

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

% *Judgment Reserved on : 21<sup>st</sup> July, 2009*  
*Judgment Delivered on: August 27, 2009*

+ **CRL.A. 19/2007**

RAKESH KUMAR & ORS. .... Appellants  
Through: Mr. M.L.Yadav, Advocate

versus

STATE .... Respondent  
Through: Ms. Richa Kapoor, Advocate

**CRL.A. 51/2007**

SHARDA JAIN & ANR. .... Appellants  
Through: Mr. R.N.Mittal, Sr.Advocate with  
Mr. Tanveer A.Mir, Advocate and  
Mr. Manoj Kumar, Advocate

versus

STATE .... Respondent  
Through: Ms. Richa Kapoor, Advocate

**CRL.A. 121/2007**

PUSHPENDER .... Appellant  
Through: Mr. Rajpal Singh, Advocate

versus

STATE .... Respondent  
Through: Ms. Richa Kapoor, Advocate

**CRL.A. 139/2007**

ROSHAN SINGH .... Appellant  
Through: Mr. R.N.Mittal, Sr.Advocate with  
Mr. Tanveer A.Mir, Advocate and  
Mr. Ashutosh Bhardwaj, Advocate

versus

STATE .... Respondent

Through: Ms. Richa Kapoor, Advocate

**CRL.A. 144/2007**

RAJINDER @ RAJESH @ RAJU ..... Appellant  
Through: Mr. Rakesh Kumar, Advocate

versus

STATE ..... Respondent  
Through: Ms. Richa Kapoor, Advocate

**CRL.A. 65/2007**

NIRVIKAR @ DOCTOR ..... Appellant  
Through: Mr. D.B.Goswami, Advocate

versus

STATE ..... Respondent  
Through: Ms. Richa Kapoor, Advocate

**CORAM:**

**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**

**HON'BLE MS. JUSTICE INDERMEET KAUR**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

**PRADEEP NANDRAJOG, J.**

1. Atma Ram Gupta (hereinafter referred to the "Deceased"), a member of the Indian National Congress, was a Councillor of the Municipal Corporation of Delhi, having been elected from Ward No.27, Tri Nagar, Delhi, in the Elections held in February 2002.

2. At 10:15 AM on 24.8.2002 he left his residence in an Indica Car bearing registration No.DL 6SA 0025 owned by him, which was driven by his driver Prabhu Yadav PW-17. While leaving the house he told his wife Sumitra Gupta PW-18, that he was going to attend a rally organized by the Congress Party at Firozshah Kotla Grounds Delhi.

3. He did not return to his residence till late evening and could not be contacted on his mobile phone since the same was switched off. His wife got worried. She contacted the younger brothers of Atma Ram Gupta as also her children and apprised them of the situation. The children of Atma Ram Gupta as also his younger brothers came to his residence and made inquiries from persons who were in contact with Atma Ram Gupta during the day. They could not ascertain the whereabouts of Atma Ram Gupta till midnight and thus Rajinder Pal Gupta PW-9, the younger brother of Atma Ram Gupta, lodged a missing person report at PS Keshav Puram. HC Ashok Kumar PW-6, recorded DD No.31, Ex.PW-6/A at 1:00 AM on 25.8.2002 in which it stands recorded that on 24.8.2002 at about 10:30 AM Atma Ram Gupta left his residence in his white coloured Indica Car bearing registration No.DL 6SA 0025 which was driven by the driver Prabhu Yadav and that he went to the residence of Sharda Jain, a Member of Indian National Congress and also a Municipal Councillor from Keshav Puram

Ward New Delhi. That on reaching the residence of Sharda Jain, Atma Ram sent back his car with the driver and thereafter, in the company of Sharda Jain and another person, Atma Ram Gupta left the residence of Sharda Jain in an Indica Car bearing registration No.DL 3SAB 0016 belonging to Sharda Jain, which was driven by Prakash Chauhan the driver of Sharda Jain and they left for Firozshah Kotla grounds to attend a rally. When Atma Ram Gupta did not return home till evening his family members contacted Sharda Jain who told them that Atma Ram Gupta had accompanied her to the rally held at Firozshah Kotla grounds and attended the same for sometime. Leaving the venue of the rally the said four persons proceeded in the car of Sharda Jain towards ring road and at a red light near Jamuna Bazar, Hanuman Mandir, opposite Nigam Bodh Ghat the driver of Sharda Jain got down from the car as he was not feeling well. The unidentified person started driving the car. Sharda Jain further told them that after some time Atma Ram Gupta got down from her car.

4. On 25.8.2002 itself, Inspector Shiv Raj Singh PW-55, recorded the statement, Ex.PW-62/DB, of Sumitra Gupta PW-18, as also the statement Ex.PW-9/C of Rajinder Pal Gupta PW-9, the younger brother of Atma Ram Gupta.

5. In her statement, Ex.PW-62/DB, Sumitra Gupta stated that on 24.08.2002 at about 10.15 A.M. her husband

left his residence in his Indica car bearing registration no.DL 6SA 0025 being driven by his driver Prabhu Yadav. Before leaving the house, her husband told her that he would first go to the house of Sharda Jain and thereafter would proceed to a rally along with Sharda Jain. She further stated that while leaving the house her husband was wearing a watch in his right hand as also a gold ring on his finger, on which letters 'AR' were engraved and was also carrying a mobile phone, some cards and documents. After some time Prabhu Yadav returned to the house and told her that he had dropped her husband at the residence of Sharda Jain and that Atma Ram Gupta told him to take back the car to the house because he would go to the rally in the car of Sharda Jain. When her husband did not return home till evening she contacted Sharda Jain over the telephone to enquire about the whereabouts of her husband and Sharda Jain informed her that her husband did not accompany her to the rally.

6. In his statement Ex.PW-9/C, Rajinder Pal Gupta PW-9, stated same facts which were already recorded in DD No.31, Ex.PW-6/A.

7. On the next day i.e. 26.08.2002, Inspector Shiv Raj Singh PW-55, recorded the statement Ex.PW-11/DA of Om Parkash, the driver of Sharda Jain, and the statement Ex.PW-10/A of the mother of Om Parkash; namely, Shanti PW-10.

8. In his statement Ex.PW-11/DA, Om Parkash stated that he had driven Sharda Jain and Atma Ram Gupta in the car of Sharda Jain to the venue of the rally at Firozshah Kotla Grounds and that another person named Rajesh @ Raju was also in the car. From the venue of the rally they all left and he drove the car towards ring road. When the car reached the red light near Hanuman Mandir at Jamuna Bazar, Nigam Bodh Ghat, since he was not feeling well, he got down from the car and Rajesh started driving the car. He further stated that Raj Kumar the brother of Sharda Jain, Rajesh @ Raju and a person named Roshan Singh Pradhan had visited the house of Sharda Jain 8-10 days prior to 24.8.2002 and he saw them again in the house of Sharda Jain on 22.8.2002. He heard suspicious talks between Roshan Singh and Sharda Jain. He further disclosed that in the night of 24.8.2002 Sharda Jain had visited his house and had told him not to divulge to anyone that Atma Ram Gupta was in her company in the morning of 24.8.2002.

9. In her statement Ex.PW-10/A, Shanti PW-10, the mother of Om Prakash, stated that Sharda Jain visited their house in the night of 24.08.2002 and asked her son Om Parkash not to divulge to anyone that Atma Ram Gupta was in her company in the morning.

10. On 26.08.2002, Inspector V.S.Meena PW-62, took over the investigation of the case.

11. The fact that the deceased was present in the company of Sharda Jain and Rajinder @ Rajesh @ Raje @ Raju on the day he went missing; that Sharda Jain, Rajinder @ Rajesh @ Raje @ Raju, Raj Kumar @ Raju and Roshan Singh were meeting each other few days before the deceased went missing and that something fishy was being discussed in the meetings between Sharda Jain, Raj Kumar, Roshan Singh and Rajinder, the said persons became suspects.

12. On 27.08.2002 Inspector V.S.Meena PW-62, accompanied by Inspector Shiv Raj Singh PW-55, SI Anil Kumar PW-44 and HC Sunita PW-31, went to the residence of Sharda Jain and arrested her at 01.00 P.M. as recorded in the arrest memo Ex.PW-31/A. On interrogation by Inspector V.S.Meena PW-62, in the presence of Inspector Shiv Raj Singh PW-55, Anil Kumar PW-44 and HC Sunita PW-31, Sharda Jain made a disclosure statement Ex.PW-31/D wherein she disclosed that she hatched a conspiracy with her brother Raj Kumar and two other persons; namely, Roshan Singh and Rajinder to murder the deceased and that pursuant to the conspiracy the deceased was taken to village Chajjupur on 24.8.2002 in her car. Two hired assassins shot him as per plan when the deceased was led to village Chajjupur. That she could take the police and show the place where the deceased was murdered.

13. After she was arrested, Sharda Jain produced one mobile phone having number 9811508688. The phone along with the SIM card were seized vide memo Ex.PW-31/C. Indica car bearing registration No.DL 3SAB 0016 was parked outside the residence of Sharda Jain. It was searched. One pair of molded P.O.P. denture set on which name of Dr.S.C.Rajput was engraved; four invitation cards dated 24.08.2002 one of which had the name of the deceased written thereon and two labels for parking of the car at Firozshah Kotla ground were recovered and hence seized vide memo Ex.PW-44/C. Mud was found sticking on the right rear tyre of the said car. The same i.e. the tyre was seized vide memo Ex.PW-44/C1.

14. When aforementioned events were transpiring in the house of Sharda Jain, Raj Kumar the brother of Sharda Jain came there and tried to slip away on seeing the police. However, he could not manage to escape and was arrested at 3 P.M. as recorded in the arrest memo Ex.PW-44/A. On being interrogated by Inspector V.S.Meena PW-62, in the presence of Inspector Shiv Raj Singh PW-55 and SI Anil Kumar PW-44, Raj Kumar made a disclosure statement Ex.PW-44/O wherein he disclosed that he was a party to the conspiracy with Sharda Jain and two other persons; namely, Roshan Singh and Rajinder to murder the deceased and that two other persons; namely, Pushpender and Nirvikar were the hired assassins who



fired shots at the deceased in pursuance of the said conspiracy. He stated that he could lead the police to the place and identify the same, where the deceased was murdered. He further disclosed that he had removed the wrist watch of the deceased and could get the same recovered.

15. Pursuant to their respective disclosure statements, Sharda Jain and Raj Kumar led the police party consisting of Inspector V.S.Meena PW-62, HC Sunita PW-31, SI Ram Kumar PW-32, SI Anil Kumar Chauhan PW-44 and SI Shiv Raj Singh PW-55 to a Dak Bangla near a Rajwaha (minor canal) situated behind village Chajjupur, U.P. and vide pointing out memos Ex.PW-44/D and Ex.PW-44/E both of them, at the same time, pointed out a spot and stated that the said spot is the place where the deceased was murdered.

16. On a thorough investigation of the place pointed out by accused Sharda Jain and Raj Kumar, the earth therein was found to be stained with blood at three different spots. SI Ram Kumar PW-32, lifted the portions of the earth stained with blood as also the earth control and seized the same vide memo Ex.PW-44/F. Thereafter the control mud/soil at the place in question was lifted and seized vide memo Ex.PW-44/G. Inspector V.S.Meena PW-62, prepared the site plan Ex.PW-62/B of the spot in question; recording therein at points 'A', 'B' and

'C', the spots where the earth was found to be stained with blood and samples lifted.

17. SI Manohar Lal PW-29, a draftsman and HC Sajjan Kumar PW-33 a photographer were summoned. SI Manohar Lal prepared the site plan to scale Ex.PW-29/A of the place in question, at the instance of Inspector V.S.Meena. HC Sajjan Kumar took five photographs Ex.PW-33/A to Ex.PW-33/E of the place in question; negatives whereof are Ex.PW-33/A1 to Ex.PW-33/E1.

18. Thereafter accused Raj Kumar led the police party consisting of Inspector V.S.Meena PW-62, SI Anil Kumar Chauhan PW-44 and SI Shiv Raj Singh PW-55, to his residence at village Gulawati, District Bulandshar, UP and recovered a wrist watch of make 'Citizen Quartz' with a gold chain from behind a speaker kept at a ventilator in the balcony of his house and the same was seized vide memo Ex.PW-44/H. The said watch was deposited in the Malkhana on the date of its recovery itself i.e. 28.08.2002 as recorded vide entry No.1560 entered by HC Dinesh Kumar PW-43, in the Store-Room Register (Part I).

19. Attempts made to locate the dead body of Atma Ram Gupta failed till 31.08.2002, when around 5 A.M. on 31.8.2002, Ram Kumar PW-22, an agriculturist and resident of village Deher Ki Madia, Bulandshar, UP saw a dead body of a

male person lying in a sub-canal of the canal known as 'Bulandshar Rajwaha/Sanota Canal'. Ram Kumar apprised the police officials. Since the body found in the canal appeared to be that of the deceased, the police called the relatives of the deceased for the purposes of the identification of the said body. Rajinder Pal Gupta PW-9, Ved Prakash Gupta PW-15, Rajpal Gupta PW-16, brothers of the deceased and Mahender Pal Gupta PW-8 and Amrit Lal Singhal PW-37, friends of the deceased, identified the body found in the canal as that of the deceased.

20. Since the body of the deceased was found within the jurisdiction of Police Station Gulawati, UP, the police officials of the said police station were joined in the recovery. Inspector V.S.Meena PW-62, informed the duty officer of PS Gulawati by way of a written application Ex.PW-62/C about the recovery of the body of the deceased based whereon Const.Lalit Kumar PW-60, prepared DD Entry Ex.PW-60/B at 5.00 A.M. on 31.08.2002. Taking along a copy of the afore-noted DD Entry, SI Rambir Singh PW-61, reached the canal, lifted the earth from near the canal and water oozing out from the body of the deceased and seized the same vide Ex.PW-23/A. SI Rambir Singh also prepared inquest report Ex.PW-61/A and other documents pertaining to the recovery and conduct of post-mortem of the deceased. Inspector V.S.Meena PW-62,

prepared the rough site plan Ex.PW-62/D of the place of the recovery of the body of the deceased; recording therein at points 'A' and 'B' the spots where the body of the deceased was found stuck in the heap of garbage in the canal and where the body was kept after being taken out from the canal. HC Sajjan Kumar PW-33, photographer, reached the said place and took the photographs Ex.PW-33/X1 to Ex.PW-33/X12 of the body of the deceased and the place of the recovery of the said body; negatives whereof are Ex.PW33/X1A to Ex.PW-33/X12A. (It may be noted here that the photographs Exhibits PW-33/X1, PW-33/X7, PW-33/X8, PW-33/X9, PW-33/X10 and PW-33/X11 are the photographs of the body of the deceased whereas the photographs Exhibits PW-33/X2, PW-33/X3, PW-33/X4, PW-33/X5 PW-33/X6 and PW-33/X12 are the photographs of the place of the recovery of the dead body of the deceased) Ravinder Singh PW-23 and Jai Chand PW-26, public persons, witnessed the investigation conducted at the place in question and preparation of the memos as also the other documents prepared by the police in connection with recovery of the body of the deceased.

21. Thereafter the body of the deceased was sent to the mortuary at District Hospital, Bulandshar, where Dr.S.K.Aggarwal PW-21 and Dr.M.M.Aggarwal conducted the post-mortem of the deceased at 2.30 P.M. on 31.08.2002 and

prepared the post-mortem report Ex.PW-21/A which records following ante-mortem injuries on the person of the deceased:-

“1. Firearm wound of entry 1.0 cm x 1 cm x cavity deep on right side forehead 2.0 cm above lateral end of right eye brow, margins inverted.

2. Firearm wound of exit 2.0 cm x 3.5 cm x cavity deep on left side of head 1.0 cm above left ear. On exploration, injuries nos.1 and 2 found communicating with each other. Margins inverted.

3. Abraded contusion 2.5 cm x 1.5 cm above top of head.”

22. The relevant portion of the external examination of the deceased recorded in the post-mortem report Ex.PW-21/A reads as under:-

“...Skin peeled off at places, scalp hair loose and easily detachable. Body covered with mud at places. Skin of hands and feet (soles) wrinkled. Foul smell present. Face scrotius and penis swollen.”

23. The post-mortem report further records that the brain of the deceased was in a liquefied state; that the small intestine was contain gases; that the death was caused due to coma, shock and haemorrhage as a result of ante-mortem injuries found on the person of the deceased and that the death of the deceased had taken place about one week prior to the conduct of the post-mortem.

24. After the post-mortem, the doctors handed over the clothes and artificial teeth, six in number; viscera of the deceased; vial of sample of preservative used for preserving

the viscera of the deceased and one sample seal to SO of PS Gulawati. HC Ajay Pal PW-4, handed over the afore-noted materials as also the materials seized vide memo Ex.PW-23/A; namely, earth lifted from near the canal and water which had oozed out from the body of the deceased; the post-mortem report and its copies and the inquest papers to Inspector V.S.Meena PW-62, vide memo Ex.PW-4/A.

25. Since accused Roshan Singh could not be located in his house, the police flashed a wireless message, Ex.PW-55/A, to all SSP's and DCP's in India to search for Roshan Singh and a Maruti 800 car bearing registration No.DDU 1371 owned by him. Proceedings were initiated to declare him a proclaimed offender.

26. Attempts were made to trace Pusphender and Nirvikar. On 6.9.2002, Inspector Ram Chander PW-20, along with other police officials was present near PS Tappal, District Aligarh when a secret informer informed him that accused Pushpender is staying in the house of his relative situated at village Bharatpur. Inspector Ram Chander PW-20, sent the aforesaid information to Police Station Keshav Puram, where DD No.11, Ex.PW-62/E, was recorded at 3.20 P.M. noting the said information. Thereafter Inspector Ram Chander proceeded to village Bharatpur and apprehended Pushpender from a road in the village. Inspector V.S.Meena accompanied

by SI Sukaram Pal PW-39 and SI Anil Kumar Chauhan PW-44, reached village Bharatpur and formally arrested accused Pushpender at 7.30 P.M. as recorded in the arrest memo Ex.PW-20/A.

27. The personal search of Pushpender resulted in the recovery of Rs.44/- and one I-Card issued in the name of the deceased by All India Crime Prevention Organization and the same were seized vide memos Ex.PW-20/B and Ex.PW-20/C respectively. On being interrogated by Inspector V.S.Meena PW-62, in the presence of SI Sukaram Pal and SI Anil Kumar PW-44, Pushpender made a disclosure statement Ex.PW-20/D wherein he disclosed that he had fired a shot at the deceased in pursuance of a conspiracy to murder the deceased.

28. On 17.09.2002 Inspector Ram Chander PW-20, telephonically informed duty officer at PS Keshav Puram that accused Nirvikar who was granted bail in connection with FIR bearing no.250/01 registered against him and had got his bail cancelled and is lodged in Aligarh Jail, based whereon, DD No.7A Ex.PW-62/F, was recorded at 10.45 A.M. noting the same information. On receipt of said information, Inspector V.S.Meena PW-62, proceeded to Aligarh, where after filing an application and getting permission from the District Judge, Aligarh, he obtained the custody of accused Nirvikar and

formally arrested him at 01.00 A.M. on 18.09.2002 as recorded in the arrest memo Ex.PW-39/A1.

29. On interrogation by Inspector V.S.Meena PW-62, in the presence of SI Sukaram Pal PW-39, accused Nirvikar made a disclosure statement Ex.PW-39/A, wherein he disclosed that the shot which caused the death of the deceased was fired by him. Additionally, he stated that he can point out the place where the deceased was murdered and the residence of accused Roshan Singh and can also get recovered the country made pistols used for committing the murder of the deceased. Pursuant to his disclosure statement, Nirvikar led the police party consisting of Inspector V.S.Meena PW-62 and SI Sukaram Pal PW-39, to a Dak Bangla near a Rajwaha which was situated behind village Chajjupur, U.P. and vide pointing out memo Ex.PW-39/B pointed out a spot and stated that said spot is the place of the murder of the deceased. (It may be noted here that the said spot is the same which was told by accused Sharda Jain and Raj Kumar as the spot where the murder of the deceased was committed i.e. the spot was already known to the police). Thereafter, he led the afore-noted police officials to the residence of his brother-in-law situated at village Chajjupur and got recovered an I-card issued in the name of the deceased by ISCKON, from underneath a trunk, which was seized vide memo Ex.PW-39/C. (It may be noted



here that in the disclosure statement Ex.PW-39/A made by accused Nirvikar he has not made any mention of any I-card or of the fact that he can get one recovered).

30. On the basis of secret information, the police party, consisting of Inspector V.S.Meena PW-62, SI Anil Kumar Chauhan PW-44 and SI Sukaram Pal PW-39, arrested accused Rajinder Singh at a bus stand situated at JJ Colony, Wazirpur, Delhi, at 8.30 P.M. on 30.09.2002 as recorded in the arrest memo Ex.PW-44/J. On being interrogated by Inspector V.S.Meena PW-62, in the presence of SI Sukaram Pal and SI Anil Kumar PW-44, Rajinder Singh made a disclosure statement Ex.PW-39/E, wherein he disclosed that he hatched a conspiracy with Sharda Jain, Raj Kumar, Roshan Singh and Rajinder to murder the deceased and that two unknown persons fired shots at the deceased in pursuance of the said conspiracy. Pursuant to his disclosure statement, Rajinder Singh led the police party consisting of Inspector V.S.Meena PW-62 and SI Sukaram PW-39, to a Dak Bangla near a Rajwaha which was situated behind village Chajjupur, U.P. and vide pointing out memo Ex.PW-39/G pointed out a spot and stated that spot is the place of the murder of the deceased. Thereafter he led the afore-noted police officials to the residence of Sharda Jain and vide pointing out memo Ex.PW-39/F pointed out the said house as the place where the

conspiracy to murder the deceased was hatched. (It may be noted here that the said places were already in the knowledge of the police).

31. On 01.10.2002, Inspector V.S.Meena PW-62, filed an application Ex.PW-62/H before the court of Metropolitan Magistrate for conduct of Test Identification of Rajinder. Rajinder refused to participate in the TIP proceedings on the ground that he is known to the witnesses. Said fact was recorded in the record Ex.PW-40/A pertaining to the TIP proceedings.

32. On 13.10.2002, SI Manohar Lal PW-29, prepared the site plan to scale Ex.PW-29/B of the place where the dead body of the deceased was recovered. He did so at the instance of Insp.V.S.Meena.

33. On 16.10.2002 Inspector V.S.Meena PW-62, filed an application before the court of Metropolitan Magistrate, Delhi for conduct of Test Identification of the wrist watch recovered at the instance of accused Raj Kumar. On 21.10.2002, Test Identification of the said wrist watch was conducted and Rajinder Pal Gupta PW-9, younger brother of the deceased, identified the wrist watch recovered at the instance of Raj Kumar, as that of the deceased. The Test Identification Proceedings were recorded vide Ex.PW-40/C. Being relevant to discuss the issue relating to the identification of the watch

as that of the deceased, it may be noted that it is recorded in Ex.PW-40/C as under:-

“On opening of the pullanda one wrist watch make citizen quartz with gold chain is found. All the wrist watches including the case property is displayed by me in a row and the case property is lying at fourth position from my left and at sixth place from my right. It is pertinent to mention here that the dial, chain and design of wrist watches produced by IO for the purpose of mixing up is similar to that of the case property. The make of wrist watches brought by IO is of different companies and there is no wrist watch of make citizen. (Emphasis Supplied)”

34. On 14.10.2002 a secret information was received by Inspector J.R.Uike PW-63, posted at PS Babai, District Hoshangabad, MP, that accused Roshan Singh is present at Rampur Tala near the tube well of Kamal Singh, pursuant whereto he went there and arrested Roshan Singh at 6.10 P.M. in the presence of two public witnesses; namely, Lalit Dubey PW-56 and Ram Bilas PW-57, as recorded in the arrest memo Ex.PW-63/A2.

35. On the next day i.e. 15.11.2002 the SP, Hoshangabad, sent the information, Ex.PW-63/B, about the arrest of Roshan Singh to the Commissioner of Police Delhi, pursuant whereto, Inspector VS Meena, accompanied by Inspector Ram Chander PW-20 and SI Sukaram Pal PW-39, went to Hoshangaband, where after filing an application and getting permission from the court at Hoshangabad, Inspector

V.S.Meena obtained the police custody of Roshan Singh and formally arrested him at 04.00 P.M. as recorded in the arrest memo Ex.PW-39/G. On being interrogated by Inspector V.S.Meena PW-62, in the presence of Inspector Ram Chander PW-20 and SI Sukaram Pal PW-39, Roshan Singh made a disclosure statement Ex.PW-20/E, wherein he disclosed that he hatched a conspiracy with Sharda Jain, Raj Kumar and Rajinder to murder the deceased and that two other persons; namely, Pushpender and Nirvikar fired shots at the deceased in pursuance of the said conspiracy. He further disclosed that he, along with three police officials; namely, Shri Pal Singh Raghav, Rakesh Kumar and Satender Kumar had thrown the body of the deceased in the canal; that one Subash who is a resident of village Chajjupur can shed some light on the said aspect of the matter and that he can get recovered a gold ring and the mobile phone of the deceased as also his mobile phone and the two pistols used for committing the murder of the deceased.

