceased), were accounted in exhibits '10a' (i.e T-shirt of accused, Abhay Dewan), '11b', (i.e. Pyjama of accused, Mahima Dewan), '12' (i.e. pants of accused, Runeet Gulati) & '13' (i.e. Knickers of accused, Jatin).

CONCLUSIONS

The DNA analysis/STR analysis were performed on the source of exhibit '4' i.e.

Blood stained gauze cloth piece of deceased are sufficient to conclude that it is similar with that of the source of exhibit '10' (i.e. T-Shirt of accused, Abhay Dewan), '11b', (i.e. Pyjama of accused, Mahima Dewan), '12' (i.e. Pants of accused, Runeet Gulati) & '13' (i.e. Knickers of accused, Jatin)"

146. In view of the above Forensic Science Laboratory reports, ***Ex-PW-32/A Ex-PW-1/B*** and ***Ex. PW-41/A*** coupled with the testimonies of relevant witnesses, it is evidently established that the residue of kerosene was detected on the black burnt clothes of the deceased and the blood of deceased (***Exhibit '4'***) matched with the blood detected on ***Exhibit '10' (i.e. T-Shirt of accused, Abhay Dewan), Exhibit '11b', (i.e. Pyjama of accused, Mahima Dewan), Exhibit '12' (i.e. Pants of accused, Runeet Gulati) & Exhibit '13' (i.e. Knickers of accused, Jatin)***, leading to the conclusion that all the accused persons had burnt the dead body of the deceased Shivam and conspired together for the commission of the offence.

Ballistic Division Examination Report

147. As per the Post-mortem report (Ex.PW37/A), a jacketed bullet around 7.65 mm in diameter was recovered in the '*para spinal muscle*' of the deceased and the same was sent to FSL for examination along with the other bullets recovered from the swift car.
148. PW-52 R. Eniyavan, Assistant Chemical Examiner (Ballistics), FSL Rohini, Delhi appeared on behalf of Dr. N.P. Waghmare Assistant

Director (Ballistics) FSL Rohini, Delhi, who had carried out the Ballistic Examination and proved his report as Ex. PW52/A. The relevant portion of his statement recorded on 31.03.2017 is reproduced below-

“Dr. N.P. Waghmare was working as Assistant Director (Ballistics) in our FSL Rohini, Delhi. He has since been transferred to Goa as Director (FSL). I had worked under him and, therefore, I am in a position to identify his signatures. In the present case also, I had assisted him. I have now been shown report No. FSL 2012/F7200 dated 22.11.2012. It bears his signatures at point A which I identify. Such report is now exhibited as Ex.PW52/A. As per report, in the present case, our FSL had received three pullandas having seal of “AS”.

First pullanda was containing on improvised pistol of 7.65mm which was marked as F1 in the laboratory. Second pullanda was containing one standard 7.65mm cartridge which was marked as A1 in the laboratory. It seemed that due to oversight instead of “cartridge”, the same has been described as “cartridge case” at portion now encircled in red and marked X.

Third pullanda was containing one standard 7.65mm cartridge which was marked as A1 in the laboratory. It seemed that due to oversight instead of “cartridge”, the same has been described as “cartridge case” at portion now encircled in red and marked X.

Third pullanda was containing one standard 7.65mm cartridge case which was marked as EC1 in the laboratory.

On examination, exhibit F1 was found to be a firearm capable of chambering and firing. It was also found in normal working order after test firing

and cartridge A1 was also found to be live ammunition before it was test fired.

*The pertinent characteristic marks of improvised pistol F1 present on crime cartridge case i.e., **EC1** were compared with the test cartridge case, fired through same pistol F1. Comparison was done with the help of comparison microscope and keeping in mind the firing pin and breech face marks, it was opined that **EC1** had been fired through said firearm F1. Mark A1 as well as mark EC1 were accordingly opined as ammunition and part of ammunition respectively. Exhibits/remnants were sealed with the seal of "FSL NPW Delhi" and were sent back to the concerned SHO along with report. Said report is correct.*

I have also been shown report no. FSL2012/CFU-8426 dated 17/12/2012 given by him. Such report also bears his signatures at point which I identify. Such report is exhibited as Ex.PW52/B."

