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

Reserved on: 29th August, 2016
Pronounced on : 08th February, 2017

\+ CRL.A. 1284/2015

SUSHIL ARORA ..... Appellant

Through: Mr. Vikas Arora and Ms. Radhika Arora, Advocates

Versus

STATE ..... Respondent

Through: Ms. Aasha Tiwari, APP for State

\+ CRL.A. 53/2016

RAJESH PANDEY ..... Appellant

Through: Mr. Vivek Sood, Sr. Advocate with Mr. Ashim Shridhar, Advocate

Versus

STATE (GOVT. OF NCT OF DELHI) ..... Respondent

Through: Ms. Aasha Tiwari, APP for State

\+ CRL.A. 190/2016

HEMANT GARG ..... Appellant

Through: Mr. K. Singhal, Advocate

Versus

STATE NCT OF DELHI ..... Respondent

Through: Ms. Aasha Tiwari, APP for State

+ CRL.A. 1338/2015

VISHNU S/O PANCHU RAM ..... Appellant
Through: Mr. M.N. Dudeja and Mr. Rajesh Kaushik, Advocates

Versus

STATE NCT OF DELHI ..... Respondent
Through: Ms. Aasha Tiwari, APP for State

+ CRL.A. 283/2016

SONVEER alias PINKU ..... Appellant
Through: Mr. Rajeev Mohan, Advocate

Versus

STATE ..... Respondent
Through: Ms. Aasha Tiwari, APP for State

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K. GAUBA, J:

"...A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being

punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish..."

[*Gangadhar Behera v. State of Orissa*, (2002) 8 SCC 381 and *Inder Singh* v. *State (Delhi Admn.)* (1978) 4 SCC 161]

1. These five appeals challenge the judgment dated 02.07.2015 and order dated 26.08.2015 passed by the Additional Sessions Judge, New Delhi in sessions case no.07/2009. By the impugned judgment, the learned trial court held the appellants guilty for offences punishable under Sections 302 and 307 read with Section 34 of Indian Penal Code, 1860 (IPC) and by the impugned order awarded as punishment imprisonment for life with various amounts of fine to each of them. By the impugned judgment, one of the appellants, viz Sonveer @ Pinku (Crl. Appeal no.283/2016) was acquitted of the charge under Section 27 Arms Act 1959, which had been additionally framed against him and against another appellant Vishnu (Crl. Appeal no.1338/2015), on the ground no proof had been adduced with regard to the grant of sanction under Section 39 of the Arms Act.

2. I had penned this opinion in September - October last year, drafting it for the bench to return a decision dismissing all the appeals thereby upholding the conviction. Upon receiving copy of a totally divergent opinion, prepared with great labour and erudition by my learned senior colleague on the bench, Gita Mittal, J, I am obliged to suitably modify the document and also now present it as "my" opinion and consequently replacing such words as "we" and "our", wherever they occur in the

original draft with "I" and "my". Aside from such cosmetic changes, I must say that having accorded anxious and careful consideration to the reasons set out in the said separate opinion proposing acquittal for all the five appellants, I, however, do not stand persuaded to revise my view. I wish to express some additional thoughts at the end of the original draft to explain why I respectfully disagree with the opinion commending benefit of doubts to be accorded and the appeals to be allowed.

POLICE REPORTS

3. The sessions case in which the impugned judgment and order were passed from which these appeals arise relates to the first information report (FIR) that had been registered (Ex.PW25/A) at 7.00 p.m. on 22.02.2009 in police station Chanakya Puri (police station) under Section 154 of the Code of Criminal Procedure, 1973 (Cr. PC) on the basis of *rukka* (Ex. PW26/A) that had been sent at 6.30 p.m. on the same evening by Inspector Surender Singh Rana (PW-26) of the police station respecting an incident that had statedly occurred at a place described as Ridge Road, near Simon Boliver Marg, T Point, it essentially being founded on the statement (Ex. PW1/A) of Sunil (PW-1), the first informant (presented as an eye witness), the investigation into the FIR brought out that in the subject incident a young person named Ankit, son of Mr. Rajiv Minocha, aged about 23 years resident of a house in Ward no.4, Mehrauli, New Delhi had suffered fire arm injuries to which he had succumbed during treatment in the Jai Prakash Narayan Apex Trauma Centre of the All India Institute of Medical Sciences (AIIMS), New Delhi (hereinafter referred to as "the trauma centre" or "the Hospital"). It has

been the case of the prosecution that in the same incident Surender (PW-8), a resident of a village in Tehsil Farooq Nagar, District Gurgaon, Haryana, then aged about 26 years, had also been shot at and had resultantly sustained a fire arm injury. The FIR was registered for investigation into offences under Sections 302, 307, 34 and 120B IPC besides under Sections 25 and 27 of the Arms Act.

4. On 24.02.2009, the appellant Sushil Arora (Crl. Appeal no.1284/2015), resident of house no.113, SBI Colony, Paschim Vihar, New Delhi working for gain by running business in the name and style of "Chintoo Car Point" from a premises described as shop no.1 at 17 Pusa Road, opposite Jassa Ram Hospital, New Delhi – hereinafter described, for convenience, variously by name or as accused / appellant no.1 (A-1) – surrendered before the Investigation Officer (IO) at the police station and in view of the evidence that had statedly been gathered by that time, he was formally arrested for involvement in the aforementioned crime. A report under Section 173 Cr. PC (charge-sheet) dated 23.05.2009 was submitted by Inspector Jagat Singh (PW-47), the then Station House Officer (SHO) of the police station in the court of the Metropolitan Magistrate seeking prosecution of the appellant Sushil Arora (A-1) for the offences under Sections 302, 307, 34 and 120B IPC, also stating that further investigation in terms of Section 173(8) Cr. PC was underway as arrests of four other persons wanted in the case described by names as Hemant Garg, Sonveer @ Pinku, Vishnu and Rajesh Pandey (i.e. the other four appellants) were yet to be effected. Cognizance on this police report (the first charge-sheet) was taken and requisite process initiated by the concerned Metropolitan Magistrate.

5. During further investigation, besides collection of other evidence, the appellant Hemant Garg (Crl.Appeal no. 190/2016) – hereinafter described, for convenience, variously by name or as accused / appellant no.2 (A-2) – was formally arrested on 10.08.2009, after his presence had been secured in the court of the Metropolitan Magistrate on the basis of the production warrant that was issued on the request of the IO upon he having learnt that he (Hemant Garg) was lodged in judicial custody in connection with another case relating to FIR no.535/2002 under Sections 365, 366 & 376 IPC PS Timarpur. It has been the case of the prosecution that on 27.08.2009 upon secret information, appellant Sonveer @ Pinku (Crl. Appeal No. 283/2016) – hereinafter described, for convenience, variously by name or as accused / appellant no.3 (A-3) – was arrested from the Coffee Home parking close to Hanuman Mandir, Connaught Place, New Delhi. Further, on 29.09.2009, appellant Vishnu (Crl. Appeal 1338/2015) – hereinafter described, for convenience, variously by name or as accused / appellant no.4 (A-4) – was formally arrested with the permission of the Metropolitan Magistrate in whose court he was produced on the production warrant on request of the IO he having learnt about he being in judicial custody in another case relating to FIR No.47/2007 under Sections 324, 506 & 34 IPC PS Prashad Nagar.

6. After the arrests of the above three additional accused – i.e. appellants Hemant Garg (A-2), Sonveer @ Pinku (A-3) and Vishnu (A-4) – on the basis of further investigation, a supplementary report under section 173 Cr. PC was laid in the court of the Metropolitan Magistrate on 24.10.2009 seeking their trial with the first accused for offences under Sections 302, 307, 34, 120B IPC read with Sections 25 and 27 of the

Arms Act. It may be added that in this supplementary report (the first supplementary charge-sheet) the name of Rajesh Pandey, the fifth appellant was again mentioned, he having since been declared a proclaimed offender by the court of the Metropolitan Magistrate by order dated 30.07.2009. The Metropolitan Magistrate took cognizance on the first supplementary charge-sheet and initiated further action thereupon under the law.

7. On 11.11.2009, the appellant Rajesh Pandey (Crl. Appeal no.53/2016) – hereinafter described, for convenience variously by name or as accused / appellant no.5 (A-5) – was statedly arrested on basis of secret information, from outside New Delhi Railway Station and after further investigation, another supplementary report under section 173 Cr. PC (second supplementary charge-sheet) was submitted on 02.01.2010 in the court of the Metropolitan Magistrate seeking his trial with the other four persons for the aforementioned offences. Cognizance on this second supplementary charge-sheet was also taken.

THE CHARGE AND FINDINGS OF TRIAL COURT

8. Eventually all the three charge-sheets were clubbed and the case came up for trial before the court of the sessions which decided, by its detailed order dated 29.01.2010 followed by subsequent orders to put the five appellants to trial on charge for offences under Sections 302, 307 read with Sections 34 and 120B IPC, the gravamen of which was that the five appellants, having entered into a criminal conspiracy, while travelling in a car make Indica bearing registration No.DL-3C-AX 2192 (hereinafter referred to as "the Indica car") at about 1.50 p.m. on 22.02.2009 on Ridge Road, Near Simon Boliver Marg, T Point, had committed certain acts of

commission resulting in a black coloured car make Santro bearing registration no.DL-2FF-K0002 (hereinafter referred to as "the black Santro car") to be overtaken, and intercepted, and its occupants being fired at resulting in fire arm injuries being suffered by Ankit (hereinafter "the deceased" or "the victim") and Surender (PW-8), resulting in the death of the former. In the charge-sheet, it was the case of the prosecution that in the said incident, appellants Sonveer @ Pinku (A-3) and Vishnu (A-4) were wielding fire arms which they had used, at the instance of and in connivance with the other three appellants, to cause the fatal injury on the person of Ankit (the deceased) and fire arm injury on the person of Surender (PW-8).