36. On 21.11.2002, Inspector V.S.Meena PW-62, came to know that Maruti car bearing registration no.DDU 1371 belonging to Roshan Singh is lying unclaimed at Malkhana of PS Kharkoda, District Meerut, UP since 09.09.2002. On the same day, Inspector V.S.Meena obtained the custody of the said car and seized the same vide memo Ex.PW-62/N. SI Karan

Singh PW-45, from the crime team reached PS Kharkoda, on being summoned and inspected the car in question but no chance print could be detected thereon as recorded in the report Ex.PW-45/A.

37. On 22.11.2002, Roshan Singh took the police party, consisting of Inspector V.S.Meena PW-62, SI Sukaram Pal PW-39 and SI Anil Kumar Chauhan PW-44, to Bijoli Mode, UP and got recovered his mobile phone from the bushes and the same was seized vide memo Ex.PW-39/O. Thereafter Roshan Singh led the said police officials to his residence and got recovered two country made pistols; two live cartridges and one gold ring from a polythene bag which was kept hidden in a heap of cattle feed, lying in a room of his house and the same were seized vide memo Ex.PW-39/L. Inspector V.S.Meena prepared rough site plan Ex.PW-62/N of the residence of Roshan Singh; recording therein at point 'B' the room where the afore-noted articles were recovered. He also prepared the sketches of the pistols and live cartridges recovered at the instance of Roshan Singh, being Ex.PW-39/H, Ex.PW-39/J and Ex.PW-39/K respectively. All the seized articles were deposited in the Malkhana on 22.11.2002 as recorded vide entry No.1642 entered in the store room register (part I) by HC Dinesh Kumar PW-43.

38. Thereafter Roshan Singh led the police officers and pointed out the spots where the deceased was murdered and body of the deceased respectively was thrown into the canal, vide pointing out memos Ex.PW-39/H and Ex.PW-39/N respectively. (It may be noted here that the spot which was pointed out by accused Roshan Singh as the place of the murder of the deceased is the same which was told by accused Sharda Jain and Raj Kumar as the spot where the deceased was murdered i.e. the spot was already known to the police). (It may further be noted here that sketch of one of the pistols recovered at the instance of accused Roshan Singh as also the pointing out memo of the place of murder of the deceased prepared at the instance of Roshan Singh have been exhibited as Ex.PW-39/H i.e. two documents have been given the same exhibit mark.) The mobile phone of the deceased could not be found pursuant to the disclosure statement of accused Roshan Singh.

39. In his disclosure statement, Roshan Singh had named Subash, stating that Subhash could shed some light on the aspect of the disposal of the dead body of the deceased, Inspector V.S.Meena tracked Subhash PW-38, and recorded his statement Ex.PW-38/DA. Thereafter, Inspector V.S.Meena filed an application Ex.PW-40/J before the Court of the Metropolitan Magistrate Delhi for recording the statement of Subash under

Section 164 Cr.P.C. Shri P.K.Jain PW-40, Metropolitan Magistrate Delhi, recorded the statement Ex.PW-38/A dated 10.12.2002 of Subash, wherein he stated that he is an agriculturist and resides in village Chajjupur. That on 24.08.2002 at around 06.00 PM he returned to his house after finishing work at his fields when some children told him that a dead body is lying near the government bungalow situated near the canal. On hearing the same, he proceeded to the house of Roshan Singh who was the Pradhan of his village to apprise him of the said fact. On his way to the house of Roshan Singh he met Roshan Singh who was driving a car and he told him about the dead body, upon which Roshan Singh told him that they should go to the police station and give the said information. Thereafter he sat in the car of Roshan Singh and while they were on their way to the police station they met three police officers; namely Shri Pal Singh Raghav, Rakesh Kumar and Satender Kumar to whom they gave the information about the dead body. The three police officers sat in the car of Roshan Singh. When the car reached near the canal, Roshan Singh asked him to get down from the car and told him that he, along with the three police officers would take care of the matter upon which he got down from the car. Roshan Singh drove the car towards the canal and he returned to his house. Roshan Singh absconded from his house since

that day. He did not see the dead body with his own eyes. He came to know that the said body was that of the deceased after reading a newspaper report a few days after the dead body of Atma Ram Gupta was discovered.

40. On 30.11.2002 Inspector V.S.Meena took the two pistols recovered at the instance of accused Roshan Singh to Dr.S.K.Aggarwal PW-21, for his opinion about the weapon. Vide report Ex.PW-21/B, Dr.S.K.Aggarwal opined that the ante-mortem injury no. (1) found on the person of the deceased could possibly be caused by one of the said two pistols.

41. In view of what was told to Inspector V.S.Meena by Subhash, it became apparent that Shri Pal Singh Raghav, Rakesh Kumar and Satender Kumar became suspects regarding the disposal of the dead body.

42. On 11.12.2002 Inspector V.S.Meena, accompanied by SI Sukaram Pal PW-39, went to PS Vijay Nagar, Ghaziabad, UP where he arrested Sripal Singh Raghav and Satender Kumar at 6.00 PM as recorded in the arrest memos Ex.PW-39/T and Ex.PW-39/U. On interrogation by Inspector V.S.Meena, in the presence of SI Sukaram Pal PW-39, accused Sripal Singh Raghav and Satender Kumar made disclosure statements Ex.PW-39/P and Ex.PW-39/Q respectively, wherein they disclosed that along with Roshan Singh and another police officer; namely Rakesh Kumar, they threw the body of the



deceased into the canal. Both of them led Inspector V.S.Meena to the place which had already been identified to the police as the place where the deceased was murdered and vide pointing out memos Ex.PW-39/V, Ex.PW-39/X, Ex.PW-39/Y and Ex.PW-39/W accused Sripal Singh Raghav and Satender Kumar pointed out the place where the dead body of the deceased was lying before it was thrown into the canal and the place where they threw the body of the deceased into the canal.

43. On the basis of secret information, Inspector V.S.Meena accompanied by SI Anil Kumar Chauhan PW-44, arrested accused Rakesh Kumar at a bus stop situated at B-2 Block, Keshav Puram, Delhi at 09.30 AM on 23.12.2002, as recorded in the arrest memo Ex.PW-44/K. On being interrogated by Inspector V.S.Meena, in the presence of SI Anil Kumar Chauhan PW-44, accused Rakesh Kumar made a disclosure statement Ex.PW-44/L wherein he disclosed that he along with Roshan Singh, Sripal Singh Raghav and Satender Kumar had thrown the body of the deceased into the canal. Thereafter vide pointing out memo Ex.PW-44/N, accused Rakesh Kumar pointed out the place where the dead body of the deceased was lying before it was thrown into the canal.

44. On 13.01.2003, Inspector V.S.Meena, obtained the blood samples of the parents of the deceased for the purposes of DNA testing and seized the same vide memo Ex.PW-62/X1.

45. On 16.01.2003 Inspector V.S.Meena, filed an application in the Court of Metropolitan Magistrate Delhi for conduct of Test Identification of the ring recovered at the instance of accused Roshan Singh. On 18.01.2003, the Test Identification of the said ring was conducted. Sumitra Gupta PW-18, wife of the deceased, identified the ring recovered at the instance of Roshan Singh as that of the deceased as noted in the record of the proceedings Ex.PW-40/M. The manner in which the TIP of said ring was conducted, is recorded in Ex.PW-40/M as under:-

“Today I.O. Insp V.S.Meena produced one sealed pullanda duly sealed with the seal of V.S. On opening of the same, one gold ring is found in match box. The English letter AR is engraved on the top of the ring. I.O. also produced eight other rings which appear to be of gold. The design and size of these rings are similar to that of case property. It is pertinent to mention here that on none of the said rings the English letters AR is engraved” (Emphasis supplied)

46. In the meantime, some of the materials seized during the course of investigation; namely, the blood samples of the parents of the deceased, the soil/earth lifted from the spot pointed out by accused Sharda Jain and Raj Kumar as the place of the murder of the deceased, the clothes, artificial teeth and viscera of the deceased, the sample of the vial used for preserving the viscera of the deceased, the tyre of the car of Sharda Jain, two country made pistols and cartridges were

sent to the Forensic Science Laboratory for serological/chemical/ballistic examination.

47. Vide CFSL report Ex.P-1, it was opined that the samples of the blood of the parents of the deceased and the sample of the tissue of the body recovered from the canal were subjected for DNA isolation by organic extraction method and that the said sample of tissue belongs to the male child of the parents of the deceased. Vide FSL reports Ex.PW-41/A and Ex.PW-41/B it was opined that the earth/soil/mud lifted from the place of occurrence was found to be stained with human blood; group whereof could not be determined and that blood could not be detected on the clothes and artificial teeth of the deceased. Vide FSL report Ex.PW-66/A it was opined that the mud/soil lifted from the place of occurrence and the soil/mud found stuck on the tyre of the car of Sharda Jain were similar in physical characteristics. Vide FSL report Ex.PW-50/A it was opined that the pistols recovered at the instance of Roshan Singh are of .315 bore, designed to fire a standard 8 mm/.315 bore and are in working order in their present condition and that the cartridges recovered at the instance of Roshan Singh are live and can be fired through a .315 bore firearm. Vide FSL report Ex.PW-59/A it was opined that blood or any other biological material could not be detected on the car of Roshan Singh.

48. Armed with the aforesaid material, the prosecution filed a charge-sheet against the accused persons. As per the charge-sheet, the broad contours of the case set up by the prosecution against the accused persons are that accused Sharda Jain developed intimate relations with the deceased due to which her husband left her. But, the deceased developed intimate relations with one Memwati Berwala who was also a member of the Indian National Congress and a Municipal Councillor. When the deceased did not end his relations with Memwati Berwala despite strong objection raised by accused Sharda Jain, accused Sharda Jain tried to commit suicide by consuming sulfas tablets. After the said incident, the relations between accused Sharda Jain and the deceased became normal and accused Sharda Jain got elected as a Municipal Councilor due to the influence of the deceased. However, after sometime, the deceased again developed intimate relations with Memwati Berwala as also started ignoring accused Sharda Jain and promoted the political career of Memwati Berwala at the cost of the career of accused Sharda Jain. The aforesaid conduct of the deceased enraged accused Sharda Jain to such an extent that she decided to do away with the deceased. Accused Sharda Jain confided in her brother Raj Kumar who agreed to aid Sharda Jain in achieving her illegal desire. To give effect to the illegal desire of Sharda

Jain he contacted accused Roshan Singh and his i.e. Roshan Singh's driver Rajinder Singh. The four of them i.e. Sharda Jain, Raj Kumar, Roshan Singh and Rajinder Singh met twice at the residence of Sharda Jain, where they hatched a conspiracy to murder the deceased. To execute the conspiracy accused Roshan Singh contacted accused Nirvikar and Pushpender, who agreed to kill the deceased. In pursuance of the said conspiracy, on 24.08.2002, accused Sharda Jain made the deceased sit in her Indica car bearing registration No.DL-3S-AB-0016, being driven by accused Rajinder Singh, and in a friendly manner, led him to a Dak Bangla near a Rajwaha situated behind village Chajjupur, UP, where accused Pushpender and Nirvikar fired shots at the deceased and caused his death. Thereafter Sharda Jain along with Rajinder Singh left the spot and asked the other accused persons to dispose of the body of the deceased. Roshan Singh asked the remaining accused persons; namely, Raj Kumar, Pushpender and Nirvikar to disperse and told them that they would come back to said spot in the evening to dispose of the body of the deceased. Before dispersing from the place of the crime, the said accused persons removed the I-cards, wrist watch and gold ring of the deceased. However, everything did not work out according to their plan inasmuch as Subash, who is a resident of village Chajjupur, got knowledge about the

presence of a body at the place in question. Notwithstanding the said obstacle, Roshan Singh, with the aid accused Sripal Singh Raghav, Rakesh Kumar and Satender Kumar managed to dispose of the body of the deceased by throwing the same in the canal flowing near the place where the deceased was murdered.

49. Charges were framed against the accused Sharda Jain, Raj Kumar, Rajinder Singh, Roshan Singh, Pushpender and Nirvikar under Section 120-B, Section 364 read with Section 120-B and Section 302 read with Section 120-B IPC for having hatched a conspiracy to abduct and murder the deceased; abducting and murdering the deceased in pursuance of the said conspiracy. Charges were also framed against accused Sharda Jain, Raj Kumar, Roshan Singh, Sripal Singh Raghav, Satender Kumar and Rakesh Kumar under Sections 120-B and 201 read with Section 120-B IPC for having hatched a conspiracy to cause disappearance of the evidence by throwing the body of the deceased in the canal in pursuance of the said conspiracy. Additionally, a charge under Section 25 of Arms Act, 1959 was framed against accused Roshan Singh for being in unlawful possession of a firearm. A charge under Section 27 of Arms Act, 1959 was also framed against accused Pushpender and Nirvikar for illegally using a firearm.

## ANALYSIS OF THE EVIDENCE LED BEFORE THE TRIAL

### COURT

50. At the trial, the prosecution examined as many as 66 witnesses. We need not note the testimony of the various police officers who took part in the investigation for they have deposed facts regarding the respective role played by them during investigation which have already been succinctly stated by us in the preceding paragraphs and in respect whereof not much submission were made during arguments in the appeals. However, whenever necessary, to deal with the submissions made by learned counsel for the appellants, such part of the testimony of the relevant witness would be noted. We would also be splitting, while noting, the testimonies of the witnesses, whenever required pertaining to the evidence throwing light on different facets/stages of the case of the prosecution.

51. With a view to have clarity in the analysis of the evidence led by the prosecution, we segregate the relevant witnesses into 10 categories, clubbing in one category witnesses who have thrown light on the same issue.

A Witnesses who participated in the preparation of the necessary documents prepared by the police till the FIR was registered:- HC Ashok Kumar PW-6, SI Shiv Raj Singh PW-55,

Const.Jitender PW-25, HC Savitri PW-27 and HC Sher Singh PW-35.

52. HC Ashok Kumar PW-6, deposed that he recorded DD No.31 Ex.PW-6/A at about 01.00 A. on 25.08.2002 on the basis of the report lodged by Rajinder Pal Gupta PW-9, regarding the deceased being missing. It may be noted here that the testimony of the said witness was not controverted by the defence. SI Shiv Raj Singh PW-55, deposed that the endorsement Ex.PW-55/C was recorded by him at 12.05 PM on 25.08.2002. No suggestion was given to the said witness in his cross-examination regarding the recording of the said endorsement. Jitender PW-25, deposed having handed over the endorsement Ex.PW-55/C to the duty officer at Police Station Keshav Puram. HC Savitri PW-27, deposed having registered FIR Ex.PW-27/A at 12.20 PM on 25.08.2002. HC Sher Singh PW-35, deposed having delivered copies of the FIR to the Ilaqa Magistrate and senior police officers.

B Witnesses to prove last seen, suspicious conduct of Sharda Jain and factum of hatching of conspiracy by the accused persons:- Sumitra Gupta PW-18, Prabhu Yadav PW-17, Manish PW-14, Om Prakash Chauhan PW-11 and Rajinder Pal Gupta PW-9.

53. Sumitra Gupta PW-18, the wife of the deceased, deposed that on 24.08.2002, at about 10.15 AM the deceased



left his residence in his Indica car bearing registration No.DL 6SA 0025, which was driven by his driver Prabhu Yadav. Before leaving the house, the deceased told her that he would first go to the house of Sharda Jain and thereafter would proceed to a rally along with Sharda Jain. She deposed that while leaving the house, the deceased was wearing a watch in his right hand and a gold ring on which letters 'AR' were engraved and was also carrying a mobile phone, some cards and papers. After sometime Prabhu Yadav returned home and told her that he had dropped the deceased at the residence of Sharda Jain and that the deceased had told him to return to his house as he would be going to the rally in the car of Sharda Jain. When the deceased did not return till evening, she tried to contact him on his mobile phone having number 9810166101, but the same was switched off. Thereafter, she contacted her children and the younger brothers of the deceased and apprised them that the deceased was missing. She made a telephonic call to Sharda Jain to enquire about the whereabouts of the deceased, in response where to, Sharda Jain told her that the deceased did not accompany her to the rally in question. After sometime, her son Amit Gupta called Sharda Jain, who then informed that the deceased did accompany her to the rally, but stated that the deceased got down from her car near ISBT when they were returning from the rally.

54. On being cross-examined about the relations between the deceased and herself, Sumitra Gupta stated (Quote): *'My husband was honest and loyal to people and was faithful to me.'* On being questioned about the belongings of the deceased, the witness stated (Quote): *'After lodging the missing report of my husband with the police, the police had not taken any belongings of Atma Ram from my house. It is wrong to suggest that police official Meena had come to my house and had taken away the ring of my husband.....It is wrong to suggest that the ring Ex.PW-18/1 was with me till 17.12.02. It is wrong to suggest that on 18.12.02, I had given the ring, Ex.PW-18/1 to Insp.Meena'*. It may be noted here that no specific suggestion was given to Sumitra Gupta that the Investigating Officer collected the wrist watch, the ring or the I-cards of the deceased from her.

55. Prabhu Yadav PW-17, the driver of the deceased, deposed that he had dropped the deceased at the residence of Sharda Jain in the morning of 24.08.2002. On reaching the residence of Sharda Jain, the deceased told him to take back the car to his house and meet him in the evening. He had seen the deceased, Sharda Jain and another person whom he cannot identify, sitting in the car of Sharda Jain, being driven by Om Prakash Chauhan, the driver of Sharda Jain. On returning the residence of the deceased, he handed over the

keys of the car of the deceased to the wife of the deceased and told her that accompanied by Sharda Jain the deceased had gone to attend the rally in the car of Sharda Jain. Thereafter he left for his house. On the same day, at about 05.00 PM he again returned to the residence of the deceased but the deceased was not present there. He remained at the residence of the deceased till about 7.00 PM - 8.00 PM but the deceased did not return.

56. On being cross-examined about the instructions given to him by the deceased on 24.08.2002 at the time when he dropped the deceased at the residence of Sharda Jain, Prabhu Yadav stated (Quote): *'When Atma Ram Gupta left for rally in the car of Sharda Jain he had told me to come to his house at 05.00 PM and he had not told me that I should come to Kamal Clinic of Dr.Mahender Pal Gupta'*. It may be noted here that save and except asking aforesaid question, the testimony of the said witness was not controverted by the defence.

57. Om Parkash Chauhan PW-11, the driver of Sharda Jain, was the star witness of the prosecution inasmuch as he was examined to prove that the deceased was last seen in the company of accused Sharda Jain and Rajinder Singh; to prove the exchange of money between accused Roshan Singh and Sharda Jain under suspicious circumstances; the visits of

accused Raj Kumar, Roshan Singh and Rajinder Singh at the residence of accused Sharda Jain and the suspicious conduct of Sharda Jain on 24.08.2002.

58. Om Parkash Chauhan deposed that he and accused Rajinder Singh were present in the house of Sharda Jain in the morning of 24.08.2002. The deceased came to the house of Sharda Jain in his Indica car, being driven by his driver Prabhu Yadav. Thereafter, the deceased sent back his car with his driver and occupied a seat in the car of Sharda Jain along with Sharda Jain and Rajinder. Thereafter, he drove the said car to Firozshah Kotla ground where a rally was organized by the Congress Party. On reaching there, the deceased and Sharda Jain went to attend the rally, while he and Rajinder remained seated in the car. Within ten-fifteen minutes of going to the rally, the deceased and Sharda Jain came back to the car and Sharda Jain instructed him to go towards Ghaziabad. When the car reached near the red light at Hanuman Mandir, Ring Road, Sharda Jain asked him to stop the car and leave for his house as he was not feeling well, upon which he enquired from Sharda Jain as to who would drive the car in his absence, to which, she replied that Rajinder would drive the car. Thereafter, he got down and saw accused Rajinder drive the car. That in the intervening night of 24/25.08.2002 a fat man came to his house and told him that Sharda Jain is calling him,

whereupon he went downstairs but did not find Sharda Jain present there. The said fat man insisted that he should immediately go and meet Sharda Jain at her residence to which he replied that he would meet her in the morning. Sometime thereafter, he received a telephonic call from the driver of the deceased i.e. Prabhu Yadav who made enquiries about the whereabouts of the deceased and he apprised him of the above facts. He went to the residence of the deceased and apprised the family members of the deceased with the above facts.

59. On being cross-examined by the learned APP since Om Prakash deviated from his statement recorded under Section 161 Cr.P.C., Om Parkash stated that eight-ten days prior to 24.08.2002, Accused Raj Kumar along with two other persons whom he cannot identify, had come to the residence of Sharda Jain. He denied having listened to any talks between Sharda Jain, Raj Kumar and said two persons regarding payment in sum of Rs.1 lakh or that he had given any such statement to the police. He stated that on 22.08.2002 Raj Kumar along with said two persons again came to the residence of Sharda Jain. On being confronted with his statement Ex.PW-11/DA wherein it was recorded that accused Sharda Jain had come to his residence and threatened him in the intervening night of 24/25.08.2002, he stated (Quote): *'It is incorrect to suggest*

*that in the night at about 12:00 of 24.8.2002 Sharda Jain had also come to my house or that she told me that I should not tell to anybody that Atma Ram Gupta was also with her on that day otherwise consequences would not be good nor I so stated to the police. Confronted with portion C to C of mark PW-11/A where it is so recorded'.*

60. On being cross-examined by the defence about the visit of accused Raj Kumar to the residence of accused Sharda Jain on 22.08.2002, he stated that he had not seen any person at the residence of accused Sharda Jain on 22.08.2002 as he was on leave on said day and therefore did not go to the residence of accused Sharda Jain. On being confronted with the omission to mention the fact in the statement Ex.PW-11/DA that accused Sharda Jain had told him on 24.08.2002 that they had to go towards Ghaziabad, the witness stated (Quote): *'Madam Sharda Jain told me that they had to go towards Ghazibad. Confronted with statement Ex.PW-11/DA where it is not so recorded. It is incorrect to suggest that I did not state to the police because Madam Sharda Jain had not told me that they had to go towards Ghaziabad.'* The same was the reply of the witness when confronted with the omission in the statement Ex.PW-11/DA to mention the fact that the driver of the deceased made a telephonic call and that he visited the residence of the deceased on 24.08.2002. It

may be noted here that Om Prakash stated that the police had kept him in police station for two days after his visit to the police station on the intervening night of 24/25.08.2002. It is further noted that neither any question was put, nor any suggestion was given to the witness in his cross-examination, regarding the factum of visit of the fatty man to his residence on 24.08.2002.

61. Shanti PW-10, the mother of the driver of Sharda Jain i.e. the mother of Om Prakash PW-11, deposed that her son was employed as a driver with Sharda Jain and that she does not know Sharda Jain. One night Sharda Jain had come to her residence and sent a boy inside her residence to call her son, whereupon she asked her son to go and meet Sharda Jain. No talks took place between Sharda Jain and her son in her presence.

62. On being cross-examined by the learned APP as she was testifying at variance with her statement recorded by the police pertaining to the afore-noted testimony, she stated (Quote): *'It is incorrect to suggest that I know Sharda Jain. I cannot say if it was 24.08.2002 but however, it was about 12 in the night when one boy came to me and asked that Om Parkash had been called by Sharda Jain'*. It is relevant to note that the testimony of the witness was not controverted by the defence.

63. Manish PW-14, the son of Mahender Pal Gupta PW-8 a friend of the deceased, deposed that on 24.08.2002 he attended a rally at Firozshah Kotla ground. He had last seen the deceased in the rally at about 12 noon. On the way after returning from the rally, his car was moving behind a car in which the deceased along with Sharda Jain and accused Rajinder Singh were traveling and that the said car was being driven by the driver of Sharda Jain. He saw that the said car stopped near the red light at Nigam Bodh Ghat, whereupon the driver of the car got down and started walking towards ISBT. He made enquiries from the deceased, who told him that driver of Sharda Jain has left as he was not feeling well and that accused Rajinder would drive the car in the absence of the driver of Sharda Jain. Thereafter, accused Rajinder sat on the driver's seat and drove the car towards ISBT. That he first identified accused Rajinder on 2.10.2002 at PS Keshav Puram when he had gone there to lodge a report about his mobile phone being missing.

64. On being cross-examined about his mobile phone being missing, Manish stated (Quote): *'I had lost my mobile phone and therefore, I had gone to the PS Keshav Puram on 2.10.2002 to make report about it. I did not so tell to the police in my statement under Sec.161 Cr.P.C. The report about the missing of the mobile phone was not recorded by the police,*



*rather I was given suggestion first I should search it out in my house. The report about the mobile has not been recorded in the PS till date because I found my mobile in my car as it was found on the next day.....I do not remember the number of my mobile which had misplaced when I had gone to the PS to make the report on 25.8.2002. It is wrong to suggest that I do not recollect the number of my mobile phone because I had not gone to the PS on 2.10.2002.*

65. Rajinder Pal Gupta PW-9, the younger brother of the deceased, deposed that in the morning of 24.08.2002 the deceased left his house in his Indica car being driven by his driver Prabhu Yadav to go to the house of Sharda Jain. The deceased was wearing a wrist watch with a gold chain, one gold ring and off-white coloured Safari suit and was also carrying a mobile phone having number 9810166101 at the time when he left the house. On reaching the house of Sharda Jain, the deceased asked his driver to leave from there and directed him to meet him at Kamal Clinic in the evening, but the deceased did not come to the said clinic. Sumitra Gupta, the wife of the deceased, informed him that she had made a telephonic call to Sharda Jain, who told her that she is not aware about the whereabouts of the deceased. Prabhu Yadav, the driver of the deceased, also confirmed to him that he had dropped the deceased at the house of Sharda Jain in the

morning. On making enquiries from Om Prakash Chauhan, the driver of Sharda Jain, Om Prakash Chauhan informed him that he had taken the deceased, Sharda Jain and another person to the rally in the car of Sharda Jain; the deceased and Sharda Jain returned to the said car after attending the rally and that he left the car near red light at Hanuman Mandir on his way, after returning from the rally, whereupon the third person sitting in the car started driving the same. Thereafter Sumitra Gupta again contacted Sharda Jain, who then informed her that the deceased went with her in her car to the rally but got down from her car near ISBT when they were returning from the rally as he had met some known person there. Amit Gupta, the son of the deceased, also made a telephonic call to Sharda Jain in his presence wherein Sharda Jain told him that the third person sitting in the car was her brother-in-law Sunil Jain, which fact was found to be false by the police.