149. From the perusal of the aforesaid testimony, it is evident that the pistol (*exhibit F1*) which was recovered at the instance of appellant/Abhay Dewan from C2/16, Sec.15, Rohini, Delhi (*residence of Abhay Dewan*) was in a normal working condition and the said firearm was capable of chambering and firing. Further, keeping in mind the firing pin and breech face marks on exhibit 'EC1' it was opined that crime cartridge case marked exhibit 'EC1' had been fired through the pistol (*exhibit F1*). Relevant portion of the FSL-2012/F-7200 (*Ex. PW52/A*) is reproduced herein below:

Results of Examination/Opinion

- (1) Exhibit 'F1' is a firearm as defined in Arms Act. It is an improvised pistol, capable of chambering & firing standard 7.65mm ammunition.*

- (2) The exhibit 7.65mm cartridge marked 'A1' & one 7.65mm cartridge taken from laboratory stock were chambered and successfully test fired through exhibit improvised pistol marked 'F1'. Hence, it is opined that exhibit improvised pistol marked 'F1' is in normal working order and exhibit 7.65mm cartridge marked 'A1' was live ammunition before it was test fired in the laboratory.*
- (3) The pertinent characteristic marks of improvised pistol marked exhibit 'F1' present on the crime cartridge case marked exhibit 'EC1' were compared with test cartridge cases fired through improvised pistol marked exhibit 'F1' under a comparison microscope. After thorough examination and comparison, firing pin and breech face marks present on exhibit 'EC1' were similar with firing pin & breech face marks present on test cartridge cases. Hence, it is opined that exhibit empty cartridge case marked 'EC1' had been fired through the improvised pistol marked exhibit 'F1'*
- (4) The exhibit 7.65mm cartridges marked 'A1' is ammunition as defined in Arms Act, 1959.*
- (5) The exhibit 7.65mm cartridge case marked 'EC1' is a part of ammunition as defined in Arms Act.*

150. Further PW50 V.R. Anand, Assistant Director (Ballistic), FSL, Rohini, Delhi carried out the Ballistic Examination of the improvised pistol 7.65 mm caliber marked Ex. F1 in FSL No. 2012/F7200 and proved his report as Ex. PW50/A. The relevant portion of his statement recorded on 06.02.2017 is reproduced below-

"On 04.01.2013 three sealed parcels in connection with the present case were duly received in the office of FSL, Rohini through Ct. Surender Kumar. Parcel

No. 1 was sealed with seal of NPW FSL Delhi containing once improvised pistol 7.65 mm caliber already marked Ex. F1 in case FSL No. 2012/F7200. Parcel No. 2 was sealed with the seal of MU FSL Delhi containing one bullet marked Ex.EB1. Parcel No. 3 was sealed with the seal of MU FSL Delhi containing one bullet marked Ex.EB2.

On examination, **bullets marked Ex.EB1 and Ex.EB2 corresponded to the bullets of 7.65mm cartridges. Two 7.65mm cartridges taken from laboratory stock were test fired through the improvised pistol marked Ex. F1. The test fired cartridge cases were marked as TC1 and TC2 and recovered bullets were marked as TB1 and TB2.**

The individual characteristics of rifling marks/striation marks present on evidence bullets marked Ex.EB1 and EB2 on test fired bullets TB1 and TB2 were examined under comparison microscope and were found identical. Hence, the evidence bullets marked Ex.EB1 and EB2 had been discharged through the improvised pistol marked Ex. F1 in case FSL No. 2012/F-7200.

Exhibit EB1 and EB2 were ammunition as defined in the Arms Act, 1959.

All the exhibits were sealed with the seal of VRA FSL Delhi after examination. My detailed report dated 05.04.2013 is Ex.PW50/A (three pages) which bears my signatures at point A on each page. My report is correct.”

151. From the perusal of the aforesaid testimony, it is evident that three parcels i.e. ‘Sealed parcel no. 1’ (containing one improvised pistol 7.65 mm caliber marked Ex. F1 in case FSL No.