9. Since the first charge-sheet had been laid only against appellant Sushil Arora (A-1), the others not having been then arrested, the case against him having been committed to the court of sessions, the trial commenced against him with formal charge having been framed on 22.08.2009. In the wake of the two supplementary charge-sheets also having come before the court of sessions, formal charges against the other four appellants on similar lines were framed on 29.01.2010.

10. As noticed at the outset, on the conclusion of the trial, the sessions court, by the impugned judgment, accepted the case of the prosecution in so far as it related to the charge for the offence of murder of Ankit (deceased), punishable under Section 302 IPC, and for the attempted murder of Surender (PW-8), punishable under Section 307 IPC, returning a finding that the said offences had been committed by all the five appellants acting in concert pursuant to a common intention shared by them, thus invoking the provision contained in Section 34 IPC. Though

the charge, as formally framed, had also referred to the criminal conspiracy in which the five appellants were allegedly a party, with reference to Section 120 B IPC, the trial judge did not indicate any definite finding on that subject.

11. As mentioned earlier, the additional charge for the offence under Section 27 Arms Act had been framed both against the appellant Sonveer @ Pinku (A-3) and Vishnu (A-4). The impugned judgment concluded with the former (A-3) having been acquitted in absence of formal proof of sanction under Section 39 Arms Act, there being no finding returned under identical charge qua Vishnu (A-4).

12. Since all the five appeals arise out of the impugned judgment, each assailing the findings returned by the trial court, the background facts and evidence being common and the arguments raised being mostly similar, if not over-lapping or identical, these appeals were taken up together for hearing.

FORENSIC REPORTS

13. During the course of hearing on these appeals, it came to light that some reports of Forensic Science Laboratory (FSL) relating to the case at hand, though filed on the record of the trial court, had escaped notice and had not been formally tendered. Since reference was being made to the result of the said part of the forensic investigation, and since the said material is of import, on the request of the learned additional public prosecutor, with the learned counsel for the appellants submitting no objection, in exercise of powers vested in this court under Section 391 Cr. PC, by our order dated 08.08.2016, the court permitted the learned additional public prosecutor to tender the said reports, copies of which

were duly supplied to the appellants, in evidence, in terms of Section 293 Cr. PC. Thus, during and on the basis of the statement of Ms. Aashaa Tiwari, learned additional public prosecutor, recorded on 08.08.2016, the reports of FSL bearing no.2009/F-4309 dated 08.12.2010 (page no.3901-02 of the trial court record) and 2009/B-2203/498-Ba dated 8th December, 2010 (page no.3903-6 of the trial court record) of ballistics division (vide Ex. HC-A and HC-B respectively), besides report no.2009/B-2203 dated 15.12.2010 (page no.3911-13 of trial court record) and report no.2009/B-2203 dated 15.12.2010 (page 3907 of trial court record) of biology division (vide Ex. HC-C/1 and HC-C/2 respectively) given under the cover of letter no. 2009/B-2203/9446 dated 15.12.2010 (page no.3909 of trial court record) of the Director FSL (vide Ex. HC-C) were taken on board. In the wake of additional evidence under Section 391 Cr. PC, having come on record during the hearing on these appeals, in order to give an opportunity to the appellants to offer their explanation in such respect, their further statements under Section 313 Cr. PC (in continuation of such statements already taken by the trial court) were recorded on 08.08.2016.

14. The court has heard at length the learned counsel for each of the appellants and the learned additional public prosecutor for the State and with their assistance during the course perused the record of the case.

DEATH OF ANKIT – HOMICIDAL?

15. There is overwhelming evidence brought on record to establish that Ankit (the victim) died a homicidal death on account of fire arm injuries suffered sometime around 1.50 p.m. on 22.02.2009 at a place near Simon Boliver Marg, T Point on Ridge road at or about the time when he was

travelling in the black Santro car, it being a part of an incident wherein more than one shot was fired from the firearm(s) used.

16. The copies of the logs of the police control room (PCR) based, initially on a telephonic call received at 13:58:22 hours from mobile "9971054074", followed by another call from same number at 14:04:29 hours and by inputs from the officials manning three PCR vans (namely, PCR Vans with call signs VTR-69, TGR-4 and VTR-70), they forming part of what are described as PCR form (Ex.PW-29/A and Ex.PW30/A) of an earlier incomplete version (mark 'X') of the latter also part of the material submitted, reveal information having been given about a person travelling in the black Santro car having been shot at, coupled with the black Santro Car, properly described by its registration number also having been found at the scene. This information was conveyed to the police station by PCR at 2.08 p.m. recorded vide DD entry no.15/A (Ex.PW34/A). Noticeably, PCR vans which had converged at the scene had also reported to the control room, where it had been properly logged (Ex.PW 30/A), that the victim had been taken to hospital by another Santro car bearing registration no.DL-4C-AG-7179 (which, going by the other evidence on record, that may be discussed later may be referred hereinafter as "white Santro Car"). It must be added here that as per the PCR form (Ex.PW30/A) the victim had been carried in the white Santro car from the place of occurrence to "Safdurjung Hospital", which information, as came to be revealed eventually, was not accurate in as much as the victim was brought to the AIIMS trauma centre rather than Safdurjung Hospital. There has been some argument raised as to this discrepancy but that would need to be discussed later and need not distract

one at this stage. For the present, it may be noted that the same information about the role of the white Santro car vis-à-vis the victim was also part of the first input vide DD entry no.15A (Ex. PW-34/A).

17. According to DD entry no.15A (Ex. PW-34/A), the matter arising out of the above noted input was made over to ASI Nand Kishore (PW-24) who set out for the scene of occurrence accompanied by constable Pradeep Kumar. The DD entry further reveals that the information was also passed on to Inspector Surender Singh Rana (PW-26), who was posted as Inspector in the police station at the relevant date. According to the evidence of Inspector Surender Singh Rana (PW-26) and that of the SHO (PW-47), both together rushed to the place of occurrence.

18. The evidence of all the above mentioned police officials reveals that on arrival at the scene of occurrence they found the black Santro car parked on the left hand *katcha* portion of the road on the carriage-way leading towards Dhaula Kuan with a hole in the small triangular glasspane next to the window glass of the right side door, the crack indicative of it having been caused due to a bullet. The car also bore other tell-tale signs of firing including scratch marks on the right side of its chassis, with the black Santro car having in due course being examined by Dr. V.R. Anand (PW-19), Sr. Scientific Officer, Ballistics Division, FSL, as per the crime scene report (Ex. PW19/A) and the control swabs (referred to as marked H1 and H2) collected (vide seizure memos Ex. PW26/K and PW26/L) in such exercise eventually being confirmed by the FSL report (Ex. HC-B) to be bearing gun shot residue (GSR) particles leaving no room for doubt about the car having been targeted and hit by projectiles discharged through a fire arm.

19. The *rukka* (Ex. PW26/A) on the basis of which FIR (Ex. PW25/A) was registered was prepared and sent by Inspector Surender Singh Rana (PW-26). It is in two parts, one being the statement (Ex. PW1/A) of the first informant Sunil (PW-1) and the second / latter endorsement of Inspector Surender Singh Rana (PW-26) narrating the sequence of events leading to such report being registered, the observations of the scene of crime being included therein. The said narration of the sequence of events has been affirmed by all the above mentioned police witnesses in the course of their respective testimonies, as indeed by certain public witnesses.

20. The above-said part of the evidence reveals that upon arrival at the scene, the Investigating Officer and other police officials accompanying, or following, him there had found blood spilled in substantial quantity behind the stationary Santro car and also on the *katcha* portion close to the road. As the ocular evidence would reveal, Ankit (the victim) had been found lying on the road behind the stationary black Santro car, at that stage still alive. The Investigating Officer also found an empty cartridge with marking "KF 7.65" engraved on its bottom on the *katcha* portion close to the car on the left side and another similar empty cartridge with similar marking on the *katcha* portion on the right side of the road a little ahead. It may be mentioned here itself that in the course of investigation that followed, the IO recorded the respective locations of various exhibits at the scene of crime depicting it in the site plan (Ex. PW26/B). He also called the crime team which included a photographer (PW-7) which preserved the scene in the form of photographs (Ex. PW-7/P1 to P-26, mark X1 to X29) which have been produced in evidence. These

photographs include several (Ex.PW2/X27 to X29, PW7/A-4, 5, 7 to 9) of the black Santro car, they having been taken from angles clearly depicting the bullet hole in the right side triangular glasspane close to the window glass of the right side door. The Investigating Officer also seized various exhibits from the scene of crime including the samples of blood lying at several places near the car and also from its body besides the earth control (vide Memo Ex. PW-24/A). The fired cartridge (Ex. PW-24/X-7) lying in the pool of blood on the rear side of the car (vide memo Ex. PW24/D) and the other fired cartridge and lead (Ex. PW24/X-8) lying 200 metres ahead of the car on the *katcha* portion on the road side (Ex. PW24/E) and the car itself (vide Ex.PW24/C).