66. On being cross-examined about his presence at the residence of the deceased on 24.08.2002 at the time when the deceased left the residence of Sharda Jain, Rajinder Pal Gupta stated (Quote): *'On 24.8.2002 Atma Ram Gupta had left the house to attend the Congress Rally in my presence. Volt : I have my office in Tri Nagar where I go daily. I usually used to go to the house of my brother Atma Ram Gupta. If the police had asked me if Atma Ram Gupta left his house in my*

*presence on 24.8.2002 then I must have so stated. At this stage the defence counsel has asked the witness to go through his Ex.PW9/C and then answer if Atma Ram Gupta had left the house in his presence. The witness has stated that it is not so written in Ex.PW9/C.'*

C Witnesses to prove the deposit of the wrist watch and the gold ring of the deceased recovered at the instance of accused Raj Kumar and Roshan Singh in the Malkhana :- Inspector V.S.Meena PW-62 and HC Dinesh Kumar PW-43.

67. Inspector V.S.Meena PW-62, deposed that the wrist watch and the gold ring of the deceased recovered at the instance of accused Raj Kumar and Roshan Singh respectively were deposited by him in the Malkhana on 28.08.2002 and 22.11.2002 respectively. HC Dinesh Kumar PW-43, also deposed that the said wrist watch and the gold ring were deposited in the Malkhana on 28.08.2002 and 22.11.2002 and that he had made entries in the Malkhana Register in the said regard. It may be noted here that no suggestion to the contrary was given to the said witnesses.

D Witnesses to prove the identification of the body of the deceased: - Mahender Pal Gupta PW-8, Rajinder Pal Gupta PW-9, Ved Prakash Gupta PW-15, Rajpal Gupta PW-16, Amrit Lal Singhal PW-37 and Zaheer Ahmad PW-36.

68. Mahender Pal Gupta PW-8, a friend of the deceased, deposed that on 31.08.2002 along with the relatives of the deceased he had gone to a canal near village Gulawati where he saw the body of the deceased lying on the bank of said canal. The body of the deceased was swollen and was clothed in an off-white colored safari suit. A label of 'Lovely Tailors' was stitched on the shirt of the safari suit. The deceased had 4 artificial teeth and that the same were not found in the jaw when the body was recovered.

69. On being confronted with the photographs Ex.DX and Ex.DX-1, Mahinder Pal Gupta stated (Quote): *'The photographs of the dead body were taken on 31.08.2002. When I saw the body, then the wrist watch was found wearing on the left hand of Atma Ram Gupta and it also reflects in the photographs Ex.DX and DX-1.'* (It may be noted here that the said statement of the witness strikes a discordant note with the case of the prosecution for the reason the claim of the prosecution is that the wrist watch of the deceased was removed by accused Raj Kumar after the death of the deceased and that the same was recovered at the instance of accused Raj Kumar).

70. Rajinder Pal Gupta PW-9, Ved Prakash Gupta PW-15, Rajpal Gupta PW-16, the younger brothers of the deceased and Amrit Lal Singhal PW-37, a friend of the deceased,

deposed that they had gone to a canal near village Gulawati where they found the body of the deceased lying on the bank of said canal. Additionally, Rajinder Pal Gupta deposed that an off-white colored safari suit was found on the body and that the artificial teeth were found in the jaw. A label of 'Lovely Tailors' was found stitched on the shirt of the said safari suit. (It may be noted here that no question regarding the presence of a wrist watch on the body of the deceased was put to the said witnesses in their cross-examinations).

71. Zaheer Ahmad PW-36, deposed that he runs a tailoring shop in the name and style of 'Lovely Tailors' at Tri Nagar, Delhi. The deceased used to get his clothes stitched by him and that he stitches his label 'Lovely' on the clothes stitched by him.

E Witnesses to prove the post-mortem report of the deceased:- Dr.S.K.Aggarwal PW-21.

72. Dr.S.K.Aggarwal PW-21, deposed that he conducted the post-mortem of the deceased on 31.08.2002 and that the post-mortem report Ex.PW-21/A as also the report Ex.P-W21/B regarding the opinion on the weapon of offence were prepared by him.

F Witnesses to prove the reports submitted by the Forensic Science Laboratoy:- A.K.Srivastava PW-41, Sri Narain PW-42,

K.C.Varsheny PW-50, Dr.Rajinder Kumar PW-59 and Dr.Swaroop Vedanand PW-66.

73. A.K.Srivastava PW-41, deposed that the FSL reports Ex.PW-41/A and Ex.PW-41/B were prepared by him. Sri Narain PW-42, deposed that the FSL report dated 29.01.2003 was prepared by him. It is noted here that the two witnesses were not subjected to any cross-examination on behalf of the accused persons.

74. K.C.Varshney PW-50, deposed that the FSL report Ex.PW-50/A was prepared by him. It may be noted here that the witness denied the suggestions that the two pistols examined by him were not in a working condition and that he did not examine them.

75. Dr.Swaroop Vedanand PW-66, deposed that FSL report Ex.PW-66/A was prepared by him. He further deposed that he holds a degree in the Masters of Science in Physics, M.Phil and Ph.D. and that he has been working as Scientific Assistant and Scientific Officer in FSL since 1993. It may be relevant to note that as per the report Ex.PW-66/A the physical characteristics of the soil scrapped from the right rear tyre of the Indica car of accused Sharda Jain were the same as that of the soil lifted from the spot pointed out by accused Sharda Jain and her brother Raj Kumar as the place where the deceased was murdered.

76. On being questioned about his credentials during cross-examination, Dr.Swaroop Vedaanand stated: *'It is correct that I have not studied any course in Geology. I have not studied any degree or diploma in structural geology or physical geology. However, structural physics forms part of a degree course in physics.'* On being questioned about the methodology adopted by him for carrying out the examination of the soil, he stated: *'It is correct that I did not carry out any Chemical examination of the soil supplied to me in the present matter so as to ascertain its various components or as to its salinity. It is correct that I had not mentioned the volume of different components of the soil sample examined by me. The elevation of the place from where the alleged samples were lifted from the sea level were not supplied to the laboratory.....Witness further states that on account of difference in quantity of samples etc it is difficult to give an opinion of identical physical character-sticks or for that matter some physical character-sticks.'*

G Witnesses to prove the ownership of the articles recovered at the instance of the accused persons:- Subash Chander PW-2, Yadukuleshwar Dass PW-5, Rajinder Pal Gupta PW-9, Sumitra Gupta PW-18, P.K. Jain PW-40 and Baldev Kumar PW-52.

77. Subash Chander PW-2, President of All India Crime Prevention Organization, deposed that the deceased enrolled himself as a member of All India Crime Prevention Organization on 08.03.1995 and that the I-card Ex.PW-2/A recovered at the instance of accused Pushpender was issued to the deceased on the same day. He further deposed that the membership of the deceased expired on 31.12.1995. Yadukuleshwar Dass PW-5, Vice-President of International Society for Krishna Consciousness (ISCKON), deposed that the deceased was a member of ISCKON and that the I-card Ex.PW-5/A recovered at the instance of accused Nirvikar was issued to the deceased. It may be noted here that the testimony of the said two witnesses was not controverted by the defence.

78. Rajinder Pal Gupta PW-9 and Sumitra Gupta PW-18, the younger brother and the wife respectively of the deceased, deposed that they had identified the wrist watch Ex.P-4 and the ring Ex.PW-18/1 of the deceased in a Test Identification proceedings. On being questioned about the wrist watch in question, Rajinder Pal Gupta stated (Quote): *'Atma Ram Gupta had gone to Singapur perhaps in the year 1996 and from where he had brought the wrist watch Ex. P-4 but I was not present when he purchased the watch.....It is correct that there is no special mark of identification on the wrist watch of Atma Ram Gupta.....Atma Ram Gupta had other wrist watches also*



*but however after he had brought the wrist watch Ex.P-4 from Singapur, he used to wear only this watch.'*

79. P.K.Jain PW-40, Metropolitan Magistrate Delhi deposed that he conducted the TIP of the wrist watch and the gold ring recovered at the instance of accused Raj Kumar and Roshan Singh and that the said wrist watch and ring were identified as belonging to the deceased by Rajinder Pal Gupta and Sumitra Gupta respectively. He also deposed having prepared the record in respect of the said TIP proceedings i.e. Ex.PW-40/C and Ex.PW-40/G.

80. Baldev Kumar PW-52, deposed that he runs a jewellery shop under the name and style of Gogna Jewelers at Narang Colony, Tri Nagar. That on 23.10.2001 the deceased purchased a gold ring from him on which the letters 'AR' were engraved and that he issued a bill Ex.PW-52/A to the deceased in said regard. The ring Ex.PW-18/1 recovered at the instance of accused Roshan Singh is the same ring which was purchased by the deceased from him.

H Witnesses to prove the record relating to the mobile phone of accused Sharda Jain :- Gulshan Arora PW-34, Anu Anand PW-65 and Inspector V.S.Meena PW-62.

81. Gulshan Arora PW-34, an employee of cellular company HUTCH, produced the record pertaining to mobile number 9811508688. On basis of the said record, he deposed

that the said number is registered in the name of Sharda Jain. He further deposed that the call record Ex.PW-34/A pertaining to the said number is for the period 24.8.2002 to 27.8.2002.

82. Anu Anand PW-65, an employee of the cellular company HUTCH, produced the Cell ID Chart Ex.PW-65/A, which record indicates the locations of the various towers installed by cellular company HUTCH in Delhi and NCR and proved the same.

83. A cumulative reading of the documents Ex.PW-34/A and Ex.PW-65/A shows that on 24.08.2002 incoming calls were received on the number 9811508688 at Shalimar Bagh at 9.09 A.M., Sarai Rohilla at 11.42 A.M., Turkman Gate at 12.05 P.M. and Raj Nagar (Ghaziabad) at 4.18 P.M., Mohan Nagar (Ghaziabad) at 4.32 P.M., Dilshad Garden at 4.52 P.M. and Mori Gate at 5.11 P.M.; outgoing calls were made from the number 9811508688 at Raj Nagar (Ghaziabad) at 4.21 P.M., Zaina Tower, Raj Nagar (Ghaziabad) at 4.27 P.M., Navyug Market (Ghaziabad) at 4.30 P.M. and Ashok Vihar at 5.31 P.M.

84. Inspector V.S.Meena PW-62, deposed that he obtained the call record Ex.PW-62/A of the mobile number 9811508688 pertaining to the period 01.06.2002 to 26.08.2002 during the course of the investigation of the present case. He further deposed that on the basis of the said

record he prepared a chart, Ex.PW-62/A1 which shows the movement of the mobile phone No.9811508688 on 24.8.2002.

85. At this juncture, it may be noted that the call details pertaining to the mobile No.9811508688 for the date 24.08.2002 contained in the call records Ex.PW-34/A and Ex.PW-62/A are exactly the same.

I Witnesses to prove the motive of Sharda Jain to murder the deceased:- Mahender Pal Gupta PW-8, Captain Dr.Satish Chand Rajput PW-3, Const.Satbir Singh PW-7, ASI Baljeet Singh PW-19, Dr.Sunil Markan PW-24, HC Bhagirath PW-28 and Tariq Nasir PW-58.

86. Mahender Pal Gupta PW-8, a friend of the deceased, deposed that he runs a medical clinic at Keshav Puram, Delhi and that Sharda Jain used to visit his clinic along with the deceased. The deceased provided help to Sharda Jain when she contested elections for the post of Municipal Councilor and that Sharda Jain was having her office at a premises situated at Keshav Puram, which premises were provided by him to Sharda Jain at the request of the deceased. After Sharda Jain was elected as councilor, she once came to his clinic and expressed her displeasure over the fact that despite the fact that she is the Chairman of the Education Committee, the deceased made Memwati Barwala, who was also a municipal councilor, a chief guest at a function organized at a school,

instead of her. She further told him that she liked the deceased and because of said liking, she has left her husband. Sharda Jain also told him that the deceased was developing intimate relations with Memwati Barwala and that he should advise the deceased to discontinue his relations with Memwati Berwala. Sharda Jain told him that on one occasion she tried to commit suicide by consuming sulfas tablets on account of her liking for the deceased. She told him that she consumed sulfas tablets because the deceased started liking Memati Berwala. Sharda Jain asked him to advise the deceased to mend his ways, else the consequences would not be good. After her talks with Sharda Jain, he talked to the deceased about his talks with Sharda Jain, but the deceased did not pay any heed to his advice.

87. On being cross-examined about his talks with Sharda Jain, Mahender Pal Gupta stated (Quote): *'It is also correct that because of my such relations with Atma Ram Gupta, accused Sharda Jain made complaint to me against Atma Ram Gupta. It is correct that accused Sharda Jain had told me that Atma Ram Gupta had developed physical relations with Mem Wati Berwala and such relations was also with her and that she did not like such relations of Atma Ram with Mem Wati Berwala....I do not recollect if Sharda Jain told me that when Atma Ram Gupta, did not act on her advice to*

*have no physical relations with Mem Wati Berwala and therefore, she had consumed Shalfas tablet. The attention of the witness has been drawn towards the portion A to A of his statement under Section 161 Cr.P.C. dt. 28.08.2002 mark PW8/C where it is so recorded. But the witness states that he does not recollect. Sharda Jain told me that Atma Ram Gupta was bent upon to spoil her political career and was taking steps to develop political career of Memwati Berwala, and that for that she could go to any extent..... The elections to Municipal Corporation of Delhi were held in Feb. 2002. No election office was opened in premises A-1 Keshav Puram before the said elections of Feb. 2002. I stated to the police that Sharda Jain told me that because of her said relations with Atma Ram Gupta, she left her husband. (confronted with statement mark PW8/C, now exhibited as Ex.PW8/DA where it is no recorded) I do not recollect the date but it was month of July 2002 when Sharda Jain told me the facts that I have deposed today I did not tell police that those facts were told to me by Sharda Jain in the month of July 2002.'*

88. Dr.Satish Chand Rajput PW-3, deposed that he runs a dental clinic at Vivek Vihar, Delhi. He deposed that the deceased visited his clinic on four dates, namely, 13/20/21/23 August 2002. On 30.07.2002 the deceased visited his clinic after the visiting hours. The deceased was accompanied by

Sharda Jain in some of the visits. On 20.08.2002 he put an artificial denture from upper first canine to upper right canine in the jaw of the deceased. During one of the aforesaid visits, Sharda Jain told him that she would make payment for the treatment rendered by him to the deceased. That the photostat copies of the record of the visit and treatment given to Shri Atma Ram Gupta on 30.7.2002, 13.8.2002, 20.8.2002, 21.8.2002 and 23.8.2002 are Ex.PW-3/A to Ex.PW-3/E. (It be noted here that the entries pertaining to the visits of the deceased are in lead pencil in the original register which had been perused by us during arguments in the appeal. All other entries pertaining to the patients of PW-3 are in ink. It may further be noted that the pair of moulded POP denture set with name of Dr.S.C.Rajput engraved thereon recovered from the car of Sharda Jain on 27.8.2002, seizure whereof has been recorded in the memo Ex.PW-44/C has not been put to the witness for purposes of identification.)

89. On being cross-examined about the entries pertaining to the visits of the deceased at his clinic, Dr.Satish Chand Rajput stated (Quote): *'The entries Ex.PW-3/A to E are not in my hand, rather the same are in the hand-writing of my assistant. The entry register starts from 1.4.2002 to 29.7.2002 are in pen ink. The entries of 30.7.2002 is written in pencil. In the register, on 13.8.02, the only entry is in regard to the visit*

*of Atma Ram Gupta and Sharda Jain and the entry is in pencil. It is correct that on 20.8.02 there are five entries in my register and out of them all are in pen except the entry of Atma Ram Gupta, which is in pencil. Similarly, there are four entries on 21.8.02 and the first three are written in pen but the last entry of Atma Ram Gupta is written in pencil. Similarly on 23.8.02, there are three entries in my register and out of them first two are written in pen and the third of Atma Ram is written in pencil. It is wrong to suggest that the writer of the entries in pen and pencil are different.'*

90. On being questioned about the factum of overwriting in the entries pertaining to the visits of the deceased, Dr.Satish Chand Rajput stated (Quote): *'It is correct that there is overwriting of the figure "4" of the date 23.8.02 in the register. The figure "4" has been written over the figure "3".'*

91. It is also worthwhile to note that suggestions were given to the witness that the deceased visited his clinic on 24/25/26 August 2002, which suggestions have been denied by the witness.

92. Const.Satbir Singh PW-7, deposed that on 25.10.2002 (should read 25.10.2000) he received an information from two different sources that Sharda Jain has consumed some tablets and that she has been admitted in the

hospital, based whereon, he recorded DD Entries Ex.PW-7/A and Ex.PW-7/B. (It may be noted here that a perusal of the aforesaid entries shows that the same have been recorded on the intervening night of 24/25.10.2000 therefore it is clear that either the witness has inadvertently deposed regarding the date in question or that there has been a typographical error at the time of the recording of the evidence).

93. ASI Baljeet Singh PW-19, deposed that he conducted investigation pertaining to the incident dated 25.10.2000 of consumption of sulfas tablets by Sharda Jain and that he prepared two DD entries Ex.PW-19/A and Ex.PW-19/B in said regard. It may be noted here that DD entry Ex.PW-19/B records that Sharda Jain gave a statement to the police to the effect that she inadvertently consumed sulfas tablets for the reason she was suffering from an illness as also was tense on account of the fact that her husband left for Madras but did not return home in spite of considerable time lapsing.

94. Dr.Sunil Marken PW-24, deposed that on 25.10.2000, Sharda Jain was admitted at Maharaja Agarsen Hospital as she had consumed sulfas tablets and that he prepared the MLC Ex.PW-24/A pertaining to Sharda Jain in said regard.

95. HC Bhagirath PW-28, deposed that on 27.03.2001 Sharda Jain visited police post Shanti Nagar and lodged a



report that her husband was missing, based whereon, he recorded DD Entry Ex.PW-28/A. It may be noted here that DD entry Ex.PW-28/A records that Sharda Jain informed the police that 6-7 months ago, her husband Ishwar Jain left for Madras and that he did not return home even up till 27.03.2001. That she has no knowledge about the whereabouts of her husband.

96. Tariq Nasir PW-58, Senior Correspondent, Rashtriya Sahara, deposed that the news item with the photograph Ex.PW-58/A was published in the Delhi edition of Rashtriya Sahara on 22.8.2002. We may note that the news item pertains to a function of a park being inaugurated and Memwati Berwala present at the function and her announcing that she would ensure that Rohini becomes garbage and corruption free area. The photograph shows Atma Ram Gupta i.e. the deceased standing next to Memwati Berwala.

J Residual Witnesses :- P.S.Chauhan PW-1, Mahender Pal Gupta PW-8, Ram Kumar PW-22, Ravinder Singh PW-23, Jai Chand PW-26, Subash PW-38, SI Kalicharan PW-53 and Dr.Prabhat Chaurasia PW-64.

97. Subash PW-38, deposed the facts recorded in his statement Ex.PW-38/A under Section 164 Cr.P.C., contents whereof have already been noted by us in para 41 above.

98. On being cross-examined about the factum of his inimical relations with accused Roshan Singh, Subhash

admitted (Quote): *'It is correct that my father Kishan Singh once contested against accused Roshan Singh for the post of village pardhan and in which my father lost.....It is correct that after Roshan Singh had won the election one complaint was lodged against him regarding misappropriation of village funds. Voltd. I was one of the signatory to the said complaint alongwith other villagers.'* On being cross-examined about his knowledge of the identity of the dead body of the deceased he stated (Quote): *'I do not remember whether I stated in my statement to the IO that after about three days I came to know from news papers that the said dead body belogned to Atma Ram (confronted with statement EXPW 38/DA where the fact that "after three days from the news papers I came to know" is not mentioned).....Police as per my knowledge came to our village either on the third or fourth day of the incident. On that day the police did not meet me. It is correct that my statement was recorded by IO after about 3 months. During the said period of 3 months I myself did not go to any police official to inform about the above incident.'*

99. Mahender Pal Gupta PW-8, a friend of the deceased, deposed that on 28.08.2002, while he was sitting at his clinic, he saw a news item on TV, regarding the deceased being missing. He further learnt from the news item that the police, along with accused Sharda Jain, Raj Kumar and Raju had gone

to village Chajjupur in connection with the present case. On reaching the rajwaha situated at village Chajjupur, he saw that accused Sharda Jain, Raj Kumar, Raju and Roshan Singh were present there. He further deposed that the police was making inquiry from accused Roshan Singh and that he does not recollect whether other accused persons; namely, Sharda Jain, Raj Kumar and Raju took part in the investigation. He stated that he appended his signatures on certain papers prepared in connection with the inquiries made from accused Roshan Singh as also signed the pointing out memos Ex.PW-8/A and Ex.PW-8/B of accused Sharda Jain and Raj Kumar. He identified accused Raj Kumar, Rajinder and Roshan Singh as the persons who were present at village Chajjupur on 28.08.2002. He also deposed that accused Rajinder is Raju.

100. On being cross-examined about the presence of accused persons at village Chajjupur on 28.08.2002, Mahender Pal GUpta stated (Quote): *'It is correct that on 28.8.2002 from the Media report, I had come to know that the police had gone to village Chajjupur along with accused Sharda Jain and Raj Kumar @ Raju and that I had not come to know that third person had also accompanied the police.....I had stated before the police that on 28.8.2002 when I reached to village Chajjupur then accused Roshan Singh was also present there and the police was making inquiry from him (confronted with*

*statement mark PW8/C where it is not so recorded) It is correct that no person by the name of Roshan Singh met me in village Chajupur when I had gone there on 28.8.02.It is correct that accused Sharda Jain and Raj Kumar @ Raju was speaking about Roshan Singh when I visited village Chajupur.....I had seen accused Rajinder as I identified in the court today, in the police station at the time of my visit after 15/20 days of 31.8.2002'.*

101. P.S.Chauhan PW-1, Head Clerk, Motor Licensing Office, Delhi, deposed that Indica car bearing registration No.DL 3S AB 0016 is registered in the name of Sharda Jain. The witness was not cross-examined by the defence and thus his testimony has gone unchallenged.

102. Ram Kumar PW-22, Ravinder Singh PW-23 and Jai Chand PW-26 deposed that they saw the body of the deceased lying in the canal in the morning of 31.08.2002. Additionally, Ravinder Singh PW-23 and Jai Chand PW-26 deposed having witnessed the investigation conducted by the police at the time of the recovery of the body of the deceased.

103. SI Kalicharan PW-53, deposed that Maruti car bearing registration No.DDU 1371 was deposited in the Malkhana of PS Kharkoda on 09.09.2002 and that the custody of the same was handed over to Inspector V.S.Meena on 21.11.2002. Dr.Prabhat Chaurasia PW-64, deposed that he sold

Maruti car bearing registration No.DDU 1371 to Roshan Singh on 27.11.2001. It may be noted here that the said witnesses were not cross-examined by the defence and thus their testimonies have gone unchallenged.

104. Inspector V.S.Meena PW-62 deposed facts pertaining to the investigation conducted by him. He deposed that he prepared the various seizure memos and that he seized the exhibits recorded in the seizure memos and deposited the same in the malkhana. He deposed having sent various exhibits for forensic opinion and the reports received. Since, while noting the case of the prosecution with reference to the contemporaneous investigation allegedly conducted, where role of Inspector V.S.Meena has been extensively noted, we are not noting his testimony which is fairly lengthy, but clarify that would be noting such parts thereof as are relevant to be noted while dealing with the submissions made during arguments in the appeals.

105. In the backdrop of the aforesaid evidence led by the prosecution, the accused were examined under Section 313 Cr.P.C.

106. In her examination under Section 313 Cr.P.C., accused Sharda Jain stated that she is innocent and denied everything save and except admitted that she and Atma Ram Gupta in the company of accused Rajinder left her residence

on 24.8.2002 to attend a Congress rally. She also admitted that after the rally Atma Ram Gupta left in her car but stated that he got down at ISBT. She also admitted that accused Raj Kumar is her brother. Everything else was denied by her. Her admissions afore-noted are contained in the answers to question No.18, 20 and 27 which are as under:-

“Ques 18: It is in evidence against you that on 24.08.02 Atma Ram Gupta left his house to attend the Congress rally in his Indica Car no.DL6SK 0025 along with his driver Prabhu Yadav and from there he came to your house and after having talks with you Atma Ram asked his driver Prabhu Yadav (PW-17) to take back the car to his house and Atma Ram Gupta sat in your car alongwith you and which was driven by your driver Om Parkash Chauhan. One other person namely co-accused Rajinder also sat alongwith you people in the said car. What you have to say?