2012/F7200), 'Sealed parcel No. 2' (containing one bullet marked Ex. EB1), 'Sealed Parcel No. 3' (containing one bullet marked Ex. EB2) were received and on examination, it was evidently established keeping in mind the rifling marks that the bullets 'Ex. EB1 and Ex. EB2' were ammunition as defined in the Arms Act 1959 and were discharged through the improvised pistol marked 'Ex. F1'. Relevant portion of the FSL-2013/F-0121 (Ex. PW50/A) is reproduced herein below:

Results of Examination/Opinion

- (1) The bullets marked exhibits 'EB1' & 'EB2' corresponds to the bullets of 7.65mm cartridges.**
- (2) The two 7.65mm cartridges taken from laboratory stock were test fired through the improvised pistol 7.65mm caliber already marked exhibit 'F1' in case FIR No. 180/12, PS: Maurya Enclave (FSL-2012/F-7200). Test fired cartridge cases were marked as 'TC1' and 'TC2' and test fired recovered bullets were marked as 'TB1' and 'TB2' respectively.**
- (3) The individual characteristic of rifling marks/striation marks present on evidence bullets marked exhibits 'EB1' and 'EB2' and on test fired recovered bullets marked as 'TB1' and 'TB2' were compared and examined under comparison microscope model lieca CMC and were found identical. Hence, the evidence bullets marked exhibits 'EB1' and 'EB2' have been discharged through the improvised pistol 7.65mm caliber already marked exhibit 'F1' in case FIR No. 180/12, PS: Maurya Enclave (FSL-2012/F-7200).**
- (4) The exhibits 'EB1' & 'EB2' are ammunition as defined in the Arms Act, 1959**

152. In view of the aforesaid Ballistic division reports, which are corroborating with the version of the prosecution, it is evidently established that the pistol (*which was recovered at the instance of Abhay Dewan from C2/16, Sec.15, Rohini, Delhi*) was in working condition and was used to kill the deceased.

Criminal Conspiracy ‘under Section 120-B of the Indian Penal Code’

153. Learned counsel for the appellants argued that the prosecution failed to prove any criminal conspiracy among the appellants to hold them guilty of offence punishable under Section 120-B IPC.

154. To bring an offence within the ambit of criminal conspiracy, the following factors are necessary to be present there:

- i) First, involvement of more than one person and
- ii) An agreement/among such persons to do or causing to be done an illegal act or an act which is not illegal but is done or causing to be done by illegal means.

155. Therefore, in order to constitute a conspiracy, meeting of mind of two or more persons to do an illegal act or an act by illegal means is a must. In other words, it is *sine qua non* for invoking the plea of conspiracy against the accused. However, it is not necessary that all the conspirators must know each and every detail of the conspiracy, which is being hatched and nor it is necessary to prove their active part/role in such meeting.

156. In other words, presence and participation of each person in such meeting alone is sufficient. Its existence coupled with the object for

which it was hatched has to be gathered on the basis of circumstantial evidence, such as conduct of the conspirators, the chain of circumstances leading to holding of such meeting till the commission of offence by applying the principle applicable for appreciating circumstantial evidence for holding the accused guilty for commission of an offence.

157. The Apex Court in the case of **Baldev Singh v. State of Punjab** reported in **2009 6 SCC 564** has held as under: -

“17. Conspiracy is defined in Section 120A of the IPC to mean:

"120A. Definition of criminal conspiracy. - When two or more persons agree to do, or cause to be done, --

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation. --It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

*An offence of conspiracy which is a separate and distinct offence, thus, would require involvement of more than one person. **Criminal conspiracy is an independent offence. It is punishable separately; its ingredients being: -***

(i) an agreement between two or more persons.

(ii) the agreement must relate to doing or causing to be done either

- (a) an illegal act;**
- (b) an act which is not illegal in itself but is done by illegal means.**

*It is now, however, well settled that a conspiracy ordinarily is hatched in secrecy. **The court for the purpose of arriving at a finding as to whether the said offence has been committed or not may take into consideration the circumstantial evidence.** While however doing so, it must be borne in mind that meeting of the mind is essential; mere knowledge or discussion would not be sufficient.*

18. Adverting to the said question once again, we may, however, notice that recently in *Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra* [(2008) 6 SCALE 469], a Division Bench of this Court held:

"25. Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement."