21. The PCR form (Ex. PW-30/A) indicates that the victim Ankit had been shifted from the scene of crime in Santro car bearing no.DL-4C-AG-7179 (white Santro car). As per the prosecution case, the white Santro car was driven by Narender Singh (PW-12) who had come on the scene driving the said car immediately after the occurrence. PW-12 has affirmed the said role performed by him in the course of his testimony. The defence, however, has questioned the credibility of this witness submitting, *inter alia*, that he had been planted. I shall take up this *issue* in due course. For the present, I need only observe that there is clear evidence indicating that Ankit was actually removed from the aforementioned scene of crime in injured state and brought to the casualty of trauma centre of AIIMS and died there as is clearly established, amongst others, by the medico legal certificate (MLC) of Ankit (Ex. PW50/A), proved by Dr. Harshwardhan (PW-50), in absence of its author

Dr. Mukesh Kumar, with whose hand writing he is duly acquainted, both having worked together.

22. The MLC (Ex. PW-50/A) proves that Ankit, his parentage then not known, was brought to the hospital at 2.20 p.m. on 22.02.2009 with history of gunshot wound. The person who had brought the victim (Ankit) was described in the hospital record as one Satpal resident of H.No.61, Chattarpur Enclave. This description was apparently incorrect as the investigation has not been able to find any person bearing such name or description. The medical officer who examined the victim while noting the history of injuries referred to the person accompanying the victim as a "passerby".

23. Noticeably, the MLC recorded that the victim, when brought was in a "drowsy" state and was gasping, his airway full of blood, blood oozing out from his scalp with another wound at the right shoulder region. The record relating to the hospital and the other evidence shows that the condition of Ankit was deteriorating and he was never in a position to make a statement to anyone concerning the identity of the author of the fire-arm injuries suffered by him. He died during treatment at 4.15 p.m. on 22.02.2009. Besides the inquest papers, which include death report (Ex. PW-26/F) and the application for post mortem examination (Ex. PW-26/D), the autopsy report (Ex. PW-18/A), duly proved by Dr. Arvind Kumar (PW-18), leave no room for doubt as to the fact of cause of death being fire-arm injuries which, besides the other injuries, they being in the nature of abrasions, were described by the autopsy doctor (PW-18) as under :-

"8. Stitched wound of size 1.5 cm on left parieto – occipital region of scalp. On dissection there were massive diffuse extra-vasation of blood below scalp (prominently on left side). Skull showed fracture of left occipito – parietal bone (3 x 1 cm) and posterior cranial fossa with fracture line extending up to middle cranial fossa and involving left temporal bone. There were corresponding tears in dura matter. Brain was showing extensive laceration with a communicating gap from posterior superior surface of left occipital lobe to interior surface of occipito temporal lobe. Track was filled with clotted blood and pieces of bones. On dissecting the lower portion of occipital bone bullet of zie .9 x .7 cm was recovered from left laterial side of neck at level of C1-2 vertebrae. (Track of wound - left parieto occipital region (entry) to left side of neck laterally, directed above downword and anteriarily. Small metallic fragment of bullet was recovered from wound track on left temporal region.

X X X

10. Firearm entry wound of size 1.3 x 1 cm on right arm posterior lateral aspect upper 1/3rd region with abrasion collar (3 mm) and contusion collar (1 cm) around entry wound, with inverted margin and oozing of blood. The wound was situated 14.5 cm BELOW LEFT SHOULDER TOP, 23 CM above left elbow, 35 cm below top of head, and 144 cm above of left heel. The track of wound was in muscular plane entering in to the chest cavity with extensive extra vacation of blood on right side chest wall. The track was entering in to pleural cavity through 3rd inter coastal space (right) pleural cavity was filled with blood. The track of wound was through lower lobe of right lung then through diaphragm in to right lobe of lever. Bullet was recovered from right lobe of lever."

24. The autopsy report unmistakably shows that the cause of death was shock and haemorrhage due to ante-mortem firm-arm injuries noted above which, in the opinion of the autopsy doctor, with which I wholly agree,

were sufficient to cause death in the ordinary course of nature individually as well as collectively.

25. The ocular evidence suggest that Ankit had suffered the first fire-arm injury in the right arm pit at a time when he was travelling in the black Santro car sitting on the rear right side, bullet having pierced through the triangular glasspane fitted in the rear right door of the car causing the hole which was mentioned earlier. The ocular evidence further indicates that after being thus hit, the firm arms being in continuous use to target the occupants of the said car, the car having come to a standstill with no possibility of it moving ahead due to traffic jam at the red traffic signal, its driver and other companions of the deceased in the car had come out with him in an attempt to run to safety. The said evidence further shows that Ankit who had been wounded in the right arm pit (tenth injury in autopsy report) by the fire-arm was unable to move beyond small distance and had fallen down on the road on rear side of the stationary car where one of the assailants, who statedly had come in the Indica car, had fired at him again in the head region causing (the eighth) injury noted in the autopsy report referred to above.

26. Even if I were not to take the ocular evidence into account at this stage, the very fact that Ankit suffered bullet injuries clearly inflicted by someone else, one after the other, with no theory of these injuries having been accidental or self-inflicted propounded by any side, I do not have the least doubt that they had been inflicted by the assailant(s) intentionally. There can be no quarrel with the thought that a fire arm injury intentionally pumped into the head region of a living human being is actuated by nothing but an intention to cause death. Thus, I uphold the

finding returned by the learned trial court that the death of Ankit in the aforementioned facts and circumstances was a case of culpable homicide within the meaning of the expression defined in Section 299 IPC, it consequently amounting to murder as per Section 300 IPC an offence that is punishable under Section 302 IPC.

DEFAULT ON LOAN

27. According to the prosecution case, the subject incident had its genesis in a dispute between the appellant Sushil Arora (A1) on one hand and Mahender Singh (PW-9) on the other. I may mention here that the full name of Mahender Singh (PW-9) is Mahender Singh Tikla, and thus, he has been referred in some part of the evidence simply as "Tikla" as well. Appellant Sushil Arora (A1) concededly ran a business in the name and style of Chintoo Car Point from the shop opposite Jassa Ram Hospital, New Delhi, referred to earlier. It appears his elder brother Pushkar Raj (DW-6) is his associate, they being engaged in the business of sale, purchase and finance of motor vehicles. The evidence, particularly of PW-9, Mahender Singh, about his acquaintance with both A1 and DW-6 and about a loan extended by PW-9 to A1 has gone unchallenged. PW-9 is also engaged in the business of transport in the name and style of CR Transport from a premises in Mehrauli. As per the evidence, he had passed on a loan of ₹10 Lakh in June or July 2008 to A1 which was to be repaid with interest. It is stated that A1 had given two post dated cheques each of ₹5 Lakhs (Ex. PW-9/A and PW9/B) under his signatures to PW-9, they representing the intended refund. According to the version of PW-9, the loan amount was repayable with interest at the rate of 2% p.m. which was duly paid by A1 to him for and upto December

2008 whereafter default had occurred. This, per the evidence of PW-9, had given rise to a dispute between him on one hand and A1 on the other. I may note here that when confronted with the evidence to above effect in the course of statement under Section 313 Cr. PC, A-1 did not deny the loan transaction or the issuance of post dated cheques (Ex. PW-9/A and PW-9/B) by him in favour of PW-9 or even about non-payment of the interest, his denial being essentially to the effect that there was "no dispute" with regard to the repayment of the loan. Noticeably, he would not elaborate further nor lead any evidence in defence to prove any theory other than he being in default in timely payment of the loan / interest.

28. In this view of the matter, the Court must accept the evidence of PW-9 as indeed the finding returned by the learned trial judge on the subject of default on the part of A-1 in refund of the loan / interest.

PROSECUTION CASE

29. It has been the case of the prosecution that PW-9, in his endeavour to realize the loan and the interest from A1, had visited him at Chintoo Car Point first on 20.02.2009, and then on 22.02.2009, the date of incident. The narration about these visits as appearing for the first time on record can be located in the FIR based on the statement of Sunil (PW-1) who is a nephew of Mahender Singh Tikla (PW-9). Besides the appellants, whose complicity in the crime is at the core of the charge, the *dramatis personae* involved include (in addition to some public witnesses, whose role shall be discussed a little later) Mahender Singh Tikla (PW-9), Hemant (PW-10), Gajender Singh (PW-11) on one hand and the first informant Sunil (PW-1), Paramjeet Singh @ Monu (PW-5), Varun (PW-6) and Surender (PW-8), this in addition to Ankit (the victim / deceased

on the other). Out of these Sunil (PW-1) statedly had accompanied Mahender Singh Tikla (PW-9) to the shop of A1 on both said visits i.e. the visits of 20.02.2009 and 22.02.2009. His visit on 22.02.2009 was by travel in the black Santro car which, per the evidence of all these witnesses, was driven by Paramjeet Singh (PW-5) who is also the owner of the said vehicle, he again being in the transport business at Mehrauli with his uncle Mahender Singh Tikla (PW-9). For clarity, I note that Paramjeet Singh (PW-5) did not describe himself by the name of Monu but the said other name by which he is known came out in the testimony of Varun (PW-6). In the black Santro car, per the evidence of all these witnesses, besides Paramjeet Singh (PW-5) being the driver, the others travelling included Varun (PW-6) occupying the front left side next to the driver, Ankit (victim / deceased) sitting on the right rear side of the car with Surender (PW-8), other person statedly injured by fire arm, occupying the left rear seat, Sunil (first informant / PW-1) sitting in the middle rear seat. These five persons were, thus, travelling in the black Santro car when it was targeted by firing. On the other hand, Mahender Singh Tikla (PW-9) had travelled to Chintoo Car Point office of A1 on 22.02.2009 in another car, make Esteem, (hereinafter referred to as "the Esteem car"), with Gajender Singh (PW-11) and Hemant (PW-10) also having accompanied.