Ans: It is correct.

Ques 20: It is further in evidence against you that on 24.08.02 after attending the Congress Rally at Feroz Shah Kotla Ground for about 15/20 minutes you alongwith Atma Ram Gupta and your co-accused Rajinder Singh left in your Indica car being driven by your driver PW11 Om Prakash Chauhan for Ghaziabad and at near Jamuna Bazar, Hanuman Mandir, ISBT you asked PW11 to go back to his house and the car was thereafter being driven by Rajinder Singh? What you have to say?

Ans: It is incorrect that after the rally we were to go to Ghaziabad.

Ques 27: It is in evidence against you that when the family members of Atma Ram Gupta made enquiries from Om Parkash Chauhan, the driver of your Indica car and came to know that Atma Ram Gupta left the Rally alongwith you in your car for Ghaziabad, that they again made enquiries from you

but you again claimed ignorance stating that Atma Ram Gupta had got down at ISBT for his some personal work. What you have to say?

Ans: It is incorrect but it is a fact that Atma Ram Gupta got down at ISBT." (Emphasis Supplied)"

107. In his examination under Section 313 Cr.P.C. accused Raj Kumar only admitted knowing accused Sharda Jain as his sister. He denied everything else.

108. In his examination under Section 313 Cr.P.C. accused Roshan Singh only admitted knowing Pushpender and Nirvikar. He denied knowing or ever meeting any other co-accused. He denied every piece of incriminating evidence put to him.

109. In their examinations under Section 313 Cr.P.C. accused Pushpender and Nirvikar denied everything.

110. In their examinations under Section 313 Cr.P.C. Sripal Singh Raghav, Rakesh Kumar and Satender Kumar pleaded innocenc e and denied everything. They stated that they have been falsely implicated in order to save Govind Singh Rawat, SO of PS Gulawati. But how, they failed to disclose.

111. The accused led no evidence in their defence.

#### ANALYSIS OF THE IMPUGNED JUDGMENT

112. After considering the evidence led by the prosecution as also the arguments advanced by the defence,

vide impugned judgment and order dated 21.12.2006, the learned Trial Court drew 7 conclusions; namely, (i) that on 24.8.2002 the deceased was last seen alive in the company of accused Sharda Jain and Rajinder Singh; (ii) that the date of death of the deceased is 24.08.2002; (iii) that the prosecution has been able to establish the motive of Sharda Jain to do away with the deceased; (iv) that a false claim was made by Sharda Jain that she was not present at Ghaziabad on 24.08.2002 (v) that the testimony of Mahender Pal Gupta PW-8, that he had seen the wrist watch on hand of the deceased at the time of the recovery of the body of the deceased and photographs Ex.DX and Ex.DX-1 do not dent the case of the prosecution regarding the recovery of wrist watch of the deceased at the instance of accused Raj Kumar; (vi) that the testimony of Om Parkash Chauhan PW-11, the driver of Sharda Jain and Shanti PW-10, establish the suspicious conduct of Sharda Jain on 24.08.2002 and (vii) that Subash PW-38, was a truthful witness.

113. As regards conclusion (i), the learned Trial Court has held that the evidence of Sumitra Gupta PW-18, the wife of the deceased, Prabhu Yadav PW-17, the driver of Sharda Jain, Om Parkash Chauhan PW-11, the driver of Sharda Jain and Manish PW-14, a friend of son of the deceased, coupled with the fact that Sharda Jain admitted the presence of Rajinder



Singh in her car on 24.08.2002 in her examination under Section 313 Cr.P.C. conclusively establishes that the deceased was last seen alive in the company of Sharda Jain and Rajinder Singh. In coming to the said conclusion, particular emphasis was laid down by the learned Trial Court on the fact that the contents of the DD Entry No.31 Ex.PW-6/A, has not been controverted by the defence.

114. In coming to conclusion (ii), the learned Trial Court noted the state of the body of the deceased recorded in the post-mortem report Ex.PW-21/A of the deceased and analyzed the same in the light of medical jurisprudence.

115. In coming to conclusion (iii), the learned Trial Court was influenced by the facts that (i) the suggestion given by the defence to Dr.S.C.Rajput PW-3, in his cross-examination that the deceased visited his clinic on 24/25/26.08.2002 corroborates the testimony of the witness that the deceased used to visit his clinic; (ii) the fact that a denture set on which words 'S.C.Rajput' were engraved was recovered from the car of Sharda Jain and that there is no evidence to show that Sharda Jain was using artificial teeth corroborates the testimony of Dr.S.C.Rajput PW-3, that Sharda Jain used to accompany the deceased during his visits to his clinic which in turn establishes that Sharda Jain and the deceased were having close relations; (iii) testimony of Mahender Pal Gupta

PW-8, establishes that Sharda Jain was unhappy and angry with the deceased as he had developed close relations with Memwati Barwala and was ignoring her; (v) the fact recorded in the DD entry, Ex.PW-6/A, that Sharda Jain misled the family members of the deceased when they made enquiries from her about the whereabouts of the deceased have not been controverted by the defence; and (vi) the fact that Sharda Jain tried to commit suicide on an earlier occasion indicates that she had close relations with the deceased.

116. As regards conclusion (iv), learned Trial Court held that (i) a cumulative reading of the call record Ex.PW-62/A of the mobile number of Sharda Jain and the Cell ID Chart Ex.PW-65/A which shows the locations of various towers installed by the cellular company at Delhi and NCR establishes that the mobile phone of Sharda Jain was present at Ghaziabad on 24.08.2002 inasmuch as incoming/outgoing calls were received/made on/from the mobile phone of Sharda Jain on the said day; and (ii) if the claim of Sharda Jain that she did not visit Ghaziabad on 24.08.2002 was correct, it was incumbent upon her to explain as to how the calls made/received to/from her mobile phone came to be routed through the towers installed at Ghaziabad and she failed to do so.

117. As regards conclusion (v), the learned Trial Court held that (i) mark of wrist watch seen in the hand of the

deceased in photographs Ex.DX and Ex.DX-1 is of no consequence for the reason some marks appear on the wrist, when a person regularly wears a watch on his wrist; (ii) testimony of Inspector V.S.Meena PW-62 and HC Dinesh Kumar PW-43 that the said wrist watch was deposited in the Malkhana on 28.08.2002 was not controverted by the defence; and (iii) no question was put to HC Sajjan Kumar PW-33, who took photographs of the body of the deceased at the time of its recovery in his cross-examination regarding presence of wrist watch on the wrist of the deceased.

118. As regards conclusion (vi), the learned Trial Court held that (i) a cumulative reading of testimony of Shanti PW-10 and Om Parkash Chauhan PW-11, establishes that Sharda Jain came to the house of Om Parkash Chauhan in the dead hour of night on 24.08.2002 particularly when the testimony of Shanti was not controverted by the defence; (ii) the fact that Sharda Jain went at such a late hour to the house of Om Parkash Chauhan shows that she wanted to tell him that he should not disclose the fact that the deceased was present with them in the morning to anyone; and (iii) if the said visit of Sharda Jain was not in connection with the present incident then it was incumbent upon her to explain as to what was the urgency for her to go to the house of Om Parkash Chauhan in the dead hour of the night.

119. In coming to conclusion (vii), the learned Trial Court brushed aside the submission advanced by the defence that Subash was a planted witness evident from the fact that as he surfaced nearly three months after the recovery of the body of the deceased, holding that (i) the fact that Subash could shed some light on the disposal of the body of the deceased came to the knowledge of the Investigating Officer only after the arrest of Roshan Singh on 15.11.02 i.e. nearly 2 ½ months after the recovery of the body of the deceased; (ii) it cannot be expected that Subash, who is a villager, would have come forward to apprise the police with the facts in his knowledge particularly when the matter was a high-profile one; (iii) had Subash been a planted witness he would have claimed to have seen the body of the deceased with his own eyes; and (iv) Subash had no reason to falsely implicate the three police officials.

120. Having drawn the afore-noted 7 conclusions, the learned Trial Court proceeded to deal with the case against each of the accused person. Save and except accused Sripal Singh Raghav, Rakesh Kumar and Satender Kumar, the learned Trial Court convicted the other accused of all the charges framed against them. Holding that the prosecution has not been able to establish that accused Sripal Singh Raghav, Rakesh Kumar and Satender Kumar entered into a criminal conspiracy with the other accused persons to cause

disappearance of the evidence of murder of the deceased, the learned Trial Court acquitted them of the charge framed against them for having committed the offence punishable under Section 120-B IPC. However, the learned Trial Court convicted the said three police officials under Section 201 IPC for causing disappearance of the evidence of the murder of the deceased.

121. The circumstances used by the learned Trial Court for convicting accused "Sharda Jain" are that (i) Sharda Jain pointed out the place of the murder of the deceased; (ii) the deceased was last seen alive in the company of Sharda Jain and that the time gap between the last seen and time of the death of the deceased is so small that it makes the possibility that the deceased could have come in the contact of any other person too remote; (iii) no plausible explanation was given by Sharda Jain as to how and when the deceased parted company with her on 24.08.2002; (iv) a false claim was made by Sharda Jain that she did not visit Ghaziabad on 24.08.2002; (v) Sharda Jain misled the family members of the deceased when they made enquiries from her about the whereabouts of the deceased; (vi) two meetings took place between Sharda Jain, Raj Kumar, Rajinder Singh and Roshan Singh at the residence of Sharda Jain just few days prior to 24.08.2002; (vii) the conduct of Sharda Jain of visiting the house of her driver in the

late hours of the night on 24.08.2002 is suspicious and (viii) Sharda Jain had a motive to kill the deceased.

122. The circumstances used by the learned Trial Court for convicting accused "Raj Kumar" are that (i) Raj Kumar along with two other persons visited the house of Sharda Jain on two occasions just few days prior to 24.08.2002; (ii) the place of residence of Raj Kumar was in the vicinity of the place of murder of the deceased; (iii) Raj Kumar did not controvert the factum of his acquaintance with accused Roshan Singh and Rajinder Singh; (iv) sudden arrival of Raj Kumar at the house of Sharda Jain on the day of arrest of Sharda Jain; (v) Raj Kumar pointed out the place of the murder of the deceased (vi) wrist watch of the deceased was recovered at the instance of Raj Kumar and (vii) the disclosure statement of Raj Kumar provided leads to the police.

123. The circumstances used by the learned Trial Court for convicting accused "Rajinder Singh" are that (i) the deceased was last seen alive in the company of Rajinder Singh and that the time gap between the last seen and time of the death of the deceased is so small that it makes the possibility that the deceased could have come in the contact of any other person too remote; (ii) no plausible explanation was given by Rajinder Singh as to how and when the deceased parted company with him on 24.08.2002; (iii) Rajinder Singh was

associated with Roshan Singh as he has not controverted the fact that he used to drive the car of Roshan Singh on a temporary basis; (iv) a false claim was made by Rajinder Singh that he never visited the house of Sharda Jain; (v) refusal of Rajinder Singh to participate in the TIP proceedings and that the reason given by him for said refusal was not plausible.

124. The circumstances used by the learned Trial Court for convicting accused "Roshan Singh" are that (i) Roshan Singh was absconding from his house after 24.08.2002; (ii) testimony of Subash PW-38, establishes that Roshan Singh played a role in disposing of the body of the deceased; (iii) Roshan Singh was closely associated with other accused persons namely Rajinder Singh, Pushpender and Nirvikar; (iv) recovery of two country made pistols and the gold ring of the deceased at the instance of Roshan Singh; (v) Roshan Singh was arrested from Hoshangabad, M.P. and he failed to give any reason for his presence at M.P.; (vi) Roshan Singh failed to give any reason for his false implication in the present case; (vii) Roshan Singh pointed out the place of murder and disposal of the body of the deceased and (viii) the disclosure statement of Raj Kumar provided leads to the police.

125. The circumstances used by the learned Trial Court for convicting accused "Pushpender and Nirvikar" are (i) recovery of I-cards of the deceased at the instance of

Pushpender and Nirvikar; (ii) Pushpender and Nirvikar were in need of a job inasmuch as said fact was not disputed by them; (iii) Pushpender and Nirvikar pointed out the place of murder of the deceased and (iv) disclosure statements of Pushpender and Nirvikar provided leads to the police.

126. The circumstances used by the learned Trial Court for convicting accused “Sripal Singh Raghav, Satender Kumar and Rakesh Kumar” are that (i) testimony of Subash PW-38, establishes that aforesaid police officials played a role in disposing of the body of the deceased; (ii) they were found to be absconding; (iii) they could not give satisfactory reason for their false implication in the present case and (iv) they pointed out the places where the body of the deceased was found and disposed.

127. Having convicted the accused persons, vide order dated 22.12.2006 the learned Trial Court proceeded to sentence them. For the offence punishable under Section 302 read with Section 120-B IPC accused Sharda Jain, Raj Kumar, Roshan Singh, Rajinder Singh, Pushpender, Nirvikar have been sentenced to undergo imprisonment for life and to pay a fine in sum of Rs10,000/- each, in default to undergo SI for six months. For the offence punishable under Section 364 read with Section 120-B IPC accused Sharda Jain, Raj Kumar, Roshan Singh, Rajinder Singh, Pushpender, Nirvikar have been



sentenced to undergo RI for seven years and to pay a fine in sum of Rs.5,000/- each, in default to undergo SI for three months. For the offence punishable under Section 120-B IPC for abducting and murdering the deceased in pursuance of a conspiracy accused Sharda Jain, Raj Kumar, Roshan Singh, Rajinder Singh, Pushpender, Nirvikar have been sentenced to undergo imprisonment for life and to pay a fine in sum of Rs10,000/- each, in default to undergo SI for six months. For the offence punishable under Section 25, Arms Act, 1959 accused Roshan Singh has been sentenced to undergo RI for three years and to pay a fine in sum of Rs5,000/-, in default to undergo SI for three months. For the offence punishable under Section 27, Arms Act, 1959 accused Pushpender and Nirvikar have been sentenced to undergo RI for three years and to pay a fine in sum of Rs5,000/- each, in default to undergo SI for three months. For the offence punishable under Section 120-B IPC for causing disappearance of the evidence in pursuance of a conspiracy accused Sharda Jain, Raj Kumar and Roshan Singh have been sentenced to undergo RI for four years and to pay a fine in sum of Rs5,000/- each, in default to undergo SI for three months. For the offence punishable under Section 201 read with Section 34 IPC accused Sripal Singh Raghav, Rakesh Kumar and Satender Kumar have been sentenced to undergo RI for three years and to pay a fine in sum of

Rs5,000/- each, in default to undergo SI for three months. All the sentences were directed to run concurrently.

### LAW OF CONSPIRACY

128. As conspiracy is the primary charge against the accused, we first advert to the law of conspiracy – its definition, essential features and proof.

129. Section 120-A defines ‘criminal conspiracy’ as under:-

**“Definition of criminal conspiracy** - When two or more person 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.”

130. It is clear from the above noted definition of ‘criminal conspiracy’ that the three essential elements of offence of conspiracy are (a) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished; (b) a plan or scheme embodying means to accomplish that object; (c) an agreement or understanding

between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means. Thus, the gist of offence of criminal conspiracy is an agreement to break the law.

131. Sections 120-A and 120-B were brought on the statute book by way of Criminal Law Amendment Act, 1913. Earlier to the introduction of Sections 120A and 120B, conspiracy per se was not an offence under the Indian Penal Code except in respect of the offence mentioned in Section 121A. In the Objects and Reasons to the Amendment Bill, it was explicitly stated that the new provisions (120-A & B) were "designed to assimilate the provisions of the Indian Penal Code to those of the English Law...." Thus, Sections 120A & 120B made conspiracy a substantive offence and rendered the mere agreement to commit an offence punishable.

132. Proof of a criminal conspiracy by direct evidence is not easy to get and probably for this reason Section 10 of the Indian Evidence Act was enacted. It reads as under:-

**"10. Things said or done by conspirator in reference to common design:-**Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such

intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

133. Thus, the substantive section of the IPC i.e. Section 120-A adumbrated thereon Section 10 of the Indian Evidence Act give us the legislative provisions applicable to conspiracy and its proof.

134. After survey of the case law on the point, following legal principles pertaining to the law of conspiracy can be conveniently culled out:-

A When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy. (See the decision of Supreme Court reported as State v Nalini (1999) 5 SCC 253)

B The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators

must know each and every detail of the conspiracy as long as they are co-participants in the main object of the conspiracy. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of

those others when they are associated with the object of the conspiracy. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse role to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role. (See the decisions of Supreme Court reported as Yash Pal Mittal v State of Punjab AIR 1977 SC 2433 and State v Nalini (1999) 5 SCC 253)

C It is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement, which is the graham of the crime of conspiracy.

D The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy. Since a conspiracy is generally hatched in secrecy, it would quite often happen that there is no evidence of any express agreement between the conspirators to do or

cause to be done the illegal act. For an offence under Section 120B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act; the agreement may be proved by necessary implication. The offence can be only proved largely from the inference drawn from acts or illegal omission committed by the conspirators in pursuance of a common design. The prosecution will also more often rely upon circumstantial evidence. It is not necessary to prove actual meeting of conspirators. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design is sufficient. Surrounding circumstances and antecedent and subsequent conduct of accused persons constitute relevant material to prove charge of conspiracy. (See the decisions of Supreme Court reported as Shivnarayan Laxminarayan Joshi v State of Maharashtra AIR 1980 SC 439, Mohammad Usman Mohammad Hussain Maniyar v State of Maharashtra AIR 1981 SC 1062 and Kehar Singh v State AIR 1988 SC 1883)

E A conspiracy is a continuing offence and continues to subsist and committed wherever one of the conspirators does an act or series of acts. So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice or necessity. A crime is complete as soon

as the agreement is made, but it is not a thing of the moment. It does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry into effect the design. Its continuance is a threat to the society against which it was aimed at and would be dealt with as soon as that jurisdiction can properly claim the power to do so. The conspiracy designed or agreed abroad will have the same effect as in India, when part of the acts, pursuant to the agreement are agreed to be finalized or done, attempted or even frustrated and vice versa.

F Section 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the acts done by one are admissible against the co-conspirators. In short, the section can be analysed as follows: (1) There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he



entered the conspiracy or after he left it; and (5) it can only be used against a co-conspirator and not in his favour. (See the decision of Supreme Court reported as Sardar Sardul Singh v State of Maharashtra AIR 1957 SC 747.)

#### DISCUSSION ON CIRCUMSTANTIAL EVIDENCE

135. As discussed in the foregoing paras, more often than not, the prosecution would adduce circumstantial evidence to prove the charge of conspiracy. The question which arises is that what should be the nature of circumstantial evidence in a case of conspiracy to bring home the guilt of the accused persons.

136. The well known rule governing circumstantial evidence that :- (a) the circumstances from which the inference of guilt of the accused is drawn have to be *proved beyond reasonable doubt* and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances; (b) the circumstances are of a *determinative tendency* unerringly pointing towards the guilt of the accused; and (c) the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him, is fully applicable in cases of proof of conspiracy. The courts have added two riders to aforesaid principle; namely, (i) there should be no missing links but it is not that every one of the

links must appear on the surface of the evidence, since some of these links can only be inferred from the proved facts and (ii) it cannot be said that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it may might be. (See the decision of Supreme Court reported as Gagan Kanojia v State of Punjab (2006) 13 SCC 516)

137. The question which arises for consideration is, what does the expression '*proved beyond reasonable doubt*' occurring in the afore-noted cardinal rule of circumstantial evidence signify. Does it mean that the prosecution is required to prove its case with hundred percent certainty?

138. The answer to the aforesaid question can be found in the following observations of Supreme Court in the decision reported as Lal Singh v State of Gujarat AIR 2001 SC 746:-

"The learned Sr. Counsel Mr. Sushil Kumar submitted that prosecution has not proved beyond reasonable doubt all the links relied upon by it. In our view, to say that prosecution has to prove the case with a hundred percent certainty is myth. Since last many years the nation is facing great stress and strain because of misguided militants and co-operation to the militancy, which has affected the social security, peace and stability. It is common knowledge that such terrorist activities are carried out with utmost secrecy. Many facts pertaining to such activities remain in personal knowledge of the person concerned. Hence, in case of conspiracy and particularly such activities, better evidence than acts and statements including that of co-conspirators in pursuance of the conspiracy is hardly available..... For assessing evidence in such

cases, this Court in Collector of Customs, Madras & Others v. D. Bhoormall AIR 1974 SC 859 dealing with smuggling activities and the penalty proceedings under Section 167 of the Sea Customs Act, 1878 observed that many facts relating to illicit business remain in the special or peculiar knowledge of the person concerned in it and held thus:

"30. .. that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it -- "all exactness is a fake". E1 Dorado of absolute proof being unattainable, the law accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case....." (Emphasis supplied)

139. The Evidence Act does not insist upon absolute proof for the simple reason that perfect proof in this imperfect world is seldom to be found. That is why under Section 3 of the Evidence Act, a fact is said to be 'proved' when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This definition of 'proved' does not draw any distinction between circumstantial

and other evidence. The use of expression '*determinative tendency*' in the afore-noted rule also seconds the view that the prosecution is not required to adduce such evidence which absolutely proves the guilt of an accused person. Thus, circumstantial evidence in order to furnish a basis for conviction requires a high degree of probability, that is, so sufficiently high that a prudent man considering all the facts, feels justified in holding that the accused has committed the crime. (See the decisions of Supreme Court reported as *State of Maharashtra v Mohd. Yakub* AIR 1980 SC 1111 and *Gokaraju Venkatanarasa Raju v State of AP* (1993) Supp (4) SCC 191)

140. The approach to be adopted by the courts while appreciating circumstantial evidence was succinctly stated by Supreme in the decision reported as *M.G. Agarwal v State of Maharashtra* AIR 1963 SC 200 in following terms:-

"It is a well established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. There is no doubt or dispute about this position. But in applying this principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope

for the application of the doctrine of benefit of doubt. The court considers the evidence and decides whether that evidence proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt."

141. Place of murder of the deceased: - As already noted herein above, the first circumstance used by the learned Trial Judge to infer the guilt of accused Sharda Jain is her conduct of pointing out the place of murder of the deceased.

142. A perusal of the impugned judgment goes to show that the learned Trial Judge has proceeded on the assumption that the spot pointed out by the accused vide pointing out memo Ex.PW-44/E is the place of murder of the deceased. No endeavor has been made out by the learned Trial Judge to determine whether the spot in question is the place of murder of the deceased. The approach of learned Trial Judge in assuming that the spot in question is the place of murder of the deceased is clearly erroneous. It was incumbent upon the learned Trial Judge to first determine from the facts emerging on record and the evidence led by the prosecution that whether the spot in question is the place of murder of the deceased. The learned Trial Judge has also not analyzed the evidence led by the prosecution to prove the pointing out of

alleged place of murder of the deceased by accused Sharda Jain.

143. That being the case, we first proceed to undertake an inquiry whether the evidence led by the prosecution to prove the pointing out of alleged place of murder of the deceased by accused Sharda Jain is creditworthy and that whether the spot pointed out by accused Sharda Jain (herein after referred to as the "Spot A") is the place of murder of the deceased.

144. To establish the pointing out of spot A by accused Sharda Jain, the prosecution has examined the police officials namely Inspector V.S.Meena PW-62, HC Sunita PW-31, SI Ram Kumar PW-32, SI Anil Kumar Chauhan PW-44 and SI Shiv Raj Singh PW-55 and one Mahender Pal Gupta PW-8, the friend of the deceased.

145. The testimony of Mahender Pal Gupta PW-8, needs to be viewed with great caution. Having perused the evidence of Mahender Pal Gupta during the course of arguments of the present case, we have come to the conclusion that Mahender Pal Gupta is a witness who lives in an imaginary world and loves to revel himself. There is hardly any relevant aspect of the case of the prosecution on which Mahender Pal Gupta has not given evidence.

146. A perusal of the testimony of Mahender Pal Gupta PW-8, contents whereof have been noted in paras 100 and 101 above, reveals that the witness is most gibberish on the point of pointing out of spot A by accused Sharda Jain and Raj Kumar. The witness has nowhere deposed that he witnessed the pointing out of spot A by accused Sharda Jain and Raj Kumar. On the contrary, he deposed that he does not remember that whether accused Sharda Jain and Raj Kumar took part in the investigation conducted at spot A on 28.08.2002. There is also a glaring discrepancy in the testimony of Mahender Pal Gupta inasmuch as he deposed that accused Rajinder and Roshan Singh were also present at spot A on 28.08.2002; whereas as per the case of the prosecution the said accused persons were arrested by the police much after 28.08.2002. The evidence of the witness is ipsi-dixit on the point of the presence of accused Rajinder at spot A on 28.08.2002 inasmuch as the witness deposed that accused Raju was also present at spot A on 28.08.2002 and has referred to accused Rajinder as Raju in his examination-in-chief whereas he has referred accused Raj Kumar as Raju in his cross-examination. The evidence of the witness is also ipsi-dixit on the point of presence of accused Roshan Singh inasmuch as the witness deposed that accused Roshan Singh was present at spot A on 28.08.2002 in his examination-in-

chief whereas he denied the presence of accused Roshan Singh at spot A on 28.08.2002 in his cross-examination. In such circumstances, the claim of the prosecution that Mahender Pal Gupta was present at spot A on 28.08.2002 and witnessed the pointing out of spot A by accused Sharda Jain and Raj Kumar is not tenable.