19. Yet again in *Nirmal Singh Kahlon vs. State of Punjab & Ors.* [(2008) 14 SCALE 639], this Court following *Ram Lal Narang vs. State (Delhi*

Administration [(1979) 2 SCC 322] held that a conspiracy may be a general one and a separate one meaning thereby a larger conspiracy and a smaller which may develop in successive stages. For the aforementioned purpose, the conduct of the parties also assumes some relevance.

20. In *K.R. Purushothaman vs. State of Kerala [(2005) 12 SCC 631]*, this Court held:

"11. Section 120A of I.P.C. defines 'criminal conspiracy.' According to this Section when two or more persons agree to do, or cause to be done (i) an illegal act, or (ii) an act which is not illegal by illegal means, such an agreement is designed a criminal conspiracy. In *Major E.G. Barsay v. State of Bombay*, (1962) 2 SCR 195, Subba Rao J., speaking for the Court has said:

"31.....The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act, It may comprise the commission of a number of acts."

13. To constitute a conspiracy, meeting of mind of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of conspiracy. Neither it is necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implications. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair, The existence of conspiracy

and its objects are usually deducted from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the Court to keep in mind the well-known rule governing circumstantial evidence viz., each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. The criminal conspiracy is an independent offence in Indian Penal Code.

(emphasis supplied)

158. Further the Apex Court in the case of ***Mukesh And Another vs State (NCT of Delhi) and Others*** reported in **2017 6 SCC 1** has held as under: -

“462. The accused have been charged with the offence of “conspiracy” to commit the offence of abduction, robbery/dacoity, gang rape and unnatural sex, in pursuance of which the accused are alleged to have picked up the prosecutrix and PW 1. The charge-sheet also states that in furtherance of conspiracy, the accused while committing the offence of gang rape on the prosecutrix intentionally inflicted bodily injury with iron rod and inserted the iron rod in the vital parts of her body with the common intention to cause her death.

463. The learned Amicus Mr. Sanjay Hegde submitted that there is no specific evidence to prove that there was prior meeting of minds of the accused and that they had conspired together to

commit grave offence by use of iron rod, resulting in the death of the victim and, therefore, insertion/use of iron rod by any one of the accused cannot be attributed to all the accused in order to hold them guilty of the offence of murder.

464. *The essentials of the offence of conspiracy and the manner in which it can be proved has been laid down by this Court through a catena of judicial pronouncements and I choose to briefly recapitulate the law on the point, so as to determine whether the offence is made out in this case or not. Meeting of minds for committing an illegal act is sine qua non of the offence of conspiracy. It is also obvious that meeting of minds, thereby resulting in formation of a consensus between the parties, can be a sudden act, spanning in a fraction of a minute. It is neither necessary that each of the conspirators take active part in the commission of each and every conspiratorial act, nor is it necessary that all the conspirators must know each and every details of the conspiracy. Essence of the offence of conspiracy is in agreement to break the law as aptly observed by this Court in E.G. Barsay v. State of Bombay [E.G. Barsay v. State of Bombay, AIR 1961 SC 1762 : (1961) 2 Cri LJ 828 : (1962) 2 SCR 195].*

465. *So far as the English law on conspiracy is concerned, which is the source of Indian law, Kenny has succinctly stated that in modern times conspiracy is defined as an agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it. Stressing on the need of formation of an agreement, he has cautioned that conspiracy should not be misunderstood as a purely mental crime, comprising the concurrence of the intentions*

of the parties. The meaning of an “agreement”, he has explained by quoting following words of Lord Chelmsford [Denis Dowling Mulcahy v. R., (1868) LR 3 HL 306 (HL)] : (LR p. 328)

“... agreement is an act in advancement of the intention which each person has conceived in his mind.”