30. According to the version of Sunil (PW-1) in the FIR, read alongside the version of other above-mentioned witnesses, in general, and of Mahender Singh Tikla (PW-9), in particular, as culled out from the evidence gathered during investigation, Mahender Singh Tikla (PW-9) accompanied by Sunil (PW-1) had visited the shop of A1 on 20.02.2009

to demand return of the loan money and interest. At the time of the said visit, A-1 had met them with his friend, appellant Rajesh Pandey (A-5) also present, A-1 having asked PW-9 to come again on 22.02.2009. On 22.02.2009, Mahender Singh Tikla (PW-9) with other accompanying him in the Esteem car, they including Hemant (PW-10) and Gajender Singh (PW-11) reached the office of A-1 in the afternoon. At this stage, Sushil Arora (A-1) had with him Rajesh Pandey (A-5) present with him in the office. It is the case of the prosecution that during discussion A-1 initially expressed inability to repay the money but eventually agreed to refund the loan in instalments of ₹2 Lakh p.m. but not so as to pay any interest. In the said parleys, Rajesh Pandey (A-5) statedly told Mahender Singh Tikla (PW-9) that he was trapped and would have to abide as directed in words, in vernacular to the effect that he was cornered (trapped) and that he should comply as told to do. It is the case of the prosecution that there were 3-4 persons standing outside the office of Chintoo Car Point who would, per the evidence collected during investigation, include Hemant Garg (A-2), Sonveer @ Pinku (A-3) and Vishnu (A-4). It has further been the case for the prosecution that since Mahender Singh Tikla (PW-9) was finding it difficult to negotiate and was feeling threatened, on his request and at his instance, his nephew Sunil (PW-1), accompanied by above mentioned persons, also reached in the meanwhile (statedly around 12.45 p.m. outside the shop of A-1). There is mention of a quarrel erupting between the aforementioned 3-4 persons present outside the office of A-1 on one hand and Varun (PW-6) who had accompanied Sunil (PW-1) and the others in the black Santro car to the place on the other. I may add here that the evidence on record has also brought out that in the said quarrel

besides Varun (PW-6), Ankit (the victim /deceased) was also actively engaged. The quarrel, per the version in the FIR, as indeed in the ocular testimony on record, essentially related to the right of way since, it has been explained repeatedly by various witnesses, the passage of the black Santro car in which the first informant (PW-1) had travelled was blocked by certain other vehicles (motor cycles with which the said 3-4 persons as mentioned above including A-3 and A-4 were apparently connected). It is clear from the evidence that both the Esteem car (in which PW-9, PW-10 and PW-11 were travelling and the black Santro car (in which the first informant Sunil and others including the injured Surender and deceased Ankit were travelling) had moved from the place (*i.e.* the market where the shop of A-1 is located), one after the other, the Esteem car having gone ahead. The occupants of the Esteem car (i.e. PW-9, PW-10 and PW-11), thus, would not be directly privy to what was to happen to the black Santro car and its occupants a little later, they statedly learning about the firing incident when their car had reached the vicinity of Hyatt Regency Hotel on its way to Mehrauli.

31. As per the version of first informant (PW-1) in the FIR, the black Santro car had reached a little ahead of Buddha Garden gate on the Ridge road at about 1.50 p.m. when it was stopped for purchasing cold drinks from a vendor (cart) on the road side. I may mention here that a cold drink bottle would later be found lying inside the car during the course of investigation, it being depicted in one of the photographs (mark X-21) and also having been seized (as Ex. PW29/X9), vide formal seizure memo (Ex. PW24/B).

32. Per the version of the first informant (PW-1) in the FIR, just as the black Santro car had moved, after the purchase of the cold drinks, the Indica car came at fast speed overtaking from the right side, it was subjected to being fired at from the latter. He reported that one bullet had come through the right side glasspane in the door of the black Santro car to hit Ankit, the Indica car having come to a halt 15-20 metres ahead on the left side in *Katcha* portion, at an angle, and its occupants had continued with firing. Paramjeet had tried to move his car at fast speed taking a rightish turn but he was constrained to take it again to the *katcha* portion on the left side unable to move further because a number of vehicles had come to a standstill at the red (traffic) light. The sequence narrated in the FIR further stated that Indica car had pursued and was noticed to be carrying, as its occupants, Sushil Arora (A-1), appellant Rajesh Pandey (A-5) and the three others – which as per further evidence presented by the prosecution would be a reference to appellants Hemant Garg (A-2), Sonveer @ Pinku (A-3), Vishnu (A-4). According to the first informant (PW-1), in the FIR, all the occupants of black Santro car including himself had rushed out of the vehicle and attempted to flee away but were fired at by the assailant party (reference to the appellants). He stated that Ankit had fallen down, PW-1 (first informant) later learning that he (Ankit) and Surender (PW-8) had been taken to the trauma centre, AIIMS with injuries suffered in the firing. By the time the *rukka* had been prepared, Ankit had already succumbed to the fire arm injury, and thus, this fact found mentioned in the endorsement of Inspector Surender Singh Rana (PW-26).

CASE AGAINST APPELLANT SUSHIL ARORA (A-1)

33. As per the charge-sheets, read together, after registration of the FIR, during investigation, besides the requisite steps like calling for the crime team, collection of the exhibits from the scene of crime and the requisite follow-up in the nature of inquest and post-mortem examination of the dead body in the wake of death of Ankit, immediate search was launched for appellant Sushil Arora (A-1) in as much as his name and address had figured in the said inputs primarily by a visit to his shop (in the name and style of Chintoo Car Point) on the same evening of the incident. The evidence of Inspector Surender Singh Rana (PW-26) and of SHO Inspector Jagat Singh (PW-47) who were almost together during the inquiry suggests and the investigation reports reveal that after dispatch of the *rukka*, they returned to the scene of crime arriving there sometime around 6.45 p.m. and having made the requisite arrangements for the necessary further action, left for Chintoo Car Point around 8.00 p.m. Given the short distance involved from the scene of crime to the location of Chintoo Car point they would have reached there by 8.45 p.m. (as is the version of PW-26). Their evidence that Sushil Arora (A-1) was not present and that the police officers were met by his elder brother Pushkar Raj (DW-6) is confirmed by the latter in the course of his own testimony, the latter, of course, stating the time of said visit of the police officers to be around 7.15 p.m. to 7.45 p.m.

34. As per the prosecution case, inspite of interrogation of Pushkar Raj (DW-6) and search for appellant Sushil Arora (A-1), he could not be immediately located, his house having been found to be locked. He (A-1) eventually surrendered in the police station on 24.02.2009, where he was

accompanied by his brother Pushkar Raj (DW-6), to be formally arrested vide arrest memo (Ex. PW26/H) after personal search (Ex. PW26/I) and subjected to interrogation. PW-26, the Investigating Officer has referred to document (Ex. PW26/J) as the disclosure made by the appellant Sushil Arora (A-1), after his arrest in the police station, on 24.02.2009. This document dated 24.02.2009, running into three pages, noticeably bearing the signatures of Inspector Surender Singh Rana (PW-26) is attested by a witness Head constable Satish Kumar (PW32-A) and is relied upon by the prosecution as an input from the first arrestee (A-1) as to the identity of his accomplices in the crime, referring to them by names Rajesh Pandey (A-5), Hemant Garg (A-2), Sonveer @ Pinku (A-3) and Vishnu (A-4), the last two being the ones who had wielded and used the fire arms in the murderous assault.

35. As noted at the outset in this judgment, A-1 having been arrested on 24.02.2009, the Investigating Officer being unable to trace out immediately, the others suspected to be involved, the main charge-sheet was laid in the court on 23.05.2009, apparently because the period of 90 days envisaged in Section 167 Cr.PC was running out. The said charge-sheet duly mentioned the fact that the arrests of the said other four persons were "yet to be effected" and thus, the Investigating agency was pursuing the matter with further investigation under Section 173(8) Cr. PC.

36. As may be culled out from the main charge-sheet and the two supplementary charge-sheets read together, the case for the prosecution against appellant Sushil Arora (A-1) essentially has been that in order to put pressure on Mahender Singh Tikla (PW-9), he had collected in his office, and outside, the other four appellants, and after Mahender Singh

Tikla (PW-9) had left the place, threatened to accept the terms on which the refund of the loan was being offered, the appellant Sushil Arora (A-1) having conspired with others followed in pursuit, himself travelling in the Indica Car driven by the appellant Hemant Garg (A-2) with appellant Sonveer @ Pinku (A-3) and Vishnu (A-4), the hired assailants also joined by his associate appellant Rajesh Pandey (A-5), to intercept the black Santro car in which the associates of Mahender Singh (PW-9) had come upto his office and arranged for the firing as a result of which Ankit (the victim) died and Surender (PW-8) suffered fire arm injury. The prosecution rests its case primarily on the ocular testimony (besides documents in the nature of the two cheques referred to earlier), narrating the sequence of events beginning with the meeting of the two sides in the office of the appellant Sushil Arora (A-1) on 20.02.2009, followed by the meeting in the afternoon of 22.02.2009, the witnesses of the scene of crime identifying him (A-1) as one of the occupants of the Indica car which had been used by the assailants stating, *inter alia*, a pro-active participation on his part in that he with his associates Rajesh Pandey (A-5) and Hemant Garg (A-2) had indulged in exhortation of others to kill.