147. The question which thus arises for consideration is, what is the effect of doubtful testimony of Mahender Pal Gupta on the credibility of the other evidence led by the prosecution to establish that the pointing out of spot A by accused Sharda Jain and Raj Kumar.

148. On this aspect, suffice would it be to note the following observations of Supreme Court in the decision reported as State of UP V Anil Singh AIR 1988 SC 1998:-

“With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. The Privy Council had an occasion to observe this. In *Bankim Chander v. Matangini* 24 C.W.N. 626 PC, the Privy Council had this to say (at 628):

That in Indian litigation it is not safe to assume that a case must be false if some of the evidence in support of it appears to be doubtful or is clearly untrue, since there is, on some occasions, a tendency amongst litigants to back up a good case by false or exaggerated evidence.

18. In *Abdul Gani v. State of Madhya Pradesh* AIR 1954 SC 31 Mahajan, J. speaking for this Court deprecated the tendency of courts to take an easy



course of holding the evidence discrepant and discarding the whole case as untrue. The learned Judge said that the Court should make an effort to disengage the truth from falsehood and to sift the grain from the chaff.

19. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.”

149. In view of the aforesaid dictum, it cannot be said that the evidence of Mahender Pal Gupta has created a doubt on the credibility of the evidence of the other witnesses of the prosecution pertaining to pointing out of spot A at the instance of accused Sharda Jain and Raj Kumar. Their evidence, thus, needs to be seen.

150. The police officials namely Inspector V.S.Meena PW-62, HC Sunita PW-31, SI Ram Kumar PW-32, SI Anil Kumar Chauhan PW-44 and SI Shiv Raj Singh PW-55 have deposed that spot A was pointed out by accused Sharda Jain and Raj Kumar on 28.08.2002. The aforesaid witnesses have withstood the test of cross-examination. Spot A was not known to police

before 28.08.2002 which implies that indeed spot A was brought to the knowledge of police either by accused Sharda Jain or by accused Raj Kumar or simultaneously by both of them. The evidence on record shows that spot A was in the knowledge of Sharda Jain before 28.08.2002, which fact conclusively establishes that spot A was pointed out by accused Sharda Jain to the police. (The evidence pertaining to knowledge of Sharda Jain of spot A before 28.08.2002 shall be discussed by us shortly herein after).

151. Having held that spot A was pointed out by accused Sharda Jain to the police, we now proceed to determine that whether spot A was the place of murder of the deceased.

152. It is an undisputed fact that the body of the deceased was found in a canal. It is further undisputed that spot A is near the canal where the body of the deceased was found.

153. It is also not in dispute that the cause of death of the deceased was not drowning. The post-mortem Ex.PW-21/A of the deceased records that death of the deceased was caused due to a firearm injury, which recording is not challenged by the defence. It thus follows that the deceased was first murdered and thereafter his body was thrown into the canal. It further follows that body of the deceased was thrown at or ahead of the spot where it was found.

154. Another undisputed fact is that spot A is upstream of the spot where body of the deceased was recovered.

155. Having noted the undisputed facts emerging from the evidence on record, we proceed to deal with the facts sought to be established by the prosecution to prove that spot A is the place of murder of the deceased.

156. The first fact sought to be established by the prosecution is that human blood was found at spot A. To establish the said fact, the prosecution placed reliance upon the testimonies of the police officials who participated in the investigation of the present case on 28.08.2002 namely HC Sunita PW-31, SI Ram Kumar PW-32, SI Anil Kumar Chauhan PW-44 and Inspector V.S.Meena PW-62 and the FSL reports Ex.PW-41/A and Ex.PW-41/B.

157. The aforesaid police officials deposed that the soil at spot A was found to be stained with blood at three different points and the said blood stained soil was lifted and seized vide memo Ex.PW-44/D. The aforesaid testimony of the witnesses could not be shaken in the cross-examination.

158. As already noted in foregoing paras, the FSL reports Ex.PW-41/A and Ex.PW-41/B record that soil lifted from spot A is found to be stained with human blood, group whereof could not be determined.

159. At this juncture, a submission advanced by the learned senior counsel pertaining to the purity of the exhibits which contained soil lifted from spot A and were sent to the FSL needs to be noted and considered.

160. To understand the submission advanced by the learned senior counsel, it is necessary to note the movement of the soil in question, to and from the Malkhana.

161. A perusal of entry no.1560 recorded in the Malkhana Register Ex.PW-43/A shows that three pullandas containing blood stained soil and three pullandas containing earth control lifted from spot A were deposited at the Malkhana on 28.08.2002. A further perusal thereof shows that HC Dinesh Kumar PW-43, Malkhana Moharar, marked the three pullandas containing blood stained soil as 1, 1A and 1B respectively and pullandas containing earth control as 2, 2A and 2B respectively.

162. A further perusal of entry no.1560 shows that an endorsement is made therein which records that SI Sukaram Pal PW-39, collected the aforesaid pullandas, jaw, piece of flesh, viscera and contents of the stomach of the deceased from HC Dinesh Kumar on 05.11.2002 for the purposes of depositing the same at the FSL.

163. It is significant to note here that HC Dinesh Kumar PW-43, deposed that on 05.11.2002, SI Sukaram Pal collected

the aforesaid materials and other case property from him and that the same was not tampered with till the time it was handed over to SI Sukaram Pal. SI Sukaram Pal PW-39, deposed that he collected the aforesaid materials and other case property from Malkhana Moharar on 05.11.2002 and deposited the same at the FSL on same day itself. He further deposed that there was no tampering with the case property till the time the same was deposited by him at the FSL. (It may be noted here that the said witnesses were not cross-examined on the said point. The testimony of the witnesses pertaining to the tampering of the case property was not controverted by the defence inasmuch as no contrary suggestion was given to them in their cross-examination).

164. The FSL report Ex.PW-41/A, which contains the description of the articles deposited at the FSL on 05.11.2002, records that exhibits 1 and 1A containing blood stained soil and exhibits 2, 2A and 2B containing earth control were deposited at the FSL. The question which stares in the face is that what happened to exhibit 1B.

165. The submission advanced by the learned senior counsel was that the fact that exhibit 1B did not reach the FSL strongly suggests that the exhibits containing soil lifted from spot A were tampered with and therefore no reliance could be placed upon the FSL reports Ex.PW-41/A and Ex.PW-41/B.

166. To solve the mystery surrounding the disappearance of exhibit 1B, it is most necessary to note the endorsement dated 28.11.2002 made in the entry No.1560 that on 28.11.2002 SI Anil Kumar Chauhan PW-44, collected the jaw and piece of flesh of the deceased as also blood stained soil from the FSL and deposited the same at Malkhana. (It may be noted here that SI Anil Kumar Chauhan PW-44, deposited to the same effect and that he was not cross-examined on the said point)

167. A perusal of the FSL reports Ex.PW-41/A and Ex.PW-41/B shows that the same were prepared on 29.01.2003, meaning thereby, that the blood stained soil was present at FSL on 29.01.2003. Now, the question is, that if blood stained soil was present at FSL on 29.01.2003 then what was collected on 28.11.2002. The answer is clear. Exhibit 1B was collected from the FSL on 28.11.2002 while exhibits 1 and 1A remained deposited at the FSL and that is the reason why exhibit 1B does not find a mention in the FSL report Ex.PW-41/A.

168. Be that as it may, no question was put to SI Sukaram Pal PW-39, who deposited the soil in question at the FSL on 05.11.2002, regarding the non-mention of exhibit 1B in the FSL report Ex.PW-41/A.

169. Having given no opportunity to the witness to explain the non-mention of exhibit 1B in the FSL report Ex.PW-

41/A, no adverse inference can be drawn against the prosecution.

170. In taking the said view, we are supported by a decision of Supreme Court reported as Rahim Khan v Khurshid Ahmad AIR 1975 SC 290 wherein it was observed as under:-

“.....The entry with which we are concerned is 5072A and this is not unusual when by mistake a clerk has written identical figures for two entries. Moreover there is no cross-examination on this point and in the absence of cross-examination giving an opportunity to the witness to explain the circumstances from which an inference is sought to be drawn, no such inference--particularly of forgery and publication of documents--can be permitted to be raised.” (Emphasis supplied)

171. In the decision reported as State of UP V Anil Singh 1988 (Supp) SCC 686, the eye-witness wrote a report giving fairly all the particulars of the occurrence and lodged the same with the report within few minutes of the occurrence. An argument was raised by the defence that it was impossible for the witness to prepare such an exhaustive report and lodge the same with the police so soon after the occurrence. The said argument was repelled by Supreme Court on the ground that the witness in question was not specifically cross-examined on said point.

172. In the decision reported as Sunil Kumar v State of Rajasthan (2005) 9 SCC 298 great stress was laid by the defence on the facts that there was delayed dispatch of the

FIR to the Ilaqa Magistrate and delayed recording of the statements of the witnesses under Section 161 CrPC. One of the reasons which weighed with Supreme Court for not drawing an adverse inference against the prosecution was that no question was put to the Investigating Officer regarding the aforesaid delay.

173. The matter can also be looked from another angle.

174. As already pointed in foregoing paras, the evidence of HC Dinesh Kumar PW-43 and SI Sukaram Pal PW-39, that there was no tampering with the case property including the soil in question till the time the same remained in their possession has not been controverted by the defence.

175. It is settled law that where a witness is not cross-examined on any relevant aspect, the correctness of the statement made by a witness cannot be disputed. (See the decisions of Supreme Court reported as State of U.P. v. Nahar Singh AIR 1988 SC 1328 and Rajinder Prasad v. Darshana Devi AIR 2001 SC 3207).

176. In view of the above discussion, we find no merit in the submission of the defence that the soil lifted from spot A was tampered with before being deposited at the FSL. We further hold that the prosecution has been able to establish that the soil lifted from spot A was found to be stained with human blood.



177. The next fact sought to be established by the prosecution is that the mud found stuck on the tyre of Sharda Jain and the soil lifted from spot A were having similar physical characteristics. To establish the said fact, the prosecution placed reliance upon the testimonies of the police officials who participated in the investigation of the present case on 27/28.08.2002 namely Inspector Shiv Raj Singh PW-55, HC Sunita PW-31, SI Ram Kumar PW-32, SI Anil Kumar Chauhan PW-44 and Inspector V.S.Meena PW-62 and the FSL report Ex.PW-66/A.

178. Inspector Shiv Raj Singh PW-55, HC Sunita PW-31, SI Anil Kumar Chauhan PW-44 and Inspector V.S.Meena PW-62, deposed that on 27.08.2002 when the investigation was being conducted at the residence of accused Sharda Jain the mud was found stuck on the right rear tyre of the car of Sharda Jain and that the said tyre was seized vide memo Ex.PW-44/C1. HC Sunita PW-31, SI Ram Kumar PW-32, SI Anil Kumar Chauhan PW-44 and Inspector V.S.Meena PW-62, deposed that on 28.08.2002 the earth control was lifted from spot A and that the same was seized vide memo Ex.PW-44/G. The aforesaid testimony of the witnesses could not be shaken in the cross-examination.

179. As already noted in foregoing paras, the FSL report Ex.PW-66/A records that the mud found stuck on the tyre of

Sharda Jain and the soil lifted from spot A possessed similar physical characteristics.

180. At this stage, a submission advanced by learned senior counsel for Sharda Jain predicated upon Section 45, Indian Evidence Act, 1872 needs consideration.

181. Learned senior counsel contended that in order to bring the evidence of a witness as that of an 'expert' it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject. After referring to the deposition of Dr.Swaroop Vedanand PW-66 that *'It is correct that I have not studied any course in Geology. I have not studied any degree of diploma in structural geology or physical geology. I am not aware about any course of physical geology'*, learned senior counsel contended that he cannot be taken as an 'expert' within the meaning of Section 45, Indian Evidence Act, 1872. In support of the said submission, reliance was placed upon the decisions of Supreme Court reported as State of HP v Jai Lal (1999) 7 SCC 280, S.Gopal Reddy v State of AP (1996) 4 SCC 596 and Magan Bihari Lal v State of Punjab (1977) 2 SCC 210.

182. Section 45, Indian Evidence Act 1872 reads as under:-

**“45. Opinion of experts** – When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinion upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions, are relevant facts.

Such persons are called experts.”

183. Section 45 permits only the opinion of an expert to be cited in evidence. This requires determination of the question as to who is an expert. The only guidance in the section is that he should be a person “specially skilled” on the matter. Thus, the only definition of an expert available in Evidence Act is that he is a person specially skilled in the subject on which he testifies. The section does not refer to any particular attainment, standard of study or experience, which would qualify a person to give evidence as an expert. The next question is what is the criteria for determining whether a witness is “specially skilled” or not. The answer to this question is to be found in decision of Supreme Court in Jai Lal's case (supra) wherein it was held that in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

184. Judged in the said background, can it be said that the fact that deposition of Dr.Swaroop Vedanand PW-66, that

he had not studied any course in geology, physical geology or structural geology implies that he was not “specially skilled” to give opinion about the physical properties of soil.

185. Dr.Swaroop Vedanand PW-66, is a highly qualified and experienced physicist evident from the fact that he had pursued M.Sc (Physics), M.Phil and Ph.D and was working in the FSL since the year 1993. Condensed matter physics or solid-state physics is a branch of physics that deals with the physical properties of solid materials. Geology, on the other hand, is a scientific study of the origin, history and structure of the earth. Considering that Dr.Swaroop Vedanand is a qualified and experienced physicist, it can reasonably be expected that he must have been well versed with the condensed matter physics and having required knowledge on the subject of physical properties of the soil. It is also relevant to note that nothing could be elicited from the cross-examination of Dr.Swaroop Vedanand which could cast a doubt on the conclusions arrived at by him in his report.

186. This takes us to the decisions relied upon by the learned counsel for Sharda Jain.

187. The decision of Supreme Court in Jai Lal's case (supra) is clearly distinguishable from the present case. In said case, a witness was examined by the prosecution as an expert on the point of assessment of optimum productive capacity of

the apple orchards. The court noted that the witness in question had not received any training with respect to assessment of apple crop and that it was the first time that the witness assessed the productivity of an apple orchard. It was further noted by the court that there were glaring omissions and inadequacies in the report prepared by him. In that context, it was held that the witness in question cannot be considered as an expert on the subject of assessment of productive capacity of apple orchards.

188. The decisions of Supreme Court in S.Gopal Reddy and Magan Bihari Lal's cases (supra) has no application to the present case. In said cases, Supreme Court was dealing with the evidence of a handwriting expert. It was held by the court that evidence of a handwriting expert is a weak type of evidence and that it is unsafe to treat opinion of a handwriting expert as sufficient basis for conviction, but that it may be relied upon when supported by other items of internal and external evidence.

189. In view of the above discussion, we find no merit in the submission of learned senior counsel that Dr.Swaroop Vedanand cannot be considered as an 'expert' on the subject of determination of physical properties of the soil as he had not studied any course in geology.

190. Having repelled the argument advanced by the learned senior counsel, we hold that the prosecution has been able to establish that car of Sharda Jain was driven to a spot where the soil found therein was having similar physical characteristics as soil found at spot A.

191. The next fact sought to be established by the prosecution is that Sharda Jain was present in the vicinity of spot A on 24.08.2002 i.e. the day of the murder of the deceased. To establish the said fact, reliance was placed by the prosecution upon the call records Ex.PW-34/A and Ex.PW-62/A and the testimony of Om Parkash Chauhan PW-11, the driver of Sharda Jain.

192. With respect to the call records Ex.PW-34/A and Ex.PW-62/A, it was strenuously argued by learned senior counsel for Sharda Jain that the said records have not been proved by the prosecution in the manner required by the law and thus their genuineness is in doubt.

193. Section 3 of the Evidence Act, 1872 defines evidence as under:

"Evidence" - Evidence means and includes:-

1)-----

2) all documents including electronic records produced for the inspection of the court;"

194. By way of amendment to the Evidence Act, 1872, incorporated by Act. No. 21 of 2000 following was inserted:

"The expression "Certifying Authority", "digital signature", "Digital Signature Certificate", "electronic form", "electronic records", "information", "secure electronic records", "secure digital signature" and "subscriber" shall have the meanings respectively assigned to them in the Information Technology Act, 2000."

195. Section 2 (c) of the Information Technology Act, 2000 reads:

"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 record."

196. Section 65A and 65B of the Evidence Act, 1872, inserted by Act No. 21 of 2000 read as under:-

"65A. Special provisions as to evidence relating to electronic record.

The contents of electronic records may be proved in accordance with the provisions of Section 65B."

"65B. Admissibility of electronic records.

(1) notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) the conditions referred to in Sub-section (1) in respect of a computer output shall be following, namely :-

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of said activities;

[c] throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regular carried out on over that period as mentioned in Clause (a) of Sub-section (2) was regularly performed by computers, whether –

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, or one



or more computers and one or more combinations of computers,  
all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

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

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

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

(c) dealing with any of the matters to which the conditions mentioned in Sub-section (2) relate,

and purporting to be signed by a person occupying a reasonable official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form or whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly

supplied to that computer shall be taken to be supplied to it in the course of those activities;

(c) to a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

197. Thus, computer generated electronic records is evidence, admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act.

198. Sub-section (1) of Section 65B makes admissible as a document, paper print-out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in Sub-section (2) of Section 65B. Following are the conditions specified by Sub-section (2):

a) The computer from which the record is generated was regularly used to store or process information in respect of activity regularly carried on by a person having lawful control over the period, and relates to the period over which the computer was regularly used;

b) Information was fed in the computer in the ordinary course of the activities of the person having lawful control over the computer;

c) The computer was operating properly, and if not, was not such as to affect the electronic record or its accuracy;

d) Information reproduced is such as is fed into computer in the ordinary course of activity.

199. Under Sub-section (3) of Section 65B, Sub-section (1) and (2) would apply where single or combination of computers, is used for storage or processing in the regular course of activities and the computers used shall be construed as a single computer.

200. Under Sub-section (5), information shall be taken to be supplied to a computer by means of an appropriate equipment, in the course of normal activities intending to store or process it in the course of activities and a computer output is produced by it whether directly or by means of appropriate equipment.

201. The normal rule of leading documentary evidence is the production and proof of the original document itself. Secondary evidence of the contents of a document can also be led under Section 65 of the Evidence Act. Under Sub-clause "d" of Section 65, secondary evidence of the contents of a document can be led when the original is of such a nature as not to be easily movable. Computerised operating systems and support systems in industry cannot be moved to the court. The information is stored in these computers on magnetic tapes (hard disc). Electronic record produced there from has to be taken in the form of a print out. Sub-section (1) of Section 65B

makes admissible without further proof, in evidence, print out of a electronic record contained on a magnetic media subject to the satisfaction of the conditions mentioned in the section. The conditions are mentioned in Sub-section (2). Thus compliance with Sub-section (1) and (2) of Section 65B is enough to make admissible and prove electronic records.

202. Sub-section (4) of Section 65B provides for an alternative method to prove electronic record. Sub-section (4) allows the proof of the conditions set out in Sub-section (2) by means of a certificate issued by the person described in Sub-section 4 and certifying contents in the manner set out in the sub-section. The sub-section makes admissible an electronic record when certified that the contents of a computer printout are generated by a computer satisfying the conditions of Sub-section 1, the certificate being signed by the person described therein.

203. Additionally, irrespective of compliance of the requirements of Section 65B, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely Sections 63 & 65.

204. Therefore, the call records Ex.PW-34/A and Ex.PW-62/ can be proved by adducing secondary evidence in terms of Section 63 of Evidence Act or by complying conditions

specified in sub-section (2) or sub-section (4) of section 65B of Evidence Act.

205. In the instant case, the moot question is whether the call records have been proved in terms of Section 63 or Section 65B(2) or Section 65B(4).

206. Inspector V.S.Meena PW-62, has merely deposed that on 25.08.2002 he obtained the print out Ex.PW-62/A of the call records of mobile number 9811508688 and that the said number is registered in the name of Sharda Jain.

207. As already noted in foregoing paras, Gulshan Arora PW-34, deposed that he has brought the record pertaining to mobile number 9811508688. As per the record, Ex.PW-34/A is the call record of the said mobile number pertaining to the period 24.08.2002 to 26.08.2002.

208. In the instant case, the call records Ex.PW-34/A and Ex.PW-62/A could not have been proved by any of the modes prescribed under Section 63 of Evidence Act. Admittedly, no certificate in terms of Section 65B(4) has been issued in the present case. The testimonies of Inspector V.S.Meena and Gulshan Arora also do not fulfil the conditions prescribed under Section 65B (2) of Evidence Act.

209. In that view of the matter, we hold that the prosecution has not been able to prove the call records Ex.PW-34/A and Ex.PW-62/A in the manner required by law.

210. This takes to the analysis of the testimony of Om Parkash Chauhan PW-11, the driver of Sharda Jain.

211. As already noted in foregoing paras, Om Parkash Chauhan PW-11, deposed that on 24.08.2002 that at the time when the deceased and Sharda Jain returned from the rally Sharda Jain instructed him to go towards Ghaziabad. (It may be noted here that Ghaziabad is in the vicinity of spot A)

212. To assail the aforesaid testimony of Om Parkash Chauhan, a submission was advanced by the learned counsel for Sharda Jain that it is not mentioned in the statement Ex.PW-11/DA of Om Parkash recorded under Section 161 Cr.P.C. that Sharda Jain instructed him to go towards Ghaziabad on 24.08.2002 and that the said omission casts a serious doubt on the truthfulness of the said testimony.

213. To deal with the said submission, the decision of Supreme Court reported as 2000 (4) SCC 484 Jaswant Singh v State of Haryana needs to be noted. In the said case, the evidence of an eye-witness was assailed on the ground that the witness did not state the details of the injuries inflicted or of the person who caused the injuries in her statement recorded under Section 161 Cr.P.C. while the said details were deposed to by her before the Court. Repelling the above contention, Supreme Court observed:-

“Section 161(2) of the Code requires the person making the statements 'to answer truly all questions relating to such case, put to him by such officer....". It would, therefore, depend on the questions put by the police officer. It is true that a certain statement may now be used under Section 162 to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872. Previously, the law was as enunciated in Tehsildar Singh & Anr. v. The State of Uttar Pradesh 1959 (2) SCR 875: as

omissions, unless by necessary implication be deemed to be part of the statement, cannot be used to contradict the statement made in the witness-box.

49. Now the Explanation to Section 162 provides that an omission to state a fact in the statement may amount to contradiction. However, the explanation makes it clear that the omission must be a significant one and 'otherwise relevant' having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

50. Reading Section 161(2) of the Criminal Procedure Code with the Explanation to Section 162, an omission in order to be significant must depend upon whether the specific question, the answer to which is omitted, was asked of the witness. In this case the Investigating Officer, PW 13 was not asked whether he had put questions to Gurdeep Kaur asking for details of the injuries inflicted or of the persons who had caused the injuries.

214. In the instant case, when the attention of Om Parkash Chauhan was drawn towards the said omission, he stated that he disclosed the said fact to the police at the time when his statement was recorded by the police. Inspector Shiv Raj Singh PW-55, the scribe of the statement Ex.PW-11/DA was not asked by defence that whether he put question to Om

Parkash Chauhan asking for details as to what all transpired in the car of Sharda Jain on 24.08.2002.

215. In view of the dictum laid down by Supreme Court in Jaswant Singh's case (supra) and the failure of defence to put question pertaining to the omission in question to the scribe of the statement of Om Parkash Chauhan particularly when Om Parkash Chauhan stated that he disclosed the said fact to the police, we find no merit in the aforesaid submission of learned senior counsel of Sharda Jain.

216. Om Parkash Chauhan has withstood the test of cross-examination. There was no reason for Om Parkash Chauhan to give false evidence against Sharda Jain. Thus, we hold that Om Parkash Chauhan has truthfully deposed that Sharda Jain instructed him to go towards Ghaziabad on 24.08.2002.

217. The aforesaid testimony of Om Parkash Chauhan establishes that the car of Sharda Jain was to be driven towards Ghaziabad on 24.08.2002.

218. Did Sharda Jain go to, or near Ghaziabad on 24.08.2002? Before embarking on the discussion of the evidence on said issue, we may note at the outset that village Chajjupur is at a distance of about 22 kms from Ghaziabad and the canal in which the body of the deceased was found flows through village Chajjupur. Thus, the relevance of Sharda Jain



being somewhere in the area of Ghaziabad assumes significance.

219. In her examination under Section 313 Cr.P.C., Sharda Jain did not disclose where she went after the rally on 24.08.2002. Neither did she explain as to how mud having similar characteristics as soil found at spot A was found to be stuck on her car.

220. In the decision reported as Sucha Singh v State of Punjab AIR 2001 SC 1436 Supreme Court observed as under:-

“We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.”

221. In the instant case, Sharda Jain alone could have told the court about her movements on 24.08.2002 after going to the rally. When Sharda Jain withheld that information from the Court there is every justification for the Court for drawing the inference that Sharda Jain did go to/around Ghaziabad, in the light of the testimony of Om Parkash Chauhan that car of Sharda Jain was to proceed towards Ghaziabad on 24.08.2002 and that mud found stuck on her tyre had similar physical characteristics as soil found at spot A.