Kenny has further said that it is not mere intention, but the announcement and acceptance of intentions. However, it is not necessary that an overt act is done; the offence is complete as soon as the parties have agreed as to their unlawful purpose, although nothing has yet been settled as to the means and devices to be employed for effecting it. (Refer Kenny's Outlines of Criminal Law, 19th Edn., pp. 426-27.)

466. *The most important aspect of the offence of conspiracy is that apart from being a distinct statutory offence, all the parties to the conspiracy are liable for the acts of each other and as an exception to the general law in the case of conspiracy intent i.e. mens rea alone constitutes a crime. As per Section 10 of the Evidence Act, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then, anything done by any one of them in reference to their common intention, is admissible against the others. As held in State of Maharashtra v. Damu [State of Maharashtra v. Damu, (2000) 6 SCC 269 : 2000 SCC (Cri) 1088] , the only condition for the application of the rule in Section 10 of the Evidence Act is that there must be reasonable ground to believe that two or more persons have conspired together to commit an offence.*

467. *The principles relating to the offence of criminal conspiracy and the standard of proof for establishing offence of conspiracy and the joint liability of the conspirators have been elaborately laid down in Shivnarayan Laxminarayan Joshi v. State of Maharashtra [Shivnarayan Laxminarayan Joshi v. State of Maharashtra, (1980) 2 SCC 465 : 1980 SCC (Cri) 493] , Mohd. Usman Mohammad Hussain Maniyar v. State of Maharashtra [Mohd. Usman Mohammad Hussain Maniyar v. State of Maharashtra, (1981) 2 SCC 443 : 1981 SCC (Cri) 477] , Kehar Singh v. State (Delhi Admn.) [Kehar Singh v. State (Delhi Admn.), (1988) 3 SCC 609 : 1988 SCC (Cri) 711] , State of Maharashtra v. Som Nath Thapa [State of Maharashtra v. Som Nath Thapa, (1996) 4 SCC 659 : 1996 SCC (Cri) 820] , State (NCT of Delhi) v. Navjot Sandhu [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , State v. Nalini [State v. Nalini, (1999) 5 SCC 253 : 1999 SCC (Cri) 691] and Yakub Abdul Razak Memon v. State of Maharashtra [Yakub Abdul Razak Memon v. State of Maharashtra, (2013) 13 SCC 1 : (2014) 7 SCC (Cri) 1] .*

468. *Another significant aspect of the offence of criminal conspiracy is that it is very rare to find direct proof of it, because of the very fact that it is hatched in secrecy. Unlike other offences, criminal conspiracy in most of the cases is proved by circumstantial evidence only. It is extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. Conspiracy is a matter of inference, deduced from the words uttered, criminal acts of the accused done in furtherance of conspiracy. (Vide Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra [Noor Mohammad*

Mohd. Yusuf Momin v. State of Maharashtra, (1970) 1 SCC 696 : 1970 SCC (Cri) 274], *Firozuddin Basheeruddin v. State of Kerala* [*Firozuddin Basheeruddin v. State of Kerala*, (2001) 7 SCC 596 : 2001 SCC (Cri) 1341], *Ram Narayan Popli v. CBI* [*Ram Narayan Popli v. CBI*, (2003) 3 SCC 641 : 2003 SCC (Cri) 869], *Yogesh v. State of Maharashtra* [*Yogesh v. State of Maharashtra*, (2008) 10 SCC 394 : (2009) 1 SCC (Cri) 51], *Pratapbhai Hamirbhai Solanki v. State of Gujarat* [*Pratapbhai Hamirbhai Solanki v. State of Gujarat*, (2013) 1 SCC 613 : (2013) 1 SCC (Cri) 579] and *Chandra Prakash v. State of Rajasthan* [*Chandra Prakash v. State of Rajasthan*, (2014) 8 SCC 340 : (2014) 3 SCC (Cri) 457], etc.)

469. In *Yogesh v. State of Maharashtra* [*Yogesh v. State of Maharashtra*, (2008) 10 SCC 394 : (2009) 1 SCC (Cri) 51], this Court, after referring to the law laid down in several pronouncements, summarised the core principles of law of conspiracy in the following words: (SCC p. 402, para 25)

“25. Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is *sine qua non* of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and

renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement.”