37. As noticed earlier, appellants Hemant Garg (A-2), Sonveer @ Pinku (A-3) and Vishnu (A-4) came to be arrested, one after the other, on 10.08.2009, 27.08.2009 and 29.09.2009 respectively, first and third of them having been brought before the court of Metropolitan Magistrate on the basis of production warrants issued on the requests of the Investigating Officer since they had come to be sent to judicial custody in two different cases. The detailed facts concerning these arrests need to be taken note of at this very stage.

CASE AGAINST APPELLANT HEMANT GARG (A-2)

38. It has been submitted by his counsel himself that appellant Hemant Garg (A-2) had been involved in a case FIR no.535/2002 under Sections 365, 366 and 376 IPC of PS Timar Pur and that, having jumped bail in the said matter, he was a proclaimed offender wanted by law. The appellant further refers to his application for anticipatory bail in the present case which had led to order dated 20.04.2009 being passed by the learned additional sessions judge, copy whereof (at pages 2263-2265 of the trial court record) have been repeatedly referred by not only by this appellant but also by others including appellant Sushil Arora (A-1). The appellant Hemant Garg (A-2) also refers to the application of the Investigating Officer moved on 20.03.2009 (page 2725 of the trial court record) seeking issuance of non-bailable warrants (NBW) against him in this case. It may be noted additionally at this stage that by the said application dated 20.03.2009, on which prayer was granted by the Metropolitan Magistrate on 24.03.2009, had requested for NBW to be issued not only against the appellant Hemant Garg (A-2) but also against Rajesh Pandey (A-5), each being described by respective full name and address. It is conceded that the application of appellant Hemant Garg (A-2) for anticipatory bail, which was declined by the aforementioned order dated 20.04.2009, was based on the knowledge about he being wanted in this case arising from the efforts to execute the NBW that had been issued on 24.03.2009. It is further the submission of the appellant Hemant Garg (A-2) himself that he had surrendered in the rape case on 06.08.2009 and had immediately moved the application, through an advocate engaged by his wife Smt. Bhavna (it being at pages 2939-2945 of the trial court record) stating, *inter*

alia, that he wanted to surrender in the present case with the request for test identification parade (TIP) to be arranged since he was "wanted" for such purposes.

39. The above material on record referred to at the hearing, at the instance of appellant Hemant Garg (A-2) himself, itself shows that he was aware of he being required for investigation in the present case as a suspect or at least since (or about) 24.03.2009 and having failed to secure anticipatory bail upon his application having been dismissed on 20.04.2009, he chose to surrender first in the rape case (which had been pending against him since 2002 but where he had been absconding) so as to surface on 06.08.2009 and upon production warrant being issued, he was arrested by the Investigating Officer in the present case on 10.08.2009 vide formal arrest memo (Ex. PW40/C).

40. It may be noted here that according to the prosecution evidence, appellant Hemant Garg (A-2) had been seen by the witnesses not only outside Chintoo Car Point at the time of visit to Mahender Singh Tikla (PW-9) and others in the afternoon of 22.02.2009 but also as the driver of the Indica Car used by the assailants near Buddha Garden on Ridge Road. It is also the prosecution case, and appellant Hemant Garg (A-2) concedes the correctness of the same through evidence of his wife, Shalini (DW-2), that he is the registered owner of Indica car, this fact having been brought home through the unchallenged testimony of Ranvir Singh (PW-3) and Hari Shah (PW-31) both officials of Regional Transport Office, Sheikh Sarai, New Delhi, their word being supported by the registration particulars (Ex. PW3/A and PW31/A respectively) duly proved. It may be added here that Indica Car had earlier been found on 09.04.2009 as

abandoned near Metro Station, Vikas Puri, AG-1, New Delhi to be seized formally vide memo (Ex. PW23/A). It be noted, for consideration later, that it was suggested to PW-26 during his cross-examination by the appellant Hemant Garg (A-2) that the vehicle had not been found abandoned but instead had been lifted from the house of one Joginder Yadav @ Vikas at Nangloi, the suggestion having been refuted.

CASE AGAINST APPELLANT SONVEER @ PINKU (A-3)

41. As mentioned earlier, according to the prosecution case, the name of appellant Sonveer @ Pinku (A-3) also figured in the disclosure made by appellant Sushil Arora (A-2) on 24.02.2009. The first charge-sheet dated 23.05.2009 against A-1 mentioned him by full name and particulars including address. It is the prosecution case, as affirmed by the Investigating Officer that, inspite of searches being made, appellant Sonveer @ Pinku (A-3) could not be found. He was eventually arrested on 27.08.2009 from Coffee Home Parking, Hanuman Mandir, Connaught Place, New Delhi, statedly on secret information. The circumstances leading to his arrest have been affirmed also by Head constable Vijay Singh (PW-17) who was assisting Inspector Arun Kumar, Incharge of the Special Staff, New Delhi where the case had been since transferred for investigation. In the course of his deposition, PW-17 proved arrest memo (Ex. PW17/A) and personal search memo (Ex. PW17/B). His evidence is corroborated by Head constable Subhash Chand (PW-40) and Inspector Arun Kumar (PW48A – also referred to PW-49). It may be noted here that during cross-examination of PW48A/PW-49 on 06.05.2013, it was suggested to him on behalf of the appellant Sonveer @ Pinku (A-3) that he (Sonveer) had been unlawfully picked up from his residence in Vijay

Nagar, Ghaziabad UP and detained for about 10 days before being formally shown arrested as above in Delhi. The witness denied the said suggestion. Interestingly, during his statement under Section 313 Cr. PC, appellant Sonveer @ Pinku (A-3) claimed that he had been picked up from his residence one day before his formal arrest on 27.08.2009. Having regard to the contradictory theories propounded by him, with no evidence having been adduced in support of either, there is no reason before me to doubt the veracity of above noted prosecution evidence as to the circumstances leading to the arrest of the appellant Sonveer @ Pinku (A-3) upon secret information from the area of Coffee Home parking, Hanuman Mandir, Connaught Place, New Delhi in the afternoon of 27.08.2009.

42. It is the case for the prosecution that evidence came up during investigation confirming the involvement of appellant Sonveer @ Pinku (A-3) in the crime in as much as witnesses have identified him to be present with others outside Chintoo Car Point at the time of visit of Mahender Singh Tikla (PW-9) in the company of others in the afternoon on 22.02.2009 and also later as one of the persons travelling in the Indica car used by the assailants. In fact, the prosecution claims that Sonveer @ Pinku (A-3) was sitting in the left side rear seat of the Indica car and was half-protruding out of its window during its movement wielding a fire-arm in his hand and using it to target the occupants of the blank Santro Car.

43. It has been the case for the prosecution that after his arrest appellant Sonveer @ Pinku (A-3) was interrogated whereupon he gave a disclosure (Ex. PW-17/D) on 27.08.2009 making some revelation about the weapon used in the crime which turned out to be misleading, it being followed by

another disclosure (Ex. PW17/E) on 08.09.2009 resulting in the weapon used in this offence being traced to one Sanjay @ Sanju @ Khatta son of Sadhu Ram, S-875, Mangol Puri, Delhi, from whose custody and control it had already been seized (vid**e** Ex.PW37B) in a case under section 25 Arms Act, registered vide FIR No.150/2009 on 14.05.2009, the said recovery having resulted in FIR (Ex. PW36/A) having been registered on the basis of *rukka* (Ex. PW37/C) of SI Ajay Kumar Sharma (PW-37). The seizure memo (Ex. PW37/B) and the corresponding sketch (Ex. PW37/A), read together, indicate that the weapon recovered from the said Sanjay @ Sanju @ Khatta on 13.05.2009 was an automatic pistol made in Italy which was found to contain four live cartridges, each bearing the mark KF 7.66 engraved on their respective bottom, one of them bearing the sign of hit by hammer. The prosecution case is that the said pistol with live cartridges, upon revelation by the appellant Sonveer @ Pinku (A-3) of it being connected with the crime at hand, were produced before the concerned Metropolitan Magistrate on the requisition based on the application of the Investigating Officer, and the said fire-arm was transferred as case property of the present case which, when submitted to the FSL, came to be positively connected with the firing incident which is the subject matter of the case at hand.

CASE AGAINST APPELLANT VISHNU (A-4)

44. The first supplementary charge-sheet shows that the appellant Vishnu (A-4) was arrested on 29.09.2009 by formal arrest memo (Ex. PW49/M). As in the case of others, his name is also shown to have figured in the disclosure attributed to the appellant Sushil Arora (A-1) made on 24.02.2009. The first charge-sheet dated 23.05.2009 indicated

his full particulars including parentage and address having come to light and he absconding at that stage.

45. Similar to the case of the appellant Hemant Garg (A-2), this appellant Vishnu (A-4) was also involved in a criminal case in the past, it being FIR No.47/2007 under Sections 324, 506, 34 IPC of police station Prasad Nagar from which proceedings he had been absconding. The learned counsel representing him at the hearing on these appeals referred to various documents on record showing Vishnu (A-4) having surrendered to custody in the case of Prasad Nagar on 26.09.2009 and information in this regard having been passed on to Inspector Arun Kumar (PW48A/49), the then Investigating Officer, leading to he moving an application (Ex. PW49/K) before the Metropolitan Magistrate on 26.09.2009. On the said application (Ex. PW49/K), appellant Vishnu (A-4) was produced in the court on 29.09.2009 and was allowed to be formally arrested. The appellant has referred to the above mentioned facts in the context of his argument raising the issue of unreliability of the evidence concerning the identity. I shall examine the arguments on the issue of identity later. For the present, it only needs to be noted that the factum of formal arrest on 29.09.2009 against the above mentioned backdrop is not disputed.