222. The necessary corollary which emerges from the above fact that Sharda Jain was present at/around Ghazibad on 24.08.2002 is that Sharda Jain made a false claim in her examination under Section 313 Cr.P.C. that she did not go towards Ghaziabad on 24.08.2002.

223. Another proved fact is that the deceased died on 24.08.2002 and that the deceased was last seen alive in the company of Sharda Jain in the afternoon of 24.08.2002. (We shall be discussing the evidence pertaining to last seen led by the prosecution shortly herein after)

224. The facts which emerge from the above discussion can be enumerated as under:-

- (i) The body of the deceased was found in a canal.
- (ii) Spot A is near the canal in which the body of the deceased was found downstream.
- (iii) The deceased was first murdered and thereafter his body was thrown into the canal.
- (iv) Spot A is upstream of the spot where the body of the deceased was recovered.
- (v) Human blood was found at spot A.
- (vi) Car of Sharda Jain was driven to a spot where soil had similar physical characteristics as soil found at point A. Sharda Jain's car was obviously driven on soft soil and she has not explained why it was so driven.

(vii) Sharda Jain was present in the vicinity of spot A on 24.08.2002.

225. With reference to our discussion in paras 137 to 139 above, it is apparent that law does not require a 100% standard of proof before a fact can be said to be proved. A fact is proved where on the basis of evidence before it, a reasonable mind would draw a conclusion that the fact is proved. From the testimony of the driver of Sharda Jain we have on record the fact that Sharda Jain along with the deceased was travelling in her car towards Ghaziabad. The deceased did not return home and was last seen in the company of Sharda Jain in the afternoon. It can safely be presumed that the deceased was with Sharda Jain in an area around Ghaziabad. That mud of same physical characteristics as of spot A was found stuck in the tyre of the car of Sharda Jain establishes that Sharda Jain's car was driven on loose soil, characteristic whereof was physically similar to the characteristic of the soil of spot A or of a similar spot. This means that the deceased was taken either to spot A or any other spot where the characteristic of the soil were similar to that of spot A. The said spot had to be upstream of the spot where the dead body of the deceased was found. The spot had to be somewhere near the canal. The fact that human blood was found at spot A is relevant under Section 11(2) of

the Evidence Act because the said fact in connection with the preceding facts noted hereinbefore makes the existence of the fact in issue i.e. whether spot A is the spot where the deceased was murdered, highly probable. We thus hold that keeping in view the standard of proof required by the Evidence Act to treat a fact as proved, the prosecution has successfully proved that the deceased was killed at spot A.

226. Section 8 of the Evidence Act makes conduct of a person a relevant fact for the proof of any fact in issue. Evidence relating to the conduct of an accused person, which is deposed to by a police officer is admissible as conduct under Section 8 of the Evidence Act. (See the decision of Supreme Court reported as Prakash Chand v State AIR 1979 SC 400). Therefore, the conduct of Sharda Jain leading the police to place of murder where the deceased was in all probability murdered is admissible under Section 8 of Evidence Act.

227. What turns on the fact that accused Sharda Jain pointed out the place of the murder of the deceased. Sharda Jain could have acquired knowledge that spot A is the place of murder of the deceased only in one of the ways. Either she herself was a party to the conspiracy to murder the deceased and thus was aware that the murder of the deceased was committed at spot A or somebody else who was a party to the conspiracy to murder the deceased told Sharda Jain that spot

A is the place of murder of the deceased. No explanation has been offered by Sharda Jain as to how she came to know that spot A is the place of murder of the deceased. In such circumstances, the fact Sharda Jain pointed out the place of murder of the deceased is a strong pointer towards the guilt of Sharda Jain.

228. Last Seen Evidence: The next three circumstances used by the learned Trial Judge to infer the guilt of accused Sharda Jain are predicated upon the fact that the deceased was last seen alive in the company of accused Sharda Jain.

229. It needs to be seen by us that whether the evidence led by the prosecution to establish that the deceased was last seen alive in the company of accused Sharda Jain is creditworthy or not. If yes, what is the effect thereof?

230. To establish the fact that the deceased was last seen alive in the company of accused Sharda Jain, the prosecution examined Sumitra Gupta PW-18, Prabhu Yadav PW-17, Om Parkash Chauhan PW-11 and Manish Gupta PW-14.

231. As already noted in foregoing paras, the evidence of Sumitra Gupta PW-18, the wife of the deceased, that the deceased told her that he would be going to the residence of Sharda Jain at the time of leaving his residence in the morning of 24.08.2002 has not been controverted by the defence and the evidence of Prabhu Yadav PW-17, the driver of Sharda

Jain, that he dropped the deceased at the residence of Sharda Jain in the morning of 24.08.2002. Likewise, the evidence of Om Parkash Chauhan PW-11, the driver of Sharda Jain, and the recording contained in the DD entry PW-6/A that the deceased was present with Sharda Jain in the car of Sharda Jain in the afternoon of 24.08.2002 has not been controverted by the defence.

232. From a perusal of the testimony of Manish Gupta PW-14, a son of the friend of the deceased, contents whereof have been noted in para 64 above, it is evident that Manish happened to see the deceased on 24.08.2002 by chance. Thus, Manish Gupta PW-14, is a chance witness. The testimony of a chance witness, although not necessarily false, is proverbially unsafe. (See the decision of Supreme Court reported as Guli Chand v State of Rajasthan AIR 1974 SC 276). Therefore, we do not consider it safe to place any credence upon his testimony that he had seen that the deceased was sitting along with Sharda Jain in a car in the afternoon of 24.08.2002.

233. As already noted herein above, Sharda Jain admitted in her examination under Section 313 Cr.P.C. that the deceased was present with her till the afternoon of 24.08.2002. It is settled law that the statement made by accused under Section 313 Cr.P.C. can certainly be taken aid

of to lend credence to the evidence led by the prosecution. (See the decision of Supreme Court reported as Mohan Singh v Prem Singh (2002) 10 SCC 236). Therefore, it has conclusively been established by the prosecution that the deceased was present with Sharda Jain in the afternoon of 24.08.2002. The deceased was not seen alive by anyone after the afternoon of 24.08.2002. Thus, the fact of the matter is that the deceased was last seen alive in the company of Sharda Jain.

234. In this regards, it is relevant to note the following pertinent observations made by Supreme Court in the decision reported as Mohibur Rahman v State of Assam AIR 2002 SC 3064:-

“The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own he liability for the homicide.” (Emphasis Supplied)

235. A similar view was taken by Supreme Court in the decision reported as Amit @ Ammu v State of Maharashtra AIR 2003 SC 3131.

236. The reasonableness of the explanation offered by the accused as to how and when he parted company with the

deceased also has a bearing on the effect of last seen in a case. In the decision reported as State of Rajasthan v Kashi Ram AIR 2007 SC 144 Supreme Court observed as under:-

It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Re. Naina Mohd.* AIR 1960 Madras, 218.

237. From the afore-noted judicial pronouncements, it is clear that effect of last seen on the guilt of accused depends upon following four factors:-

(i) Proximity between the time of last seen and time of death of the deceased.



(ii) Proximity between the place where the deceased was last seen with the deceased and place of murder of the deceased.

(iii) Nature of place of murder of the deceased.

(iv) Attending circumstances enwombing the time and place of last seen.

(v) Reasonableness of the explanation offered by the accused.

238. In the instant case, there is proximity between the time of last seen and time of death of the deceased inasmuch as the deceased died on 24.08.2002 and he was last seen alive in the company of Sharda Jain in the afternoon of 24.08.2002. The place of murder of the deceased was a secluded area. The explanation offered by Sharda Jain in her examination under Section 313 Cr.P.C. regarding the circumstances in which she parted company with the deceased on 24.08.2002 was that the deceased got down from her at ISBT. Is the said explanation reasonable and satisfactory? The answer is an emphatic NO. Sharda Jain has not stated about her movements after the deceased allegedly got down from her car. Sharda Jain denied having gone to vicinity of spot A on 24.08.2002 which claim has been found false by us.

239. In view of the aforesaid facts, the fact that the deceased was last seen alive in the company of Sharda Jain is highly determinative of the guilt of accused Sharda Jain.

240. The next circumstance used by the learned Trial Judge to infer the guilt of Sharda Jain is that Sharda Jain misled the family members of the deceased when they made enquiries from her about the whereabouts of the deceased.

241. As already noted in foregoing paras, Sumitra Gupta PW-18, the wife of the deceased, and Rajinder Pal Gupta PW-9, the younger brother of the deceased, deposed that Sharda Jain gave misleading and false answers to them when they made enquiries from her about the whereabouts of the deceased.

242. A comparable situation arose before Supreme Court in the decision reported as Mani Kumar Thapa v State of Sikkim AIR 2002 SC 2920. In the said case, the accused person in whose company the deceased was last seen misled the investigation. One of the reasons which weighed with Supreme Court in coming to the conclusion that the fact that the deceased was last seen alive in the company of the deceased is determinative of the guilt of the accused person was his conduct of misleading the investigation.

243. We shall be further dwelling on the impact of last seen evidence in the instant case while summarizing the evidence against Sharda Jain.

244. The next circumstance used by the learned Trial Judge to infer the guilt of accused Sharda Jain is that two meetings took place between accused Sharda Jain, Raj Kumar, Roshan Singh and Rajinder Singh at the residence of Sharda Jain few days prior to 24.08.2002.

245. The discussion contained in the impugned judgment in said respect is as under:-

“The hatching of criminal conspiracy at the house of Sharda Jain in consultation with her brother Raj Kumar and two other persons also stands well established not only from the overall facts and circumstances of the case but also from the testimony of her driver PW11-Om Parkash Chauhan. He clearly stated in his deposition that a few days prior to 24-8-02 accused Raj Kumar twice came to the house of Sharda Jain along with two other persons. Though, it will be worthwhile to mention that this witness though stated that the said other two persons were not accused Roshan Singh and Rajinder Singh but the fact that a meeting did take place between four persons including accused Sharda Jain and Raj Kumar at the house of Sharda Jain a few days prior to 24-8-02 becomes relevant when seen and analyzed in the overall facts and circumstances of the case. I shall be separately discussing as to how it also stands established from the record that said two other persons could be none else but accused Roshan Singh and Rajinder Singh only and this aspect of the testimony of PW11 Om Parkash Chauhan cannot be given much credence.” (Emphasis Supplied)

246. Although the learned Trial Judge has held that he shall be separately discussing that two persons who came along with accused Raj Kumar to the house of Sharda Jain few days prior to 24.08.2002 were accused Roshan Singh and

Rajinder Singh, no such discussion is found in the impugned judgment.

247. The prosecution sought to establish through the testimony of Om Parkash Chauhan PW-11, the driver of Sharda Jain, that accused Raj Kumar along with accused Rajinder and Roshan Singh visited the residence of Sharda Jain on two occasions just few days prior to 24.08.2002 and that suspicious talks took place between Sharda Jain and Roshan Singh during the said visits. However, Om Parkash Chauhan did not support the case of the prosecution and denied that accused Raj Kumar was accompanied by accused Rajinder and Roshan Singh during his visits to the residence of the deceased or that he heard any talks between Sharda Jain and Roshan Singh.

248. Accused Raj Kumar is the brother of Sharda Jain. Being councilor of MCD, Sharda Jain was a public figure and therefore number of people would have been visiting the office and residence of Sharda Jain to meet her. The visits in question could have been casual visits of a brother to meet and inquire about well being of his sister. The visits could also have been in connection with the public dealings of Sharda Jain. In such circumstances, the fact that accused Raj Kumar along with two unidentified persons visited the residence of Sharda Jain can hardly be used as an incriminating circumstance against

Sharda Jain particularly when what transpired during the said visits is not forthcoming on record.

249. Suspicious conduct of Sharda Jain:The next circumstance used by the learned Trial Judge is that Sharda Jain went to the house of her driver in the late hours of night of 24.08.2002

250. The evidence of Om Parkash Chauhan PW-11, the driver of Sharda Jain, that Sharda Jain sent a fat man to his residence in the late hours of night of 24.08.2002 and that the said person told him that Sharda Jain is calling him has not been controverted by the defence. Likewise, the evidence of Shanti PW-10, that on occasion a boy came to her house and told her that Sharda Jain is calling Om Parkash has not been controverted.

251. In this regards, a submission was advanced by the learned senior counsel for the defence that there is a serious contradiction between the evidence of Om Parkash Chauhan and Shanti inasmuch as Om Parkash deposed that a boy came to his house to call him while Shanti deposed that Sharda Jain herself came to her house to call Om Parkash. Counsel urged that the said material contradiction shows that the witnesses Om Parkash and Shanti are not truthful witnesses.

252. To appreciate the submission of learned senior counsel, the following two depositions of Shanti PW-10, made by her in her testimony need to be noted.

a) (Quote) *Once Sharda Jain had come to my resident and sent a boy inside the house to call my son Om Parkash.*

b) (Quote) *It was about 12 in the night when one boy came to me and asked that Om Parkash had been called by Sharda Jain.*

253. Shanti PW-10, is a rustic woman. What should be the approach of the Court while appreciating ocular evidence of a rustic witness? The answer to this question lies in the following observations made by Supreme Court in the decision reported as *Shivaji Sahabrao Bobade & Anr v State of Maharashtra* AIR 1973 SC 2622:-

Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioral pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered.

254. In the backdrop of aforesaid observations of the Supreme Court, when the afore-noted two depositions are

read harmoniously, the so-called contradiction pointed out by learned senior counsel is clearly explainable. It is clear that when Shanti was told by the boy that Sharda Jain is calling her son, she perceived that Sharda Jain is present outside her house and has sent the boy inside her house to call her son and on basis of said perception formed by her, Shanti deposed that Sharda Jain came to her house.

255. A cumulative reading of the afore-noted uncontroverted evidence of Om Parkash PW-11 and Shanti PW-10, establishes that Sharda Jain tried to contact Om Parkash in the late hours of the night of 24.08.2002. The learned Trial Judge has not appreciated the evidence of Om Parkash and Shanti in correct perspective inasmuch as the conclusion drawn by him from the testimony of said witnesses that Sharda Jain visited the residence of Om Parkash in the late hours of the night of 24.08.2002 is incorrect. However, the circumstance that Sharda Jain tried to contact Om Parkash in the late hours of night of 24.08.2002 is equally incriminating. It does not matter that she personally went to the house of her driver or sent somebody to summon him.

256. In view of above discussion, we hold that the conduct of Sharda Jain of trying to contact Om Parkash in the late hours of the night of 24.08.2002 raises strong suspicion

against her and thus is a pointer towards the guilt of accused Sharda Jain.

257. Motive of Sharda Jain:The last circumstance used by the learned Trial Judge to infer the guilt of accused Sharda Jain is the motive of Sharda Jain to commit the crime of murder of the deceased.

258. As per the case projected by the prosecution in the charge-sheet (see para 48 above for reference), the motive of Sharda Jain to commit the murder of the deceased was (i) her love for deceased because of which she could see the deceased getting close to Memwati Berwala; (ii) hatred towards the deceased as the deceased for whom she left her husband was getting close to Memwati Berwala and (iii) jealousy as the deceased was promoting the political career of Memwati Berwala.

259. A perusal of the testimony of the witnesses examined by the prosecution to prove the motive of Sharda Jain noted in paras 86 to 96 above shows that Mahender Pal Gupta PW-8, is the lynchpin of the case set up by the prosecution pertaining to motive of Sharda Jain.

260. The most important statements in the testimony of Mahender Pal Gupta is that Sharda told him that she liked the deceased and that she expressed her displeasure over the fact that despite the fact that she is the Chairman of Education



Committee the deceased made Memwati Berwala as a Chief Guest in a function held at a school.

261. The aforesaid deposition of the witness could have easily been corroborated by the prosecution by adducing evidence to the effect that Memwati Berwala presided over as Chief Guest in a function held at a school. However, no such proof was adduced by the prosecution. Considering the fact that evidence of Mahender Pal Gupta PW-8 has been found to be false in respect of pointing out of place of murder of deceased and identification of the body of the deceased, we do not consider it safe to place any reliance on the aforesaid uncorroborated evidence of Mahender Pal Gupta.

262. A close scrutiny of the evidence of Mahender Pal Gupta reveals that the same suffers from two serious infirmities. As per Mahender Pal Gupta, after getting elected as Municipal Councilor, Sharda Jain told him that she 'has' left her husband because of her liking for the deceased. The election in question was held in July 2002 (The said fact was deposed to by Mahender Pal Gupta). The husband of Sharda Jain left her in the year 2000 as evident from the reading of the contents of the DD entries Ex.PW-28/A and Ex.PW-7/A. Therefore, the deposition of Mahender Pal Gupta that Sharda Jain told him that she left her husband in the year 2002 is incorrect. The second infirmity is that Mahender Pal Gupta in

his examination-in-chief deposed that Sharda Jain told him that she tried to commit suicide on account of the fact that the deceased was getting close to Memwati Berwala however, in cross-examination he stated that he does not recollect that whether any such fact was told to him by Sharda Jain. That apart, deposition of PW-19 and PW-24, noted in para 93 and 94 above shows that Sharda Jain consumed sulfas on 25.10.2000.

263. This takes us to the remaining evidence adduced by the prosecution to prove the motive of Sharda Jain.

264. Dr.S.C.Rajput PW-3, was examined by the prosecution to prove the factum of close relations between Sharda Jain and the deceased. The close relations were sought to be inferred from the fact that Sharda Jain used to accompany the deceased to his visits to the clinic and that she offered to pay the expenses incurred on the treatment of the deceased.

265. Has Dr.S.C.Rajput PW-3, proved that the deceased used to visit his clinic.

266. As already noted in para 88 above, except for the entries pertaining to the visits of the deceased no other entry has been recorded in pencil in the entry register Ex.PW-3/A maintained by the witness. No explanation is forthcoming from the testimony of the witness as to why only the entries

pertaining to the visits of the deceased have been recorded in pencil. The witness has also admitted to the factum of overwriting in the entry register Ex.PW-3/A. In that view of the matter, no credence can be placed upon the testimony of Dr.S.C.Rajput PW-3 that the deceased used to visit his clinic.

267. It may be noted here that it was strenuously argued by learned counsel for Sharda Jain that a perusal of the entry register PW-3/A shows that an attempt was made by the prosecution to create false evidence against the accused persons, which fact has seriously tainted the veracity of the case of the prosecution. It is settled law that the infirmity in one piece of evidence adduced by the prosecution does not render doubtful the whole case of the prosecution.

268. The next piece of evidence pressed into service by the prosecution to prove that Sharda Jain used to accompany the deceased during his visits to the clinic of Dr.S.C.Rajput is the recovery of a denture set from the car of Sharda Jain on which words 'S.C.Rajput' were engraved. Nothing turns on the said fact for the reason the denture set recovered from the car of Sharda Jain was not put to Dr.S.C.Rajput. He did not identify the same as prepared by him. Therefore, it has not been established by the prosecution that the denture set in question was made by Dr.S.C.Rajput.

269. Another piece of evidence relied upon by the prosecution to prove the motive of Sharda Jain is that Sharda Jain attempted to commit suicide. Nothing turns on the said fact inasmuch as no evidence is forthcoming on record to show that Sharda Jain attempted to commit suicide on account of failed relationship with the deceased. On the contrary, the evidence, noted in paras 93 to 95 above show that she attempted suicide in the year 2000 when Memwati Barwala was not even in the scene.

270. The last piece of evidence relied upon by the prosecution to prove the motive of Sharda Jain is the photograph Ex.PW-58/A which shows the deceased and Memwati Berwala standing close to each other in a public function. (It may be noted here that the function in question is not the function mentioned by Mahender Pal Gupta in his testimony) By no stretch of imagination, it can be inferred from the mere circumstance that the deceased and Memwati Berwala were standing close to each other that the deceased and Memwati Berwala were having intimate relations.

271. The net result of the above discussion is that the prosecution has not been able to prove the motive of Sharda Jain to commit the murder of the deceased. The prosecution has failed to establish that the deceased was having intimate relations with Sharda Jain or Memwati Berwala. The evidence

on record at best shows that the deceased and Sharda Jain were good friends and nothing more.

272. What is the impact of the failure to prove motive in the case set up by the prosecution against accused Sharda Jain.

273. In the decision reported as State of UP v Babu Ram (2000) 4 SCC 515 it was held:-

“We are unable to concur with the legal proposition adumbrated in the impugned judgment that motive may not be very much material in cases depending on direct evidence whereas motive is material only when the case depends upon circumstantial evidence. There is no legal warrant for making such a hiatus in criminal cases as for the motive for committing the crime. Motive is a relevant factor in all criminal cases whether based on the testimony of eye witnesses or circumstantial evidence. The question in this regard is whether a prosecution must fail because it failed to prove the motive or even whether inability to prove motive would weaken the prosecution to any perceptible limit. No about, if the prosecution proves the existence of a motive it would be well and good for it, particularly in a case depending on circumstantial evidence, for, such motive could then be counted as one of the circumstances. However, it cannot be forgotten that it is generally a difficult area for any prosecution to bring on record what was in the mind of the respondent. Even if the Investigating Officer would have succeeded in knowing it through interrogations that cannot be put in evidence by them due to the ban imposed by law.”

274. It is also relevant to note the following observations of Supreme Court in the decision reported as Ujjagar Singh v State of Punjab (2007) 14 SCALE 428:-

“It is true that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence of motive would dislodge the entire prosecution story is perhaps giving this one factor an importance which is not due and (to use the cliché) the motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy”

275. The prosecution has thus established that Sharda Jain was last seen in the company of the deceased in the afternoon of 24.8.2002 and thereafter the deceased went missing. He was killed on the same day. The destination of the deceased and Sharda Jain was Ghaziabad when they were last seen together. The place where the dead body of the deceased was found was a canal flowing from village Chajjupur which is about 20 kms away from Ghaziabad. The spot where the deceased was killed is spot A which was not in the knowledge of the police and its whereabouts surfaced only after Sharda Jain made her disclosure statement. The spot is near the embankment of the canal in which, further downstream the dead body of the deceased was discovered. Sharda Jain tried to mislead the family members of the deceased and had tried to surreptitiously contact her driver in the night with the obvious intention to pressurize him to withhold truth from the police. Said evidence is sufficient wherefrom the guilt of Sharda Jain can be inferred. Assuming that the deceased was not killed at spot A. Removing the said

evidence, the chain of circumstances are still complete wherefrom an inference of guilt can be drawn against Sharda Jain. In the decision reported as 2002 (6) SCC 715 Mohibur Rahman & Anr. Vs. State of Assam, the deceased named Rahul was last seen on 24.1.1991 at 5:00 PM at a bus stand in the company of Taijuddin and Mohibur Rahman and his body was found 13 days after at a distance of 30 km to 40 km from the bus stand where the deceased and the accused were seen last alive. Accused Taijuddin had met the mother and the cousin of the deceased and falsely told them that Rahul i.e. the deceased had eloped with one Balijan Begum. Acquitting Mohibur Rahman holding that the proximity of distance and time having broken, qua Taijuddin the fact that he tried to mislead the relatives of the deceased coupled with his being last seen with the deceased were sufficient evidence wherefrom his guilt could be inferred for the reason he had also pointed out the place where the dead body of Rahul was buried. In the decision reported as AIR 1955 SC 801 Deonandan Mishra Vs. State of Bihar a husband and wife were seen in a train at Chakand Railway Station at around 11:00 PM in the night. The train passed through Gaya Town. The dead body of the wife was found at the outskirts of the city of Gaya the next morning. The husband was convicted on last seen evidence. This Bench, while deciding a batch of appeals, lead

appeal being Crl.A.No.362/2001 Arvind Vs. State, decided on 10.8.2009, while referring to the decision in Deonandan Mishra's case (supra) had held that with reference to the last seen evidence theory, the circumstance of the accused and the victim being co-passengers i.e. starting their journey together would require an inference to be drawn that they should reach their destination together and one of them dying a homicidal death, the other must own up responsibility unless he explains the circumstance of the two parting company. In the instant case, the fact that Sharda Jain and the deceased left together, and the deceased died the same day without reaching his destination would entitle this Court to draw an inference against Sharda Jain on last seen evidence alone and if linked with the attempt made by Sharda Jain to mislead the family members of the deceased and her attempt to contact her driver the same night in very suspicious circumstances are enough to nail her.

276. The net result of the above discussion is that even ignoring the parts of the faulty reasoning of the learned Trial Judge and incriminating circumstances relatable thereto, the prosecution has been able to prove the complicity of accused Sharda Jain in the conspiracy to murder the deceased.

CASE AGAINST ACCUSED RAJ KUMAR



277. Visit of accused Raj Kumar to the residence of Sharda Jain: The first circumstance used by the learned Trial Judge to infer the guilt of accused Raj Kumar is that he along with two other persons visited the residence of Sharda Jain on two occasions just few days prior to 24.08.2002.

278. We have already discussed in paras 246 to 248 above that there is nothing incriminating in the conduct of accused Raj Kumar in visiting the residence of Sharda Jain along with two other persons just few days prior to 24.08.2002.

279. Location of residence of accused Raj Kumar: The next circumstance used by the learned Trial Judge to convict accused Raj Kumar is that he is a resident of village Gulawati which is situated in the vicinity of village Chajjupur where the murder of the deceased was committed.