470. In the present case, there is ample evidence proving the acts, statements and circumstances, establishing firm ground to hold that the accused who were present in the bus were in prior concert to commit the offence of rape. The prosecution has established that the accused were associated with each other. The criminal acts done in furtherance of conspiracy, is established by the sequence of events and the conduct of the accused. Existence of conspiracy and its objects could be inferred from the chain of events. The chain of events described by the victim in her dying declarations coupled with the testimony of PW 1 clearly establish that as soon as the complainant and the victim boarded the bus, the accused switched off the lights of the bus. Few accused pinned down PW 1 and others committed rape on the victim in the backside of the bus one after the other. The accused inserted iron rods in the private parts of the prosecutrix, dragging her holding her hair and then threw her outside the bus. The victim has also maintained in her dying declaration that the accused persons were exhorting that the victim has died and she be thrown out of the bus. Ultimately, both the victim and the complainant were thrown out of the moving bus through the front door, having failed to throw them through the rear door. The chain of action and the act of finally throwing the victim and PW 1 out of the bus show that there was unity of object among the accused to commit rape and destroy the evidence thereof.

471. In this case, the existence of conspiracy is sought to be drawn by an inference from the circumstances:

(i) the accused did not allow any other passenger to board the bus after PW 1 and the prosecutrix boarded the bus;

(ii) switching off the lights; pinning PW 1 down by some while others commit rape/unnatural sex with the prosecutrix at the rear side of the bus;

(iii) exhortation by some of the accused that the victim be not left alive; and

(iv) their act of throwing the victim and PW 1 out of the running bus without clothes in the wintery night of December.

Existence of conspiracy and its objects is inferred from the above circumstances and the words uttered. In my view, the courts below have rightly drawn an inference that there was prior meeting of minds among the accused and they have rightly held that the prosecution has proved the existence of conspiracy to commit gang rape and other offences.”

(emphasis supplied)

159. The aforesaid judgments were followed by the Apex Court in the case of ***Bilal Hajar@Abdul Hameed v. State Rep by Inspector of Police*** reported in ***2018 SCC OnLine SC 1865***. The relevant para's is reproduced as under:

“27. The expression "criminal conspiracy" is defined in Section 120-A, Indian Penal Code. It

says that when two or more persons agree or cause to be done an illegal act or an act, which is not illegal by illegal means, such an agreement is designated a "criminal conspiracy". It then provides an exception to the effect that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. The explanation appended to the Section clarifies that it is immaterial whether the illegal act is the ultimate object of such agreement or is merely incidental to that object.

28. Section 120-B, Indian Penal Code provides a punishment for committing an offence of criminal conspiracy. It says that whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life, or rigorous imprisonment for a term of two years or upwards shall be punished in the same manner as if he had abetted such offence provided there is no express provision made in the Code for punishment of such conspiracy.

29. Sub-section (2) of Section 120-B, Indian Penal Code, however, provides that a person who is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with an imprisonment of either for a term not exceeding six months or with fine or both.

30. Reading of Section 120-A and Section 120-B, Indian Penal Code makes it clear that an offence of "criminal conspiracy" is a separate and distinct offence. Therefore, in order to constitute a criminal conspiracy and to attract its rigor, two factors must be present in the case on facts: first, involvement of more than one person and second, an agreement between/among such persons to do

or causing to be done an illegal act or an act which is not illegal but is done or causing to be done by illegal means.

31. The expression "criminal conspiracy" was aptly explained by this Court in a case reported in Major E.G. Barsay v. State of Bombay 1961: (1962) 2 SCR 195. Learned Judge Subba Rao (as His Lordship then was and later became CJI) speaking for the Bench in his distinctive style of writing said:

31. ...The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts.

32. Therefore, in order to constitute a conspiracy, meeting of mind of two or more persons to do an illegal act or an act by illegal means is a must. In other words, it is sine qua non for invoking the plea of conspiracy against the accused. However, it is not necessary that all the conspirators must know each and every detail of the conspiracy, which is being hatched and nor it is necessary to prove their active part/role in such meeting.