46. The prosecution rests its case against appellant Vishnu (A-4) on the evidence of witnesses of the scene outside Chintoo Car Point in the afternoon of 22.09.2009 at the time of visit of Mahender Singh Tikla (PW-9) with others, and also later at the time of black Santro car being intercepted by Indica Car near Buddha Garden on Ridge Road, the witnesses of that scene stating, *inter alia*, that this appellant Vishnu (A-4) was sitting on the left front seat of the Indica Car with body almost

protruding out of the window [like Sonveer @ Pinku (PW-3)], wielding a fire arm and using it to target the occupants of the black Santro car" The evidence for the prosecution includes ocular testimony, particularly of a passerby Ranjeet Singh (PW-4) identifying appellant Vishnu (A-4) as the person who (with others) had even come out of the Indica car in the process of launching the attack and he (Vishnu) being the person who had come up to victim Ankit (deceased) at the stage when the latter (Ankit) had fallen down behind the stationary black Santro car and having shot him in the head. It must, however, be added, that the weapon of offence statedly used by the appellant Vishnu (A-4) was not recovered.

CASE AGAINST APPELLANT RAJESH PANDEY (A-5)

47. The main charge-sheet and the first supplementary charge-sheet, having reported the arrests of others, had indicated that appellant Rajesh Pandey (A-5) was still absconding. As is clear from the narration thus far, the name of Rajesh Pandey (A-5) had come up in the FIR itself, he being one of the persons who were present with appellant Sushil Arora (A-1) in his office (Chintoo Car Point) at least in the meeting in the afternoon of 22.02.2009, and also the person who had actively participated in the discussion over the demand of Mahender Singh Tikla (PW-9) for refund of the loan with interest and the one to whom the first informant Sunil (PW-1) and Mahender Singh Tikla (PW-9) attribute having adopted threatening posture so as to corner the latter into accepting the terms which were being dictated.

48. As noted earlier, in the contest of the appellant Hemant Garg (A-2), the record shows that an application was moved on 20.03.2009 by the Investigating Officer (page 2725 of the trial court record) seeking NBW to

be issued, *inter alia*, against appellant Rajesh Pandey (A-5). The main charge-sheet informed the court on 23.05.2009 that this person, then a suspect, was yet to be arrested. By the time first supplementary charge-sheet was filed on 24.10.2009, appellant Rajesh Pandey (A-5) had been declared proclaimed offender in the case, by order dated 30.07.2009. The evidence on record shows that on 11.11.2009, A-5 was arrested from outside New Delhi Railway Station, the arrest memo (Ex.PW1/C) and personal search memo (Ex. PW1/D) having been proved by Inspector Arun Kumar (PW48A/49) the then Investigating officer and also by Sunil (PW-1) and Head constable Subhash Chand (PW-40)

49. It has been the defence of the appellant Rajesh Pandey (A-5) by way of suggestions given to the relevant witnesses including arresting officer Inspector Arun Kumar (PW-48A/49), and also in his statement under Section 313 Cr.PC that rather than being arrested on 11.11.2009, as shown by the above noted documents, he had himself surrendered in the police station on 10.11.2009. The prosecution witnesses would deny the said version. The appellant Rajesh Pandey (A-5) examined his own brother Rajeev Pandey (DW-1). Rajeev Pandey (DW-1), in his defence to affirm on oath, *inter alia*, that upon receiving telephonic instructions from Inspector Arun Kumar (PW48A/49) on 08.11.2009 and 09.11.2009 on his mobile phone number 9818858644, he and his brother Rajesh Pandey (A-5) had come from Patna by Indigo Airlines on 10.11.2009 travelling on air ticket (Ex.DW1/DA) and had accompanied him to the office of Special Staff in police station Parliament Street at 5.00 p.m. on 10.11.2009 for he (A-5) to surrender (for arrest). I note this defence here reserving scrutiny

and examination of its effect on the prosecution case at appropriate stage later in this judgment.

50. The prosecution rests its case against appellant Rajesh Pandey (A-5) on the basis of ocular testimony confirming his presence in the office of the appellant Sushil Arora (A1) in the aforesaid meeting, his pro-active participation as mentioned above as also he being in constant touch with the other three appellants who were present outside the office of Chintoo Car Point at that stage by coming out, in between the talks, to speak with three other appellants outside, and going back in. The prosecution also relied on the ocular evidence showing the presence of appellant Rajesh Pandey (A-5) in the Indica car besides others, he occupying the middle rear seat with appellant Sushil Arora (A-1) on his right and appellant Sonveer @ Pinku (A-3) on his left, appellant Hemant Garg (A-2) being the driver with appellant Vishnu (A-4) on the left front seat. The ocular evidence adduced by the prosecution also seeks to show that at the time of attack appellant Sushil Arora (A-1) and Rajesh Pandey (A-5) besides Hemant Garg (A-2) were exhorting others to kill.

PROSECUTION EVIDENCE

51. The prime evidence adduced by the prosecution in support of its case at the trial, leaving aside for the present the testimony of such witnesses as related to the investigation, may be classified into three categories – one, those pertaining to the background facts leading to the meeting in the office of Chintoo Car Point on 22.02.2009; two, the testimony of witnesses inside or outside the office of Chintoo Car Point at or about the time of the aforesaid meeting; and, third, witnesses of the

scene of the crime. I would discuss the evidence of these witnesses in that order.

52. Before I take up the evidence, it needs to be recalled here that after the filing of the main charge-sheet against appellant Sushil Arora (A-1), the trial had begun with framing of charge against him on 22.08.2009. Pursuant to the said charge, to which A-1 had pleaded not guilty, the first informant Sunil (PW-1) was summoned and his examination (as PW-1) commenced on 06.10.2009. The examination-in-chief had to be deferred midway, *inter alia*, since the case property (Indica car) had not been produced on that day. As noted earlier, on 24.10.2009, the first supplementary charge-sheet came to be filed after appellants Hemant Garg (A-2), Sonveer @ Pinku (A-3) and Vishnu (A-4) had been arrested and the investigation qua them had been concluded. The last appellant Rajesh Pandey (A-5) having been arrested on 11.11.2009, second supplementary charge-sheet sending him for trial with others was submitted on 02.01.2010. Upon committal, the cases arising out of the two supplementary charge-sheet were also brought before the sessions court where the trial against A-1 was already underway. In view of these developments, the trial against A-1 had come to a halt. With charge also being framed against the other four appellants on 29.01.2010, the trial recommenced, Sunil (PW-1) having been re-summoned on 08.03.2010.

53. The proceedings of 08.03.2010 reflect that the learned sessions court was of the view that PW-1 required to be examined *de novo*. He, thus, called upon the prosecutor to examine PW-1 calling him upon to bring out the facts from the beginning. This, strictly speaking, was correct approach in so far as the prosecution of the appellants other than A-1 is

concerned. After all, the law required the evidence to be taken on board in their presence and the evidence, earlier recorded, if any, could not be used against them unless a case for such exception was made out.

54. The question which arises for consideration is as to whether the testimony of PW-1 which had been recorded on 06.10.2009 vis-à-vis the trial against A-1 would stand totally effaced. That part of the testimony, taken down in the court in the proceedings against A-1, after the charge had been framed against him, was evidence taken in court in accordance with law. In so far as A-1 is concerned, there is no reason why the said part of the testimony of PW-1 cannot be read either against him, or in his defense, if it could be so used, particularly because it was also a deposition recorded in the course of same trial. Of course, the testimony of PW-1, to the extent recorded on 06.10.2009, cannot be available to the prosecution for bringing home the charge against others because they were not in the fray as accused before the court on the day of it being recorded. But, this logic does not apply to the case against or for A-1 for purposes of his defense. The testimony of PW-1 recorded on 08.03.2010 and thereafter on several consecutive dates would be "in continuation of" the statement of PW-1 made on 06.10.2009.

55. I, thus, read the evidence of Sunil (PW-1), for appreciating the arguments for or against appellant Sushil Arora (A-1) treating his deposition in continuation of the part examination recorded on 06.10.2009.

MEETING OF 20.02.2009

56. The agenda for the meeting in the office of Chintoo Car Point on 22.02.2009 was clearly to discuss the issue of loan and its refund with

interest. On this subject, which concerned primarily appellant Sushil Arora (A-1), the prosecution rested its case on the testimony of Mahender Singh Tikla (PW-9) and first informant Sunil (PW-1), the testimony of former more than that of latter as it is he (PW-9) who had extended the loan.

57. PW-9 testified that he was engaged in the business of transport from Mehrauli. He was acquainted with appellant Sushil Arora (A-1) since 2008, upon being introduced by one Atul of Vasant Kunj, A-1 being in the business of sale/purchase of old used vehicles. His testimony, including such parts as based on the suggestions given during cross-examination, has only reinforced their association. Both PW-9 and A-1 had developed close bonding as they would even visit on the family functions like weddings, PW-9 engaging in certain sale/purchase of cars in his own name or that of close relatives through A-1. PW-9 stated that he had given a loan of ₹10 lacs to A-1 in six or seventh month of 2008 on the asking of the latter on a visit to his house, in the presence of his wife, son and certain other relatives. He testified that the two cheques (Ex.PW-9/A and Ex.PW-9/B), each in the sum of ₹5 lacs, were given by A-1 for refund of the principal amount of the said loan, the cheques having been signed by A-1 though the relevant portions filled up by Smt. Saroj, wife of A-1. According to his deposition, A-1 had paid interest @ 2% per month upto December, 2008 but thereafter had committed default on that score. He explained that the marriage of his daughter was scheduled for 14.02.2009 and, thus, he had remained pre-occupied. After the marriage had been solemnized, he visited the office of A-1 in Chintoo Car Point on 20.02.2009 accompanied by his wife (Sumitra Devi) and his nephew Sunil

(PW-1) to demand the refund of the money. His deposition states that at the time of the said meeting, on 20.02.2009, A-1 was present with his brother Pushkar Raj (DW-6) and appellant Rajesh Pandey (A-5) besides three or four persons standing outside. On that date, A-1 had expressed inability to pay as he did not have any money. This, as per his testimony, resulted in the second visit on 22.02.2009.