280. Merely because Raj Kumar was residing at a place which was situated in the vicinity of the place of the murder of the deceased can hardly be used as an incriminating circumstance against him. It could well be a coincidence that there was close proximity between the place of residence of accused Raj Kumar and place of the murder of the deceased. The view taken by the learned Trial Judge that *it cannot be termed as a mere coincidence* that accused Raj Kumar is a resident of village Gulawati and that the entire execution of

the conspiracy happened to take place at near village Chajjupur, in our opinion is incorrect.

281. Non-denial of accused Raj Kumar to his acquaintance with other accused persons: - The third circumstance used by the learned Trial Judge to convict accused Raj Kumar is that he did not controvert the fact that he was acquainted with accused Roshan Singh and Rajinder during the trial.

282. The aforesaid circumstance is factually incorrect inasmuch as accused Raj Kumar in his statement under Section 313 Cr.P.C. stated that save and except Sharda Jain he has never met any other accused person at any point of time in his life.

283. Sudden arrival of accused Raj Kumar at the residence of Sharda Jain on the day of her arrest: - The fourth circumstance used by the learned Trial Judge to convict is the fact of sudden arrival of accused Raj Kumar at the residence of Sharda Jain on the day of her arrest.

284. We fail to understand what is incriminating in the conduct of accused Raj Kumar of arriving at Sharda Jain's residence on the day of her arrest. Sharda Jain is the sister of accused Raj Kumar.

285. Conduct of accused Raj Kumar in pointing out spot A: - The fifth circumstance used by the learned Trial Judge to

convict accused Raj Kumar is that he pointed out the place of murder of the deceased.

286. As already noted in the foregoing paragraphs, accused Sharda Jain and Raj Kumar pointed spot A (which we have already held to be the place of murder of the deceased) to the police. It is not forthcoming from the evidence on record that which of the accused person first pointed out spot A or that both the accused persons simultaneously pointed out spot A. Be that as it may, the fact of the matter is that either one of the accused person or both of them pointed out spot A to the police inasmuch as said spot was not in the knowledge of the police before it was pointed out. In case of Sharda Jain, an assurance is forthcoming from the evidence on record that she did point out spot A inasmuch as spot A was known to her before it was pointed out to police. The said knowledge can be inferred from the proved facts that Sharda Jain was present in the vicinity of spot A on 24.08.2002 and that mud found on the tyre of her car had similar physical characteristics as soil found at spot A. But, in the case of Raj Kumar, no assurance is coming from the evidence on record that he did point out spot A to the police. There is no evidence to show that spot A was known to accused Raj Kumar before it was pointed out to police. It is also relevant to note that HC Sunita PW-31, who was part of the police party which conducted investigation at

spot A on 28.08.2002 deposed that (Quote) '*In my presence, accused Raj Kumar had not pointed out any place in village Chajjupur.*' In view of aforesaid deposition of HC Sunita PW-31, the possibility that Sharda Jain pointed out spot A to police and pursuant to that accused Raj Kumar was made to point spot A by the police cannot be ruled out. Therefore, accused Raj Kumar is entitled to benefit of doubt on said point.

287. Discovery of clues from the disclosure statement of Raj Kumar: - The next circumstance used by the learned Trial Judge to infer the guilt of accused Raj Kumar is that the disclosure statement of accused Raj Kumar provided clues to the investigating agency.

288. The complicity of accused Pushpender and Nirvikar in the conspiracy to murder the deceased came to the knowledge of the police from the disclosure statement of Raj Kumar.

289. The question which arises is that whether the information provided by an accused person in his disclosure statement, which was not in the knowledge of the police, if receives confirmation by subsequent events, is admissible under Section 27 of Evidence Act.

290. The answer to the above question lies in the decision of Supreme Court reported as State (N.C.T. of Delhi) v Navjot Sandhu @ Afsan Guru AIR 2005 SC 3820. In the said

decision, Supreme Court examined the correctness of the following submissions advanced by the prosecution:-

“The physical object might have already been recovered, but the investigating agency may not have any clue as to the "state of things" that surrounded that physical object. In such an event, if upon the disclosure made such state of things or facts within his knowledge in relation to a physical object are discovered, then also, it can be said to be discovery of fact within the meaning of Section 27.

The other aspect is that the pointing out of a material object by the accused himself is not necessary in order to attribute the discovery to him. A person who makes a disclosure may himself lead the investigating officer to the place where the object is concealed. That is one clear instance of discovery of fact. But the scope of Section 27 is wider. Even if the accused does not point out the place where the material object is kept, the police, on the basis of information furnished by him, may launch an investigation which confirms the information given by accused. Even in such a case, the information furnished by the accused becomes admissible against him as per Section 27 provided the correctness of information is confirmed by a subsequent step in investigation. At the same time, facts discovered as a result of investigation should be such as are directly relatable to the information.”

291. After analyzing the case law pertaining to Section 27, Evidence Act in great detail, Supreme Court laid down that aforesaid arguments do not state correct proposition of law. It was held by Supreme Court that expression ‘discovery of fact’ referred to in Section 27 of Evidence Act cannot be interpreted to mean a pure and simple mental fact or state of mind relating to a physical object dissociated from the recovery of the physical object. In other words it was held that a fact

discovered has to relate to an object recovered i.e. the recovery of an object and the discovery of a fact go hand in hand.

292. In view of aforesaid dictum of Supreme Court, the circumstance that investigating agency got lead from the disclosure statement of accused Raj Kumar cannot be used against him.

293. Recovery of wrist watch of the deceased at the instance of accused Raj Kumar: - The last circumstance used by the learned Trial Judge to infer the guilt of accused Raj Kumar is that the wrist watch of the deceased was recovered at his instance.

294. It may be noted here that the watch recovered at the instance of the deceased was not an ordinary watch. The watch was of make Citizen and was having a gold chain.

295. Before proceeding to analyze the evidence pertaining to recovery of the wrist watch of the deceased, we note the following pertinent observations made by Lahore High Court in the decision reported as Shera v Emperor AIR 1943 Null 5:-

“.....When the evidence of recovery of stolen property is attacked, the Court has to examine the evidence in the light of following alternative hypothesis: (1) The complainant might have been persuaded by the police to state in the first information report that property which in fact was not stolen had been stolen and to hand over such property

to the police to be used in fabricating recoveries from the accused persons. This assumes a conspiracy between informant and the police from the very start. (2) The police might have obtained property similar to the stolen property from the complainant or some one else and used it for the purpose of fabricating the recoveries. (3) The police might have suppressed some of the stolen property recovered from an accused person and utilized it in inventing a recovery from another person. (4) The property might have been recovered from a third party and used by the police in one of the impugned recoveries.”

“.....In considering the possibility of the second hypothesis, regard must necessarily be had to the nature and value of the property recovered. It should be borne in mind that when a person hands over to the police valuable property with a view to enable the police to fabricate a false recovery of this property from someone else, there is always a possibility of the accused being acquitted and the owner of the property being deprived of such property. In the present case the property recovered consists of valuable ornaments of gold and silver and I do not consider that the police procured this property from someone else with the object of inventing false recoveries from innocent persons.....”

296. The afore-noted four grounds of attack pointed out by Lahore High Court in Shera's case (supra) can be modified in following manner in case where the recovery effected at the instance of the accused person is the personal effect of the deceased person:-

(i) The family members of the deceased might have been persuaded by the police to state that an article which in fact was not possessed by the deceased at the time of his death had been possessed by him and to hand over such article to

the police to be used in fabricating the recoveries from the accused persons.

(ii) The police might have obtained an article similar to the article possessed by the deceased at the time of his death from the family members of the deceased and use it for the purpose of fabricating the recoveries.

(iii) The police might have suppressed some of the articles possessed by the deceased at the time of his death recovered from an accused person and utilized it in inventing a recovery from another accused person.

(iv) Article in question might have been recovered from a third party and used by the police in one of the impugned recoveries.

297. The ground of attack taken in the instant case to assail the purported recovery of the watch of the deceased at the instance of the deceased is ground no. (ii) namely, the police might has procured a watch similar to the watch possessed by the deceased at the time of his death and has planted the same on accused Raj Kumar. The said attack is predicated upon the testimony of Mahender Pal Gupta PW-8, the photographs Ex.DX and Ex.DX1 of the body of the deceased taken at the time of its recovery and the manner of conduct of Test Identification of the watch purportedly recovered at the instance of accused Raj Kumar.



298. On a first blush, the evidence of Mahender Pal Gupta PW-8, a friend of the deceased, that a wrist watch was present on the body of the deceased at the time of its recovery does strikes a discordant note with the case set up by the prosecution with regard to recovery of the wrist watch of the deceased. We therefore proceed to closely scrutinize the case set up by the prosecution pertaining to the recovery of the wrist watch of the deceased.

299. To prove the recovery of the wrist watch of the deceased, the prosecution examined police officials namely, Inspector V.S.Meena PW-62, Anil Kumar Chauhan PW-44 and SI Shiv Raj Singh PW-55.

300. The aforesaid police officials have deposed that on 28.08.2002 accused Raj Kumar got recovered the wrist watch of the deceased from behind a speaker kept at a ventilator in the balcony of his house. The witnesses have withstood the test of cross-examination. Nothing could be elicited from their cross-examination which could cast a doubt on the veracity of their evidence pertaining to the recovery of the wrist watch of the deceased.

301. The prosecution further claims that the wrist watch of the deceased recovered at the instance of accused Raj Kumar was deposited in the Malkhana on the date of its recovery itself i.e.28.08.2002. Inspector V.S.Meena PW-62 and

HC Dinesh Kumar PW-43, have categorically deposed to the said fact. The witnesses have not been cross-examined on the said point. No suggestions have been given to the witnesses that the wrist watch of the deceased was not deposited in the Malkhana on 28.08.2002.

302. If indeed the watch of the deceased was not recovered at the instance of accused Raj Kumar then the police would not taken such a huge risk of showing the recovery of the watch in question before the date of recovery of the body of the deceased as in all likelihood the body of the deceased would have shown up with a watch on the wrist of the deceased.

303. As already noted herein above, no questions were put to the other witnesses who were present at the time of the recovery of the body of the deceased namely, Rajinder Pal Gupta PW-9, Ved Prakash Gupta PW-15, Rajpal Gupta PW-16 and Amrit Lal Singh PW-37, regarding the presence of the wrist watch on the body of the deceased at the time of its recovery.

304. A perusal of the evidence relating to the recovery of the body of the deceased shows that Mahender Pal Gupta was as usual living in his imaginary world and that he was not paying much attention to the body of the deceased at the time of its recovery. For instance, Mahender Pal Gupta deposed that artificial teeth were not found in the jaw of the deceased at the

time of recovery of the body of the deceased, which deposition is contrary to the recording contained in the post-mortem report Ex.PW-21/A of the deceased that six artificial teeth were found in the jaw of the deceased. The deposition of Rajinder Pal Gupta PW-9, the younger brother of the deceased, that artificial teeth were found in the jaw of the deceased at the time of the recovery of the body of the deceased corroborated the aforesaid recording contained in the post-mortem report of the deceased.

305. In these circumstances, no benefit can be defence from the afore-noted evidence of Mahender Pal Gupta particularly when the evidence pertaining to the date of deposit of the wrist watch in question in the Malkhana has gone unrebutted.

306. The photographs Ex.DX and Ex.DX1 have been minutely looked by us. Nothing much turns on the said photographs inasmuch as they merely show a mark around the area of the wrist of the deceased. The photographs in question do not establish the presence of a watch on the wrist of the deceased.

307. With regard to the manner of conduct of the Test Identification of the watch recovered at the instance of accused Raj Kumar, the learned senior counsel argued that the Test Identification of the watch in question was

conducted in a most unsatisfactory manner, which fact has rendered the evidence pertaining to identification of the watch in question most doubtful. Counsel pointed out that none of the watches mixed with the watch in question in the TIP were of make Citizen which made it very easy for the witness who participated in the TIP to identify the watch recovered at the instance of accused Raj Kumar as that of the deceased.

308. We agree with the learned senior counsel that the conduct of TIP of the watch recovered at the instance of accused Raj Kumar is not up to the mark. Has said fact vitiated the evidence pertaining to the identification of the wrist watch recovered at the instance of accused Raj Kumar?

309. In the decision reported as Kanta Prashad v Delhi Administration AIR 1958 SC 350 it was held by Supreme Court even though it is prudent to hold a TIP with respect to the witnesses who do not know accused before the occurrence, the failure to hold such a proceeding would not make the evidence of identification inadmissible in the Court. It was further held that weight to be attached to failure to hold a TIP would depend upon facts of each case. Where evidence pertaining to identification is convincing, the failure to hold TIP would be of no consequence.

310. In this regards, it is also relevant to note the following observations made by Supreme Court in the decision

reported as *Earadrabhappa v State of Kerala* AIR 1983 SC 446:-

“.....There is no merit in the contention that the testimony of these witnesses as regards identity of the seized articles to be stolen property cannot be relied upon for want of identification of prior test identification parade. There is no such legal requirement.”

311. Therefore, the mere fact that TIP of the watch in question was not conducted in an unsatisfactory manner is no ground to reject the evidence pertaining to identification of the watch in question. It needs to be seen by us whether said evidence is creditworthy or not.

312. Rajinder Pal Gupta PW-9, the younger brother of the deceased, identified the watch recovered at the instance of accused Raj Kumar as that of the deceased. The witness has deposed that he used to visit the deceased daily and that the deceased was wearing the said watch since the year 1996. Therefore, the witness who had seen the deceased wearing the watch in question almost daily for about six years could have easily identified the watch. Nothing could be elicited from the cross-examination of the witness which could cast a doubt on the veracity of his testimony.

313. In view of above discussion, we hold that the prosecution has been able to establish that a watch was

recovered at the instance of accused Raj Kumar and that the said watch belonged to the deceased.

314. The moot question which now merits consideration is, as to what turns on the fact that the wrist watch of the deceased was recovered at the instance of accused Raj Kumar?

315. The deceased was wearing the wrist watch recovered at the instance of accused Raj Kumar on 24.08.2002. Sumitra Gupta PW-18, categorically deposed to the said fact in her testimony. It is significant to note here that said fact was also stated by Sumitra Gupta in her statement Ex.PW-62/DB recorded by the police few hours after the missing of the deceased.

316. In the decision reported as Machi Singh v State of Punjab AIR 1983 SC 957 one of the factor's which weighed with Supreme Court in coming to the conclusion that the witness in question was a truthful witness was that the version of the incident given by witness in court was similar to the version given by him in his statement to the police which was recorded four hours after the occurrence.

317. The afore-noted decision brings out that a fact which is stated by the witness too soon after the incident generally has a ring of truth attached to it for the reason the

witness did not get much time to cook up a false story or embellish facts.

318. The watch which was worn by the deceased on the day of his death i.e. 24.08.2002 was not found on the body of the deceased at the time of its recovery on 31.08.2002 but instead was recovered 3 days prior i.e. on 28.08.2002. The watch of the deceased was an expensive watch as it was having a gold chain. The possibility that the person who participated in the conspiracy to murder the deceased was tempted to remove the watch of the deceased cannot be ruled out.

319. Being a woman, Sharda Jain could not have single handedly planned and executed the conspiracy to murder the deceased. She required contact killers to do the dirty job. She would have surely required the help of some male person to give effect to her illegal plans. She definitely would have turned to a close and trusted male person in whom she could have confided and who would also agree to help her. The husband of Sharda Jain had left her. Raj Kumar is the brother of Sharda Jain. The fact that the wrist watch of the deceased was recovered at the instance of accused Raj Kumar shows that Raj Kumar was that close and trusted male person who helped Sharda Jain in giving effect to her illegal designs. In view of special circumstances of the case, we hold that the

fact of recovery of wrist watch of the deceased at the instance of accused Raj Kumar proves the complicity of accused Raj Kumar in the conspiracy to murder the deceased.

CASE AGAINST ACCUSED RAJINDER SINGH

320. Last seen: The first circumstance used by the learned Trial Judge to infer the guilt of accused Rajinder Singh is that the deceased was last seen alive in the company of accused Rajinder Singh.

321. As already noted in foregoing paras, one of the fact which led the learned Trial Court to conclude that the deceased was last seen alive in the company of accused Rajinder Singh is the admission made by accused Sharda Jain in her examination under Section 313 Cr.P.C. that accused Rajinder Singh was present with her and the deceased in her car on 24.08.2002.

322. It is settled law that a statement made by an accused in his examination under Section 313 Cr.P.C. cannot be used against the co-accused.

323. While dealing with Section 342 of the old Code (corresponding to Section 313 of present Code) in the decision reported as Narayan Swami v State of Maharashtra AIR 1968 SC 609 Supreme Court observed as under:-

“We have adverted to the above circumstances, only for the purpose of holding that the learned Sessions Judge, in coming to the conclusion that the appellant



is guilty, has placed considerable reliance on the evidence of Dilawar, given in the dacoity case and to his statement, made under S.342 Cr.P.C., as co-accused, in the present trial. The legal position is quite clear, viz., that the evidence, given by Dilawar, in the dacoity case, cannot be used as evidence against the appellant, who had no opportunity to cross-examine Dilawar, in the said case; and the statements of Dilawar, as co-accused, made under S.342 Cr.P.C., in the present trial, cannot be used against the appellant. We are not certainly inclined to accept the contention of the learned counsel, for the State, that these very serious illegalities, committed by the learned Sessions Judge, must be considered to have been approved, by the learned Judges of the High Court, when they dismissed the appeal, summarily. In fact, we are inclined to think, that, by dismissing the appeal summarily, the learned Judges of the High Court have omitted to note these serious illegalities, contained in the judgment of the learned Sessions Judge. As to whether there is other evidence, on record, which would justify the conclusion that the appellant has been rightly convicted, is not a matter on which it is necessary for us to embark upon, in this appeal. That is essentially for the High Court, as a Court of appeal, to investigate, and come to a conclusion, one way or the other.”

324. Therefore, the learned Trial Judge has committed an illegality by using the admission made by Sharda Jain against accused Rajinder Singh.

325. Excluding the aforesaid admission of Sharda Jain as evidence against Rajinder Singh it needs to be seen by us that whether the prosecution has been able to establish that the deceased was last seen alive in the company of accused Rajinder Singh.

326. This takes us to the analysis of the testimony of Om Parkash Chauhan PW-11, the driver of Sharda Jain and Manish Gupta PW-14, the son of the friend of the deceased.

327. As already held above, Manish Gupta PW-14, is a chance witness and thus we do not think it safe to place any reliance upon his testimony. There is also another circumstance which casts a serious doubt on the veracity of his testimony. Manish deposed having identified accused Roshan Singh when he came to the police station to lodge a report about the missing of his mobile phone. It is difficult to fathom why coincidences keep happening in the life of said witness. He first happened to see the deceased in the car of Sharda Jain on 24.08.2002 by chance and then happened to come at the police station by chance at the time when accused Rajinder Singh was present there. In fact, the whole story of the witness that he identified accused Rajinder Singh at the police station when he came there to lodge report about the missing of his mobile phone is seriously dented by the fact that no such report was lodged by him. The explanation offered by him for not lodging the report that the police told him to first look for the mobile phone in his house is not plausible.

328. As already noted herein above, Om Parkash Chauhan PW-11, deposed that accused Rajinder Singh was

present in the house of Sharda Jain in the morning of 24.08.2002. That thereafter he traveled along with the deceased and accused Sharda Jain in the car of Sharda Jain for going to Firozshah Kotla ground. He further deposed that when he got down from the car of accused Sharda Jain on 24.08.2002 Sharda Jain told him that accused Rajinder Singh would drive the car in his absence and thereafter he saw accused Rajinder Singh driving the car of Sharda Jain.

329. The aforesaid testimony of Om Parkash Chauhan PW-11, was not seriously challenged on behalf of accused Rajinder Singh inasmuch as during the cross-examination a single suggestion was given to the witness that he was on leave on 24.08.2002, which suggestion was emphatically denied by the witness. No other suggestion/question was given/put to the witness.

330. In view of the fact that aforesaid testimony of Om Parkash Chauhan has not been seriously challenged by the defence and that Om Parkash Chauhan had no reason to give false evidence against accused Rajinder Singh, we hold conclusion that aforesaid testimony of Om Parkash Chauhan is true.

331. Another fact lends assurance to the above conclusion drawn by us. Rajinder Singh refused to participate in the Test Identification Proceedings on the ground that

the witnesses are known to him. The witness who was to identify accused Rajinder Singh in the TIP was Om Parkash Chauhan. The said statement of Rajinder Singh that Om Parkash Chauhan was known to him lends credence to the testimony of Om Parkash Chauhan that he had seen accused Rajinder Singh in the house and car of Sharda Jain on 24.08.2002.

332. The aforesaid testimony of Om Parkash Chauhan establishes two things. One, that the deceased was last seen alive in the company of accused Rajinder Singh in the afternoon of 24.08.2002. Two, that accused Rajinder Singh was driving the car of Sharda Jain in the afternoon of 24.08.2002.

333. Having held that the prosecution has been able to establish that the deceased was last seen alive in the company of accused Rajinder Singh, we need to determine the effect of said circumstance on the guilt of accused Rajinder Singh.

334. In the instant case, there is proximity of time of last seen and time of death of the deceased.

335. No explanation has been given by accused Rajinder Singh regarding the circumstances as to when and how he parted company with the deceased. The response of accused Rajinder Singh to all the incriminating circumstances put to

him in his examination under Section 313 Cr.P.C. including the circumstance of last seen was a bald denial.

336. In this regard, few judicial decisions may be noted.

337. *In Joseph S/o Kooveli Poulo v. State of Kerala* 2000 CriLJ 2467 (SC); the facts were that the deceased was an employee of a school. The appellant representing himself to be the husband of one of the sisters of Gracy, the deceased, went to the St. Mary's Convent where she was employed and on a false pretext that her mother was ill and had been admitted to a hospital took her away with the permission of the Sister in charge of the Convent, PW-5. The case of the prosecution was that later the appellant not only raped her and robbed her of her ornaments, but also laid her on the rail track to be run over by a passing train. It was also found as a fact that the deceased was last seen alive only in his company, and that on information furnished by the appellant in the course of investigation, the jewels of the deceased, which were sold to PW-11 by the appellant, were seized. There was clear evidence to prove that those jewels were worn by the deceased at the time when she left the Convent with the appellant. When questioned under Section 313 Cr.P.C., the appellant did not even attempt to explain or clarify the incriminating circumstances inculcating and connecting him with the crime

by his adamant attitude of total denial of everything. In the background of such facts, Supreme Court held:

“Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else, they being personally and exclusively within his knowledge. Of late, courts have, from the falsity of the defence plea and false answers given to court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed. That missing link to connect the accused appellant, we find in this case provided by the blunt and outright denial of every one and all the incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause for the death of Gracy.”

338. In Ram Gulam Chaudhary and Ors. v. State of Bihar; AIR 2001 SC 2842 the facts proved at the trial were that the deceased boy was brutally assaulted by the appellants. When one of them declared that the boy was still alive and he should be killed, a chhura blow was inflicted on his chest. Thereafter, the appellants carried away the boy who was not seen alive thereafter. The appellants gave no explanation as to what they did after they took away the boy. The question arose whether in such facts Section 106 of the Evidence Act applied. Supreme Court held as under:

“In the absence of an explanation, and considering the fact that the appellants were suspecting the boy to have kidnapped and killed the child of the family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information

from the court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference.”

339. In Sahadevan alias Sagadevan v. State represented by Inspector of Police, Chennai AIR 2003 SC 215, the prosecution established the fact that the deceased was seen in the company of the appellants from the morning of March 5, 1985 till at least 5 p.m. on that day when he was brought to his house, and thereafter his dead body was found in the morning of March 6, 1985. In the background of such facts Supreme Court observed:

"Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants have failed to discharge this onus. In their statement under Section 313 Cr.P.C. they have not taken any specific stand whatsoever".

340. In this view of the matter, we hold that the fact that the deceased was last seen alive in the company of accused

Rajinder Singh is determinative of the guilt of accused Rajinder Singh.

341. False defence taken by accused Rajinder Singh: The next circumstance used by the learned Trial Judge to infer the guilt of accused Rajinder Singh is that a false defence was taken by accused Rajinder Singh.

342. The defence taken by accused Rajinder Singh in his statement under Section 313 CrPC that he does not know Sharda Jain and has never visited her residence has already been found to be false.

343. It is settled law that a false defence taken by an accused can be taken as an additional link in the chain of circumstances against him.

345. In the decision reported as Swapan Patra and Ors. v. State of W.B., (1999) 9 SCC 242 Supreme Court held as under :-

"It is well settled that in a case of circumstantial evidence when the accused offers an explanation and that explanation is found to be untrue then the same offers an additional link in the chain of circumstance to complete the chain. Applying the aforesaid principle, we have no hesitation to hold that the circumstances established in the case complete the chain of circumstances to prove the charge of murder against the appellant Swapan Patra and, therefore, the conviction of appellant Swapan Patra has to be upheld under Section 302 IPC. So far as the other two appellants are concerned, as stated earlier, in the absence of any positive evidence even about their



presence in the house at the relevant point of time, it is difficult to rope them in even if all other circumstances narrated earlier are established and, therefore, they are entitled to an order of acquittal."