33. In other words, their presence and participation in such meeting alone is sufficient. It is well known that a criminal conspiracy is always hatched in secrecy and is never an open affair to anyone much less to public at large.

34. It is for this reason, its existence coupled with the object for which it was hatched has to be gathered on the basis of circumstantial evidence, such as conduct of the conspirators, the chain of circumstances leading to holding of such meeting

till the commission of offence by applying the principle applicable for appreciating the circumstantial evidence for holding the Accused guilty for commission of an offence. (See also Baldev Singh v. State of Punjab.

35. Keeping in view the aforesaid principle of law which is consistently followed and reiterated by this Court in several cases, the issue involved in this case is required to be examined with a view to find out as to whether Appellant (A-6) was a member of a criminal conspiracy which was hatched on 01.09.1991 to kill Siva on 05.09.1991 or in other words whether there is any evidence to sustain Appellant's conviction Under Section 120-B, Indian Penal Code and, if so, whether the evidence adduced by the prosecution is in conformity with the parameters laid down by this Court to prove the guilt of the Appellant beyond reasonable doubt.”

(emphasis supplied)

160. In view of the judgments cited above, as well as on the basis of evidence borne out from the previous part of the judgment, it is established that all the appellants were in agreement with each other and were actively involved in the commission of the alleged offence. Hence, the argument raised by the appellants that the prosecution failed to prove any criminal conspiracy under Section 120-B IPC among the appellants holds no ground.

Conclusion

161. In our view, the chain of circumstances as recited above coupled with the law laid down by the Apex Court unerringly leads to one

conclusion and that is the guilt of the Appellants. The prosecution has been able to prove the case against the Appellants beyond reasonable doubt. The testimonies of PW-16 (Deepak Kapoor), PW-18 (Sanjeev Kapoor) and PW-19 (Vishal Verma) are corroborative and clearly point out towards the Appellants as the perpetrators of the crime. The police witnesses PW-25 (HC Manoj Raghav), PW-42 (SI Satya Dev), PW-48 (Insp. Sanjeev Verma) and PW-49 (Insp. Anil Sharma) have testified in Court on the basis of the records and demonstrated the line of investigation and have proved arrest of the Appellants as well as the recoveries made at the instance of the Appellants. Though the Appellants took up a plea that they were apprehended/arrested from Nepal Border but despite opportunity provided to them they failed to raise any defence. Further there is no cogent reason to disbelieve the testimonies of the police witnesses that the recoveries were made pursuant to the disclosure statements made by the appellants. The conviction of the Appellants in the present case is not based solely on the testimonies of police witnesses PW-25 (HC Manoj Raghav) and PW-49 (Insp. Anil Sharma) but the chain of events has also been clearly established by the prosecution with support of testimonies of other witnesses as well, which were corroborated with the testimonies of PW-25 (HC Manoj Raghav) and PW-49 (Insp. Anil Sharma).

162. The Call Detail Records of the mobile phones used by the Appellants as well as the CCTV footage obtained by the Investigating Agency during the course of investigation undoubtedly points out towards the guilt of the Appellants and strengthen the story set up by the

prosecution that Appellants (*Abhay Dewan & Mahima Dewan*) accompanied each other to Faridabad and after picking up Jatin at about 01:30 am from Faridabad, purchased bandages and Suthol liquid at 02:43 am from Apollo Pharmacy situated at Sector-9, Rohini, Delhi. Further in view of the testimonies of the prosecution witnesses (*PW-19(Vishal)*, *PW-25 (HC Manoj Raghav)* and *PW-49 (Insp. Anil Sharma)* it is clear that the swift car bearing registration no. DL2CAN3335 used in the commission of the offence was being used by Appellant/Abhay Dewan who was accompanied by the Appellant/Runeet Gulati and the said car was in exclusive control and possession of Appellant/Abhay Dewan. Moreover, the Ballistic analysis report and scientific evidence produced by the prosecution are clear and cogent that the pistol (*which was recovered at the instance of Abhay Dewan from C2/16, Sec.15, Rohini, Delhi*) was in working condition and was used in commission of the crime. It was further evidently established by the prosecution that the residue of kerosene was detected on the black burnt clothes of the deceased and the blood of deceased (*Exhibit '4'*) matched with the blood detected on *Exhibit '10' (i.e. T-Shirt of accused, Abhay Dewan)*, *Exhibit '11b', (i.e. Pyjama of accused, Mahima Dewan)*, *Exhibit '12' (i.e. Pants of accused, Runeet Gulati)* & *Exhibit '13' (i.e. Knickers of accused, Jatin)*.