58. For reasons which cannot be attributed to Sunil (PW-1), in his examination-in-chief recorded on 08.03.2010, he was not questioned by the public prosecutor in-charge of the case about any facts anterior to the events of 22.02.2009. I find this jarring but find solace in the fact that in the deposition of this very witness recorded on 06.10.2009, he had been called upon to narrate facts within his knowledge of what had happened prior to the said date, particularly on 20.02.2009. Though the lapse on the part of the prosecution in conducting proper examination of the witness after the trial against other accused had been clubbed is questionable, there is saving grace in the testimony of this very witness recorded on 06.10.2009 wherein he spoke about he having gone with PW-9 to Chintoo Car Point on 20.02.2009 in connection with meeting on the subject of loan given to appellant Sushil Arora (A-1) by PW-9 though, according to him he had learnt the name of A-1 only on 22.02.2009, corroborating the word of PW-9 as to the presence of A-5 in the first meeting as well.

59. Even if the testimony of PW-1 with regard to the events of 20.02.2009 were to be kept aside, the evidence of PW-9 by itself is sufficient to conclude that a dispute had arisen between him (PW-9) on one hand and A-1 on the other. In the cross-examination of PW-9, his word about the loan, and the default in the timely payment of interest

w.e.f. January, 2009, was not challenged. There was no effort made to contradict PW-9 as to his claim of visit to the office of A-1 on 20.02.2009 to demand refund of loan and interest. The word of PW-9 that A-1 had expressed inability to pay as he did not have any money has remained unchallenged. Similarly, there was no contest by A-1 to the testimony of PW-9 as to the presence of Pushkar Raj (DW-6) and Rajesh Pandey (A-5) in his office, at least on 20.02.2009, when PW-9 had gone there demanding the refund of the loan and interest, he (PW-9) being accompanied at that stage by his nephew Sunil (PW-1). Pertinent to add here that even appellant Rajesh Pandey (A-5) made no effort to challenge PW-9 during his cross-examination and, thus, would not resist the deposition that he was present in the office of A-1 at the time of visits/meetings of PW-9 with A-1 on 20.02.2009.

60. From the above, I find it safe to conclude that there was indeed a dispute existing between the appellant Sushil Arora (A-1) on one hand and Mahender Singh Tikla (PW-9) on the other hand on account of non-payment of interest against the loan of ₹10 lacs that had been advanced by the latter to the former and that PW-9, accompanied by his nephew PW-1, had visited the office of A-1 on 20.02.2009, and was met there by A-1 with his brother Pushkar Raj (DW-6) and appellant Rajesh Pandey (A-5) present on the side of A-1 who expressed inability to pay and, thus, PW-9 being constrained to go back empty handed.

EVENTS INSIDE CHINTOO CAR POINT OFFICE ON 22.02.2009

61. The events of 22.02.2009 are stated to have taken place in two parts, Chintoo Car Point office of A-1 at Pusa Road being the scene of the first part and the T-Point of Simon Boliver Marg, Ridge Road where the

firing took place being the second. The first part of the incident statedly began when Mahender Singh Tikla (PW-9) arrived at Chintoo Car Point in the Esteem car accompanied by Hemant (PW-10) and Gajender Singh (PW-11). As has been explained by PW-11, he was in business of property dealing and finance with Mahender Singh Tikla (PW-9) and Hemant (PW-10) as his partner. Both of them were, thus, close associates of Mahender Singh Tikla (PW-9) and from their evidence it is clear that they were privy to the transaction and the outstanding demand of PW-9 for refund of the loan and interest by A-1. They all travelled together in the Esteem car driven by PW-9 upto the office of Chintoo Car Point and testified as to what transpired inside that office on 22.02.2009. The other group including Sunil (PW-1) had followed them up to the place in the black Santro car, also carrying, per the witnesses, Paramjeet Singh @ Monu (PW-5), Varun (PW-6) and Surender (PW-8). It has come in the evidence of these witnesses that during the talks underway inside the Chintoo Car Point office of A-1, at least Sunil (PW-1) had entered once but since there was hardly any space left for anyone else to be accommodated, he was asked by PW-9 to stay outside. Though some stray claims had appeared in some of these depositions as to the similar entry by another witness midway the talks inside the office, there being no consistency in such regard, we conclude that only Sunil (PW-1) had actually entered the office where PW-9, PW-10 and PW-11 were engaged in discussion with appellant Sushil Arora (A-1) and other present with him. Thus, barring the said one effort on the part of Sunil (PW-1) to join the deliberations inside the office of A-1, wherein he not having been accommodated, he with others – Paramjeet Singh @ Monu (PW-5), Varun

(PW-6), Surender (PW-8) and Ankit (the deceased) – had remained outside, waiting.

62. In above view, the evidence of PW-9, PW-10 and PW-11 is relevant to bring out what had transpired inside the office of A-1 in the meeting on 22.02.2009 while that of PW-1, PW-5, PW-6 and PW-8 is relevant to find out the sequence of events unfolding outside the office, the former set of witnesses (PW-9, PW-10 and PW-11), of course, continuing to be able to throw light on facts concerning the events as they were developing after they had come out of the office.

63. Having gone through the testimony of Mahender Singh Tikla (PW-9), Hemant (PW-10) and Gajender Singh (PW-11), I do not have the least doubt that the former (PW-9) did not receive the assurance of refund of loan with interest to his satisfaction. The evidence of these witnesses confirms, and there is virtually no challenge thereto, the presence of A-1 in his office in the afternoon of 22.02.2009 with appellant Rajesh Pandey (A-5) and Pushkar Raj (DW-6) pro-actively assisting him.

64. PW-9 deposed at the trial that when he had gone to the office of A-1 on 22.02.2009 to demand his money, he was accompanied by PW-10 and PW-11, while Sushil Arora (A-1) had accompanied appellant Rajesh Pandey (A-5) with him alongwith four or five other persons standing outside. He testified that initially Sushil Arora (A-1) had expressed inability to repay but finally it came to be settled and agreed that he would do so by paying an amount of ₹2 lacs per month. While narrating the deliberations that took place he stated that A-1 had declined to pay any interest and A-5 had told him in words in vernacular to the effect that he was trapped and would do as directed *("Tu Phasa Hua Ha, jaisa hum*

kahte hai, vaisa man jaa"). He stated that he had then called his nephew Sunil (PW-1) on his mobile phone telling him that Sushil Arora (A-1) did not intend to repay whereupon Sunil (PW-1) with his associates arrived at the office around 1:00 p.m. But when PW-1 came inside the office he was told to wait outside while the talks were underway.

65. Hemant (PW-10) and Gajender Singh (PW-11) corroborated the word of Mahender Singh Tikla (PW-9) in above regard. From their depositions, it is clear that both of them were already privy to the dispute between PW-9 and A-1 over the refund of loan and interest. In their respective deposition they affirmed as to the presence of Pushkar Raj (DW-6), brother of A-1 and appellant Rajesh Pandey (A-5) with Sushil Arora (A-1) in his office. Hemant (PW-10) stated that there was "exchange of words" between the two sides and that A-5 in a threatening tone had told PW-9 that "interest would not be paid" and "only" the principal amount would be paid. Gajender Singh (PW-11), on his part, spoke about this visit to the office of A-1 sometime around one o'clock in the afternoon. He would identify only A-1 and his brother Pushkar Raj (DW-6) and appellant Rajesh Pandey (A-5) as those present on the occasion. He spoke about PW-9 insisting that he would collect the principal amount with interest whereas A-1 was offering to pay only the principal in five to six months' time. Both PW-10 and PW-11 attributed to A-5 he having adopted a threatening posture (in words to the effect *"my name is Rajesh Pandey"*). PW-10 deposed that Mahender Singh Tikla (PW-9) had agreed to forego the interest part and accepted the terms on which the principal amount was offered to be repaid. This is also the version of Gajender Singh (PW-11) and, as per these witnesses, the

meeting concluded on this note and the three of them came out of the office of appellant Sushil Arora (A-1).

66. From the version of PW-9 it is clear that the meeting had lasted for quite some time. Though, PW-9 during his cross-examination conceded that he had agreed to receive only the principal amount of the loan in the monthly installments of ₹ 2 lacs, and not insist on the payment of the interest part, and further that during this meeting the atmosphere was congenial to the extent that even tea was served, he stuck to the position about the exchange referred to earlier, particularly the posture adopted by appellant Rajesh Pandey (A-5) extending direct or implied threats. The cross-examination of these witnesses could not discredit them as to their veracity on this score. During cross-examination of PW-9 he was confronted with his statement (Ex.PW-9/D1) under Section 161 Cr.P.C. to point out that the threatening words statedly used by A-5 in the court were not same as were the words attributed by him during investigation. We have gone through the said statement and are of the view that PW-9 had indeed used words, in his statement under Section 161 Cr.P.C. which (*"Sushil Arora Ne kaha ki Rajesh Bhai ne Byaj Na Dene Ka Jo Faisla Kiya Hai vaih Thik Hai. Agar Inki Baat Nahi Manoge To Tum Ghirey Huai Ho Kuch Bhi Haath Nahi Lagega To Rajesh Pandey Ne Kaha Jo Sushil Kah Raha Vaih Thik Hai. Tum Mujhe Jantey Nahi Ho Mera Naam Rajesh Pandey Hai.")* are slightly at variance from what he deposed in the court. I am, however, of the view that the effect is same and therefore, the defense cannot claim any such contradiction as may go to the root of the matter. Noticeably, the statement of PW-10 and PW-1 on this score has been consistent throughout.