346. In the decision reported as State of Maharashtra v. Suresh, (2000) 1 SCC 471, Supreme Court held as under :-

"It is regrettable that the Division Bench had practically nullified the most formidable incriminating circumstance against the accused spoken to by PW 22 Dr. Nand Kumar. We have pointed out earlier the injuries which the doctor had noted on the person of the accused when he was examined on 25.12.1995. The significant impact of the said incriminating circumstance is that the accused could not give any explanation whatsoever for those injuries and therefore he had chosen to say that he did not sustain any such injury at all. We have no reason to disbelieve the testimony of PW 22 Dr. Nand Kumar. A false answer offered by the accused when his attention was drawn to the aforesaid circumstance renders that circumstance capable of inculpating him. In a situation like this such a false answer can also be counted as providing "a missing link" for completing the chain."

347. Non-denial of accused Rajinder Singh to his acquaintance with accused Roshan Singh: The last circumstance used by the learned Trial Judge to infer the guilt of accused Rajinder Singh is that accused Rajinder Singh did not deny the fact that he was temporarily employed with accused Roshan Singh as a driver.

348. The aforesaid circumstance is factually incorrect inasmuch as accused Rajinder Singh in response to question no.3 put to him in his examination under Section 313 Cr.P.C. has vehemently denied that he was temporarily employed

with accused Roshan Singh as a driver. No evidence has been led by the prosecution to show that accused Rajinder Singh and Roshan Singh were known to each other or employment of accused Rajinder Singh with accused Roshan Singh. The only document on record showing the acquaintance of accused Rajinder Singh with accused Roshan Singh is the disclosure statement of accused Rajinder Singh, contents of which document are completely inadmissible in evidence.

349. But we find yet another circumstance which points towards the culpability of accused Rajinder Singh. The same has escaped the notice of the learned Trial Court.

350. It has already been held by us that accused Rajinder Singh was driving the car of Sharda Jain in the afternoon of 24.08.2002 and that the deceased and accused Sharda Jain were present in the said car at that time. It has further been held by us that spot A is the place of murder of the deceased and that Sharda Jain was present at/around spot A on 24.08.2002. Accused Sharda Jain reached at/around spot A by her car which is evident from the fact that mud found stuck on the tyre of car of Sharda Jain has similar physical characteristics as soil found at spot A. The date of death of the deceased is 24.08.2002. The car of Sharda Jain was found by the police at the residence of Sharda Jain on 27.08.02. How did the car of Sharda Jain come back from spot A? Accused

Rajinder Singh has not given any explanation regarding his movements on 24.08.2002. In such circumstances, this Court is justified in inferring from the above proved facts that accused Rajinder Singh drove the car of Sharda Jain which was occupied by Sharda Jain and the deceased to spot A on 24.08.2002 and thereafter he drove the car of Sharda Jain back from spot A after the conspiracy to murder the deceased was executed.

351. The net result of the above discussion is that the prosecution has been able to prove the complicity of accused Rajinder Singh in the conspiracy to murder the deceased.

#### CASE AGAINST ACCUSED ROSHAN SINGH

352. Abscondence of accused Roshan Singh: The first circumstance used by the learned Trial Judge to infer the guilt of accused Roshan Singh is the abscondence of accused Roshan Singh.

353. The prosecution has sought to establish the abscondence of the deceased through the fact that the car of accused Roshan Singh was lying as unclaimed at Malkhana from 09.09.2002 to 22.11.2002 till the time the custody of the said car was obtained by Inspector V.S.Meena PW-62.

354. As already noted in foregoing paras, the evidence of that SI Kalicharan PW-57, that one Maruti 800 car bearing registration no.DDU-1371 was lying as unclaimed at Malkhana

from 09.09.2002 to 22.11.2002 till the time the custody of the said car was obtained by Inspector V.S.Meena PW-62 and the evidence of Prabhat Kumar Chaurisia PW-64, that he sold Maruti 800 car bearing registration no.DDU-1371 to accused Roshan Singh has not been controverted by the defence. Therefore, the prosecution has been able to prove the fact that the car of accused Roshan Singh was lying as unclaimed at Malkhana since a considerable period which in turn establishes the abscondence of accused Roshan Singh.

355. At this juncture, a submission advanced by learned counsel for accused Roshan Singh deserves consideration. Counsel submitted that pieces of evidence pertaining to abscondence of accused Roshan Singh were not put to him in his examination under Section 313 CrPC, and therefore circumstance pertaining to abscondence cannot be used against him. In support of the said submission, counsel placed reliance upon the decision of Supreme Court reported as Sharad Birdhichand Sarda v State of Maharashtra AIR 1964 SC 1622.

356. It is no doubt true that the underlying object behind Section 313 Cr.P.C. is to enable the accused to explain any circumstance appearing against him in the evidence and this object is based on the maxim audi alteram partem which is one of the principles of natural justice. It has always been

regarded unfair to rely upon any incriminating circumstance without affording the accused an opportunity of explaining the said incriminating circumstance. The provision in Section 313, therefore, makes it obligatory on the court to question the accused on the evidence and circumstances appearing against him so as to apprise him the exact case which he is required to meet. But it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance but he must also show that such non-examination has actually and materially prejudiced him and has resulted in failure of justice. In other words in the event of any inadvertent omission on the part of the court to question the accused on any incriminating circumstance appearing against him the same cannot ipso facto vitiate the trial unless it is shown that some prejudice was caused to him.

357. In taking said view, we are supported by the decision of Supreme Court reported as Bejoy Chand Patra v State of WB AIR 1952 SC 105 where it was observed as under:-

“The last contention put forward by the learned counsel for the appellant was that he was not examined as required by law under section 342 of the Criminal Procedure Code.....To sustain such an argument as has been put forward, it is not sufficient for the accused merely to show that he has not been fully examined as required by section 342 of the Criminal Procedure Code, but he must also show that such examination has materially prejudiced him.”

358. In this regards, it is also relevant to quote following observations made by Supreme Court in a recent decision reported as State of Rajasthan v Kashi Ram AIR 2007 SC 144:-

“Learned Counsel submitted that the aforesaid statement of PW-2 was not specifically put to the accused when he was examined under Section 313 Cr.P.C.. That may be so, but in the facts of the case, we find that by such omission no prejudice has been caused to the appellant. Mamraj, PW-2 had deposed in his presence and was exhaustively cross-examined by counsel appearing for him. The statement of Mamraj, PW-2 regarding his having seen the deceased last in the company of the respondent was not even challenged in his cross-examination. Moreover, from the trend of the answers given by the respondent in his examination under Section 313 Cr.P.C., it appears that the respondent made only a bald denial of all the incriminating circumstances put to him, and had no explanation to offer.”

359. It is apparent from a perusal of the afore-noted observations of Supreme Court in Kashi Ram's case (supra) that the factors which weighed with the Court in coming to the conclusion that no prejudice was caused to the accused due to irregularities in his examination under Section 313 Cr.P.C. were that the evidence of the witness which was not put to him in his examination under Section 313 Cr.P.C. was not cross-examined by the accused and that the accused made a bald denial of all the incriminating circumstances put to him.

360. A perusal of the examination of accused Roshan Singh under Section 313 Cr.P.C. shows that three questions were put to Roshan Singh regarding his abscondence. The first

question is question no.37 in which the fact that a wireless message was flashed to all SSPs and SHOs in India to trace him was put to him. The second question is question no.43 in which the fact that Inspector V.S.Meena obtained non-bailable warrants against him as he was evading arrest was put to him. The third question is question no.50 in which the fact that Inspector V.S.Meena sought initiation of proceedings under Section 82-83 Cr.P.C. against him as he was evading arrest was put to him. The response of accused Roshan Singh to the aforesaid questions was ignorance. Therefore, it is not the case that accused was completely unaware of the fact that the prosecution would be using his abscondence as an incriminating circumstance against him.

361. Accused Roshan Singh has not controverted the testimonies of the witnesses examined by the prosecution to establish his abscondence. He made a bald explanation of all the incriminating circumstances put to him, and had no explanation to offer.

362. In such circumstances, keeping in view the afore-noted observations of Supreme Court in Kashi Ram's case (supra) it has to be held that no prejudice has been caused to accused Roshan Singh on account of the fact that the evidence that his car was lying deposited at Malkhana was not put to him under Section 313 Cr.P.C.

363. Close relations of accused Roshan Singh with other accused persons: The next circumstance relied upon the learned Trial Judge is that accused Roshan Singh was closely associated with accused Rajinder Singh, Pushpender and Nirvikar.

364. The aforesaid circumstance cannot be taken as an incriminating circumstance against accused Roshan Singh inasmuch as no evidence has been led by the prosecution to establish that accused Roshan Singh was closely associated with accused Rajinder Singh, Pushpender and Nirvikar.

365. Place of arrest of accused Roshan Singh: The next circumstance against accused Roshan Singh is that he was arrested at Hoshangabad, M.P. and that there was no occasion for accused Roshan Singh to be present at said place.

366. With respect to aforesaid circumstance, suffice would it be to state that said circumstance shows that accused Roshan Singh was absconding and the circumstance of abscondence of Roshan Singh has already been used as an incriminating circumstance against him.

367. No reason for false implication of accused Roshan Singh: The next circumstance relied upon by the learned Trial Judge to infer the guilt of accused Roshan Singh is that no reason has been given by him for his false implication in the present case.



368. We do not consider it proper to infer the guilt of accused Roshan Singh from the aforesaid circumstance.

369. Pointing out of places of murder of the deceased and the disposal of body of the deceased by accused Roshan Singh: The next circumstance used by the learned Trial Judge to infer the guilt of accused Roshan Singh is that accused Roshan Singh pointed out the place of murder of the deceased as also the place from where the body of the deceased was thrown into the canal.

370. Insofar as pointing out of place of murder of the deceased is concerned, nothing turns on the same as the said place was already in the knowledge of the police. Likewise, nothing turns on the fact that accused Roshan Singh pointed out the place from where the body of the deceased was thrown into the canal for the reason there is no evidence to show that the place pointed out by accused Roshan Singh was the place from where the body of the deceased was thrown into the canal.

371. Recovery of country made pistols and the gold ring of the deceased at the instance of accused Roshan Singh: The last circumstance used by the learned Trial Judge to infer the guilt of accused Roshan Singh is that two country made pistols and the gold ring of the deceased were recovered at the instance of accused Roshan Singh.

372. Insofar as recovery of country made pistols is concerned, suffice would it be to state that it is settled legal position that the connection between the object recovered and the offence with which an offence is charged must always be established by evidence 'alinude'. In the instant case, there is no evidence to show that the pistols recovered at the instance of accused Roshan Singh were used to murder the deceased. Therefore, the circumstance pertaining to recovery of country made pistols at the instance of accused Roshan Singh cannot be used as an incriminating piece of evidence against accused Roshan Singh.

373. Insofar as the recovery of the gold ring of the deceased is concerned, the ground of attack taken by the defence to assail the said recovery is that the family members of the deceased falsely stated that the ring in question was worn by the deceased on 24.08.2002 and the police took the ring in question from wife of the deceased and planted the same on accused Roshan Singh. It be noted here that a suggestion was given to the wife of the deceased that the Investigating Officer collected the ring in question from her on 18.12.2002 for the purposes of planting it upon accused Roshan Singh.

374. It may be noted here that the prosecution examined Inspector V.S.Meena PW-62, SI Sukaram Pal PW-39

and SI Anil Kumar Chauhan PW-44, to prove the said recovery. The aforesaid police officials deposed that a ring was got recovered by accused Roshan Singh from his residence. Sumitra Gupta PW-18, the wife of the deceased and Baldev Kumar PW-52, the jeweler who sold the ring to the deceased identified the ring recovered at the instance of accused Roshan Singh as that of the deceased. Nothing could be elicited from the cross-examination of the said witnesses which could cast a doubt upon the veracity of the said witnesses.

375. As already noted herein above, the evidence of Sumitra Gupta PW-18, the wife of the deceased, that the deceased was wearing a gold ring on 24.08.2002 has a ring of truth attached to it inasmuch as she stated the said fact in her statement to the police which was recorded just few hours after the missing of the deceased.

376. A close scrutiny of the defence taken by accused Roshan Singh with respect to recovery of the ring in question reveals that the said defence has no merit. As per accused Roshan Singh, the ring in question was collected by the Investigating Officer from the wife of the deceased on 18.12.2002. The evidence of Inspector V.S.Meena PW-62 and HC Dinesh Kumar PW-43, that the ring in question was deposited in the Malkhana on 22.11.2002 has not been

controverted on behalf of accused Roshan Singh. Therefore, when the ring in question was deposited in Malkhana on 22.11.2002 where is the occasion for the Investigating Officer collecting it from the wife of the deceased on 18.12.2002.

377. In view of above circumstances, we thus hold that the prosecution has been able to establish that a gold ring was recovered at the instance of accused Roshan Singh and that the said ring belonged to the deceased.

378. Testimony of Subash PW-38: The last circumstance used by the learned Trial Judge to infer the guilt of accused Roshan Singh is that the testimony of Subash PW-38, establishes that the body of the deceased was thrown into the canal by accused Roshan Singh.

379. A perusal of the testimony of Subash PW-38, contents whereof has been noted in para 98 above, shows that Subash was an 'inimical witness' evident from the accused Roshan Singh defeated the father of the witness in an election and that Subash was a signatory to a complaint lodged against accused Roshan Singh.

380. Inimical witnesses are not necessarily false witnesses though the fact that said witnesses have personal interest or stake in the matter must put the Court on its guard and thus the evidence of such witnesses must be subjected to

close scrutiny. (See the decision of Supreme Court reported as Chander Mohan Tiwari v State of MP AIR 1992 SC 891.

381. A close scrutiny of evidence of Subash PW-38 reveals that he is not a truthful witness. He claims that through the newspaper reports, after three or four days of the dead body of Atma Ram Gupta being recovered he realized that the dead body of which he had informed Roshan Singh was that of Atma Ram Gupta. How could he do so remains a mystery for the reason Subash does not claim that he saw the dead body about which the children of the village had told him. He has deposed that when the children told him about a dead body near the Dak Bangla he proceeded to inform the police and on the way met Roshan Singh.

382. Another fact which has cast a serious doubt on the testimony of Subash is that Subash did not come forward till about three months to report the police about the facts known to him about the body of the deceased. The learned Trial Court has also noticed the said fact but has not attached due importance to the same on the ground that Subash is a rustic villager and thus it could not be expected of him that he would approach the police on his own particularly when the matter is high profile. The aforesaid explanation given by the learned Trial Court to justify suspicious conduct of Subash is clearly untenable. He is not a rustic villager as has been projected by

the learned Trial Judge. He was signatory to a complaint lodged against accused Roshan Singh. His family members used to contest the elections. Neither was he afraid to get involved in the present matter because had that been the case he would not have come forward at all to report the matter to the police.

383. Keeping in view the fact that Subash is an inimical witness, the serious discrepancy appearing in his evidence and his suspicious conduct, we do not consider it safe to place any reliance upon the testimony of Subash.

384. Thus, there are only two incriminating circumstances against Roshan Singh. Firstly the recovery of gold ring of the deceased at the instance of accused Roshan Singh. The second is his abscondence after the day of the murder of the deceased. The two are sufficient to conclude his guilt.

#### CASE AGAINST ACCUSED PUSHPENDER AND NIRVIKAR

385. Recovery of the I-cards of the deceased at the instance of accused Pushpender and Nirvikar: The first circumstance used by the learned Trial Judge to infer the guilt of accused Pushpender and Nirvikar is that the I-cards of the deceased were recovered at their instance.

386. Before we proceed to discuss the aforesaid circumstance, we note few judicial decisions.

387. The first decision is Rex v Jora Hasji 11 Bom H.C.R. 242 wherein West J. observed that *'we must not under cover of this provision allow the discovery of ordinary articles like lathis, knives, sticks and clothes to be introduced so as to admit what are practically confessions to the police and that the discovery ought to be of a fact which is directly connected with the crime apart from the statement itself.*

388. The second decision is State v Wahid Bux AIR 1953 All 314 wherein it was observed as under:-

"Further the articles recovered were of a very ordinary type. For instance, from Waliid Bux a Dua, a Jugnu and a patta were recovered. From Dori completely torn coat and a dhoti were recovered. From Chandu a lota, a tumbler, a longe were recovered. Nothing was recovered from the other respondents. These articles were of ordinary kind and could be found with anybody in the village and the witnesses did not point out any special features or marks of identification on them. They were not able to say to whom the articles belonged. In this view of the matter the learned Sessions Judge did not draw any inference from the fact that these articles were recovered from the possession of the aforesaid respondents. We arc of opinion that the learned Sessions Judge was right in rejecting the testimony relating to the recovery of the articles."

389. The third decision is Shera v Emperor AIR 1943 Null 5 relevant portion whereof has already been noted in para 295 above.

390. A combined reading of the afore-noted judicial decisions shows that the effect of recovery of an ordinary article on the culpability of an accused is different vis-a-vis

recovery of a valuable article. The reason is obvious. While an ordinary article can easily be procured and planted upon an accused person the same is not the case with a valuable article as pointed out by Lahore High Court in Shera's case (supra).

391. Another legal principle is discernible from Jora Hasji's case (supra); that recoveries can be of two kinds; namely, (1) Those which directly connect the accused to the offence; (2) Those which may be of an incriminating nature but do not suggest any direct connection of the accused in the commission of offence.

392. In this regards, it is most apposite to note the decision of Supreme Court reported as Bhagwan Singh v State of MP AIR 2003 SC 1088 wherein it was observed as under:-

“In these circumstances, the evidence of recoveries of certain articles of the deceased on the alleged information, given by the accused is concerned, such evidence in itself is too weak a piece of evidence to sustain the conviction of the accused. The trial Judge has held that the recovery of a bottle under memorandum (Ex.P13) which is an article too ordinary to be stolen and religious book 'Vishram Sagar' with spectacles belonging to the house of the deceased were articles of little value which no accused would have carried after committing a crime.”

393. From the afore-noted decision the legal principle which can be culled out is that the effect of recovery of a useless article on the culpability of an accused person is nil.



394. I-cards purportedly recovered at the instance of accused Pushpender and Nirvikar are useless articles and are not directly connected with the crime of the murder of the deceased. Therefore, in view of the above discussion, the said recoveries cannot be taken as pointer to the complicity of accused Pushpender and Nirvikar in the conspiracy to murder the deceased.

395. Be that as it may, the evidence led by the prosecution in said regard as also the circumstances surrounding the recoveries in question are suspicious.

396. The membership of the deceased in the organization which has issued the I-card to the deceased purportedly recovered at the instance of accused Pushpender expired in the year 1995. Why would the deceased be carrying an I-card pertaining to a membership which has long expired in his pocket?

397. Ram Chander PW-20, a witness to the recovery of I-card pertaining to accused Pushpender deposed that no I-card was found in the possession of accused Pushpender at the time when he conducted a primary search of accused at the time of his arrest. Where did the I-card materialize from if the same was not found in the primary search?

398. The above two unanswered questions seriously vitiates the case set up by the prosecution with regard to the

recovery of I-card of the deceased at the instance of accused Pushpender.

399. With regard to accused Nirvikar, it is most relevant to note that the disclosure statement of Nirvikar does not contain a word about the I-card of the deceased.

400. In this regards, it is most relevant to note following observations of Supreme Court in the decision reported as Pohalaya Motya Valvi v State of Maharashtra AIR 1979 SC 1949:-

“The High Court uses the pronoun 'I' at two places. We, with the assistance of both the learned Counsel proficient in Marathi language read the original statement. The reading of the statement by the High Court appears to be far-fetched. Even the High Court is conscious of it when it observes in para 20 of the judgment that the authorship of the act of concealment of the spear would be implied and would be none other than the appellant, and then observes that this circumstance which is one of the strongest links stands duly established. The Marathi word 'Me' is to be found at the commencement of the statement followed by the wholly inadmissible portion and then there is reference to the place where the spear was hidden. The Marathi expression 'Thevalela' would more appropriately be translated has been kept and not 'I have kept' because in the case of 'Have kept it,' the Marathi word would be 'Thevala'. It may be that being not conversant with Marathi language our translation may not be appropriate but if this recovery of bloodstained spear is the only important circumstance of an incriminating character established in this case and if the authorship of concealment is not clearly borne out by cogent and incontrovertible evidence but as the High Court observes left to be inferred by implication, we have considerable hesitation in placing implicit reliance upon it. More so when it is a confessional statement which becomes

admissible under Section 27 of Evidence Act though made in the immediate presence of a Police Officer. The recovery of a bloodstained spear becomes incriminating not because of its recovery at the instance of the accused but the element of criminality tending to connect the accused with the crime lies in the authorship of concealment, namely, that the appellant who gave information leading to its discovery was the person who concealed it. And in this case Bhamta was another co-accused. The appellant may have only the knowledge of the place where it was hidden. To make such a circumstance incriminating it must be shown that the appellant himself had concealed the bloodstained spear which was the weapon of offence and on this point the language used in the contemporaneous record Ext. 28 is not free from doubt and when two constructions are possible in a criminal trial, the one beneficial to the accused will have to be adopted. Therefore, this linchpin of the prosecution case ceases to provide any incriminating evidence against the appellant.”

401. Accused Nirvikar is on a better footing than the accused before Supreme Court in Pohalaya's case (supra). The disclosure statement of Nirvikar does not contain a word about I-card of the deceased, much less a recording pertaining to authorship of the concealment of the said I-card.

402. In such circumstances, we reject the evidence pertaining to the recovery of the I-cards of the deceased.

403. Unemployment of accused Pushpender and Nirvikar: The next circumstance relied upon by the learned Trial Judge to infer the guilt of accused Pushpender and Nirvikar was that they were unemployed. Merely because accused Pushpender and Nirvikar were unemployed does not

mean that they participated in the conspiracy to murder the deceased.

404. Pointing out of place of murder of the deceased by accused Pushpender and Nirvikar: The next circumstance used by the learned Trial Judge to infer the guilt of accused Pushpender and Nirvikar is that they pointed out the place of murder of the deceased. Nothing turns on the same as the said place was already in the knowledge of the police.

405. Discovery of clues from the disclosure statement of Pushpender and Nirvikar: - The next circumstance used by the learned Trial Judge to infer the guilt of accused Pushpender and Nirvikar is that the disclosure statement of accused Pushpender and Nirvikar provided clues to the investigating agency.

406. The aforesaid circumstance is factually incorrect inasmuch as the police did not get any clues from the disclosure statements of accused Pushpender and Nirvikar. The police got the clues from the disclosure statements of accused Raj Kumar and Roshan Singh. None have been set out by the learned Trial Court. None have been shown to us.

407. Before concluding the discussion pertaining to accused Pushpender and Nirvikar, we would like to highlight a grave illegality committed by the learned Trial Court. The learned Trial Court convicted accused Pushpender and Nirvikar

for illegally possessing and using the firearms recovered at the instance of accused Roshan Singh. No evidence was led by the prosecution to establish that the firearms recovered at the instance of Roshan Singh were possessed or used by accused Pushpender and Nirvikar. The only documents on record which contains a recording that the firearms recovered at the instance of accused Roshan Singh were used by Pushpender and Nirvikar are the disclosure statements of Pushpender and Nirvikar, contents of which are completely inadmissible in evidence.

408. The net result of the above discussion is that the case of the prosecution fails against accused Pushpender and Nirvikar.

#### CASE AGAINST THE POLICE OFFICERS

409. Testimony of Subash PW-38: The first circumstance used by the learned Trial Judge to infer the guilt of the police officers that the testimony of Subash PW-38, establishes that they provided aid to Roshan Singh in throwing the body of the deceased into the canal.

410. We have already held above that we do not consider it safe to place any reliance upon the testimony of Subash PW-38.

411. Abscondence of the police officers : The next circumstance used by the learned Trial Judge to infer the guilt

of the police officers is that they were absconding. In this regards, suffice would it be to state that abscondence in itself is not the sufficient to infer the guilt of an accused person.

412. Pointing out of places of murder of the deceased and the disposal of body of the deceased by accused Roshan Singh: The last circumstance used by the learned Trial Judge to infer the guilt of the police officers pointed out the place of murder of the deceased as also the place from where the body of the deceased was thrown into the canal.

413. Insofar as pointing out of place of murder of the deceased is concerned, nothing turns on the same as the said place was already in the knowledge of the police. Likewise, nothing turns on the fact that the police officers pointed out the place from where the body of the deceased was thrown into the canal for the reason there is no evidence to show that the place pointed out by accused Roshan Singh was the place from where the body of the deceased was thrown into the canal.

414. The end result of the above discussion is that the case set up by the prosecution against accused Sripal Singh, Rakesh Kumar and Satender Kumar fails.

#### CONCLUSION

415. The end result of the journey undertaken by us is that the appeals filed by Sharda Jain and her brother Raj

Kumar i.e. Crl.A.No.51/2007, criminal appeal filed by Roshan Singh i.e. Crl.A.No.139/2007 and criminal appeal filed by Rajinder i.e. Crl.A.No.144/2007 are dismissed. Criminal appeals filed by Pushpinder, Nirvikar, Rakesh Kumar, Sripal Singh Raghav and Satender Kumar i.e. Crl.A.No.19/2007, Crl.A.No.121/2007 and Crl.A.No.65/2007 are allowed. Pushpinder, Nirvikar, Rakesh Kumar, Sripal Singh Raghav and Satender Kumar are acquitted of the charges framed against them. Such of the accused who are in custody and whose appeals are allowed are directed to be set free unless required in custody in some other case. Such accused who have been acquitted and are on bail, we discharge their bail bonds and surety bonds.

**(PRADEEP NANDRAJOG)  
JUDGE**

**(INDERMEET KAUR)  
JUDGE**

**AUGUST 27, 2009  
mm/dk**