163. After considering the entire evidence and re-appreciating the same in the light of arguments and the reasons given by the Trial Court, we are of the view that the chain of circumstances is complete, which rules out any possibility that there can be any other person than

Appellants who had committed the murder. The circumstances from which an inference of guilt is drawn are cogently and firmly established and the circumstances have a definite tendency to unerringly point towards the appellants as the actual perpetrators of the crime, who had entered into a criminal conspiracy as per section 120-B to commit this gruesome murder; the circumstances, taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Appellants and no one else. In this background, we are of the view that the prosecution has succeeded in establishing its case against the Appellants because the evidence adduced by the prosecution is sufficient, cogent and credible to establish that the Appellants have committed the crime.

164. In the present case we find that the act of the Appellants reflects extreme depravity. It is a case of brutal murder involving most gruesome and barbaric act. The diabolical manner in which crime was committed leaves one worried as to the pervert mental state of the accused persons and the brazenness and coldness with which the act was committed in the night hours. The horrific act reflecting the in-human extent to which the accused could go to satisfy their greed, being completely oblivious, not only to the norms of the society, but also to the norms of humanity. The gruesome manner in which the Appellants had killed Shivam and dealt with his body, we unhesitatingly say that the abhorrent act of the Appellants has definitely shocked our judicial conscience.

165. Keeping in view the facts of the present case and the nature in which the ghastly offence was committed with highest viciousness wherein the human greed was allowed to take such a demonic form, we find no infirmity in the judgment passed by the learned Trial Court and we see no cogent reason to interfere with the same.
166. However, a perusal of the record transpires that the Trial Court vide order dated 05.02.2013 has amended the charges against the Appellants including the charge under Section 302 IPC which read as under: -

“Thirdly, on the same intervening night of 17/18.07.2012 in furtherance of the above said criminal conspiracy you all i.e. accused Abhay Dewan @ Gappy, Runit Gulati, Mahima Dewan and Jatin committed the murder of Shivam Kapoor aged 19 years by using force and also by using the firearm and deadly weapon (cutter) and thus you (Abhay Dewan, Runit Gulati and Jatin) Committed an offence punishable U/s 302 r/w section 120B IPC and within my cognizance.”

167. From the perusal of the amended charge under Section 302 IPC we find that substantive charge under Section 302 of the IPC has not been framed against the Appellant/Mahima Dewan. In this background, punishment for the offence punishable under Section 302 IPC against the Appellant/Mahima Dewan without a substantive charge is unwarranted. Accordingly, the order on sentence in relation to Appellant/Mahima Dewan is modified to the extent that the Appellant/Mahima Dewan is sentenced to undergo all the

sentences except for the offence punishable under Section 302 of the IPC as directed vide order on sentence dated 19.09.2018.

168. Accordingly, the conviction of the Appellants under Sections 302/201/364/120B IPC read with Section 25/27 Arms Act is upheld except for conviction of Appellant/Mahima Dewan for the offence punishable under Section 302 IPC and all the appeals are dismissed.
169. Appellant/Mahima Dewan is directed to surrender within 4 weeks before the Trial Court. Bail Bonds are cancelled and sureties stand discharged.
170. Copy of the order be communicated to the Trial Court as well as to the Jail Superintendent, Tihar Jail.
171. Trial Court record be sent back along with a copy of this order.

Crl.M.(B)1815/2018, Crl.M.(B) Nos.1997/2018, Crl.M.(B)536/2019
Crl.M.(B) 107/2019

1. In view of the above order passed in the appeals, the present applications are rendered infructuous.
2. All pending applications stand disposed off.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

SEPTEMBER 20, 2019
gr/da*