67. In above view of the matter, it is evident that though PW-9 had come to the place with his associates to demand the refund of the loan with interest, A-1 had been successful in making him agree to forego the interest and accept the refund of the loan in five installments. This tentative settlement was clearly brought about, under the shadow of veiled threats extended by appellant Rajesh Pandey (A-5), quite obviously at the instance of appellant Sushil Arora (A-1).

EVENTS OUTSIDE CHINTOO CAR POINT OFFICE ON 22.02.2009

68. I am satisfied that appellant Sushil Arora (A-1) had designedly set the stage for the meeting in the afternoon on 22.02.2009, before the arrival of PW-9 for payment of money such that he could be coerced into agreeing to forego the interest part and also accept the refund of the loan in installments on the terms dictated, by use of intimidatory tactics, stands established not only from the above-noted conduct of appellant Rajesh Pandey (A-5) at the instance of the former but also by presence of others outside the office. Though, PW-9, PW-10 and PW-11 alluded to such presence of others noticed prior to the said meeting, the relevance of such presence of others to the events that unfolded later may not have dawned on them immediately. Be that as it may, all these witnesses are consistent in their depositions that appellant Rajesh Pandey (A-5), during the course of deliberations inside the office, was in constant touch with such other persons outside the office who he would talk to by coming out. This fact is confirmed by the deposition of Sunil (PW-1), Paramjeet Singh (PW-5), Varun (PW-6) and Surender (PW-8). It may be noted here that the evidence of these witnesses is relied upon by the prosecution to bring home its case that the persons standing outside the office of A-1 at the

time of above-mentioned meeting of PW-9 with appellant Sushil Arora (A-1) and Rajesh Pandey (A-5) on the other side included the three other appellants, namely, Hemant Garg (A-2), Sonveer @ Pinku (A-3) and Vishnu (A-4). The veracity of the evidence attributing presence of the said three appellants, namely, Hemant Garg (A-2), Sonveer @ Pinku (A-3) and Vishnu (A-4) outside the office of A-1 at the time of above-mentioned meeting is challenged by each of them on basis of certain other evidence on record. We shall consider the said issue in due course. For the present, it only needs to be flagged that the evidence clearly shows that appellant Rajesh Pandey (A-5) even in the course of deliberations inside the office of A-1 was in regular and constant touch with others standing outside.

69. It is of some import that while appellant Sushil Arora (A-1), assisted by his brother Pushkar Raj (DW-6) and appellant Rajesh Pandey (A-5), was exerting pressure on PW-9 inside the office, the persons stationed outside, quite clearly those with whom appellant Rajesh Pandey had prior acquaintance, were engaged in an altercation with Varun (PW-6) and Ankit (the deceased) who had accompanied Sunil (PW-1) in the black Santro car to the said place. The altercation, per the consistent evidence of all the above-mentioned witnesses (namely, PW-1, PW-4, PW-5, PW-6, PW-8, PW-9, PW-10 and PW-11) took place in the parking lot outside the shopping complex where the office of A-1 is located. As per their depositions, the dispute arose on account of the passage for the black Santro car having been blocked by some other vehicles. Going by their versions, the vehicles blocking the way were of the associates collected by appellant Rajesh Pandey (A-5) which statedly included appellants Hemant

Garg (A-2), Sonveer @ Pinku (A-3) and Vishnu (A-4). There is some confusion as to the identity of the vehicle which was blocking the passage in that references have come to the car and motorcycle. This need not be of any consequence inasmuch as the fact that an altercation over the right of way actually took place - which is before the time PW-9 with others (PW-10 and PW-11) were about to come out of the office - is conceded by the defense and also because it finds resonance in the police record contemporaneously prepared. In fact, the defence refers to this incident (altercation in the parking) to set up the theory of what happened later near B*uddha* Garden on ridge road to be the result of road rage. What stands out from the evidence of the above-mentioned witnesses is that both Varun (PW-6) and Ankit (the deceased) were actively participating in the said altercation from their side.

70. The prosecution evidence includes copy of DD entry no.20A (Ex. PW27/A) recorded at 1.45 p.m. in police station Karol Bagh pursuant to an input received from PCR about a telephonic intimation regarding a brawl (*jhagra*) at 17, Pusa Road, City Hospital. The DD entry was proved by Head Constable Arvind Kumar (PW-27), the duty officer of the time. PW-27 also testified that he had entrusted the matter to ASI Deshpal for follow up action. This fact is recorded in the DD entry itself. It appears there was some confusion in the PCR as to the jurisdictional police station. The same input of PCR was also logged in police station Rajender Nagar, the boundary of which abuts that of police station Karol Bagh, it having been reduced there into DD entry no.23B at 1.45 p.m. by Head Constable Mahadev Prashad (PW-28), the duty officer stationed in the said police station. As per the said record, the matter was entrusted by

the police station Rajender Nagar to ASI Ramphool. It may be mentioned here that the input through PCR about firing incident also received the attention of PS Rajender Nagar as appearing in the evidence vide DD entry (PW-28/B) logged at 2.06 p.m., which matter was also followed up by the same police official named ASI Ramphool. The prosecution evidence would not show as to what were the reports made by ASI Deshpal or ASI Ramphool to their respective police stations in the wake of enquiries they would have made upon visit to the place where the quarrel had taken place. This deficiency, however, is inconsequential in as much as the evidence unmistakably shows that the persons involved in the brawl in the parking lot outside Chintoo Car Point office had not stayed back. Two of them, i.e. Varun (PW-6) and Ankit (the deceased), are shown by the consistent evidence of above mentioned witnesses to have boarded the black Santro car and moved from the place. Similarly, Mahender Singh Tikla (PW-9) with others who had accompanied him had also left the area in the Esteem car. Thus, the police officials from the nearby police stations would not have come across any person involved in the altercation and there would be no material left for it to be reported back.

71. In above context, one may quote the following observations of the Supreme Court in a judgment quoted as *State of U.P. v. Krishna Master, (2010) 12 SCC 324 :-*

> *"16. ...The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the*

former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it.

(emphasis supplied)

72. As mentioned earlier, the defence refers to the incident in the parking as giving rise to the possibility that frayed tempers resulting from the altercation could have resulted in the black Santro car carrying Varun (PW-6) and Ankit (the deceased) being pursued, waylaid and attacked. I reserve scrutiny of this possibility for later. For the present, I only flag the fact that the persons present outside the Chintoo Car Point office of A-1 with whom A-5 was in constant touch during the meeting inside with PW-9, were indeed engaged in an altercation with the associates of PW-9, both sides having collected at the instance of their respective controllers. This, as per the prosecution, was reflective of flexing of muscles by the associates of A-5, at the instance of A-1, in furtherance of the design to bring about pressure.

EVENTS AT PLACE OF FIRING

73. That both the black Santro car carrying PW-1, PW-5, PW-6, PW-8 and Ankit (the deceased) and the Esteem car carrying PW-9, PW-10 and PW-11 having moved away from the shopping complex where the office of Chintoo Car Point of A-1 is located, the focus has to shift to the place where the firing took place i.e. near T point of Simon Boliver Marg and red light close to Buddha Garden gate. It may be mentioned here that evidence clearly shows that the Esteem car driven by PW-9 had moved ahead and by the time the news of firing incident spread and reached him (PW-9), the said vehicle had already come in the vicinity of Hyatt

Regency (on its way to Mehrauli). The black Santro car driven by PW-5 had lagged behind, also for the reason that its occupants wanted to purchase cold drinks. The evidence of the four surviving occupants of this car (PW-1, PW-5, PW-6 and PW-8) clearly shows that cold drinks were actually purchased from a road side vendor. As mentioned earlier, a cold drink bottle was later found in the car confirming the evidence to this effect. Since the Esteem car had moved away and its occupants would join the others later in the hospital, the evidence of PW-9, PW-10 and PW-11 regarding firing incident would be hearsay and, hence, inadmissible. Thus, the prosecution rests its case on this core incident on the evidence of PW-1, PW-5, PW-6 and PW-8, besides relying on the testimony of two public persons named Manveer Singh (PW-2) and Ranjeet Singh (PW-4), both described as passersby who happened to be at or about the scene when the firing took place. I would first take note of the evidence of the four witnesses who were occupants of the black Santro car before we consider the evidence of the two chance witnesses.

74. The first informant, Sunil (PW-1) deposed that when the black Santro car driven by Paramjeet Singh (PW-5) in which he alongwith Varun (PW-6), Surender (PW-8) and Ankit (the deceased) were travelling was at the cold drinks vend, a fire-arm shot was heard, followed by the Indica car bearing silver grey colour being sighted it having come at a very high speed overtaking the parked Santro car. He testified that the bullet had pierced through the right side fixed glass near the window pane to hit Ankit in his right arm-pit. The Indica Car had stopped at a distance of about 40 feet and more shots were fired towards the black Santro car. As per him, the black Santro car had started moving, it having been taken

towards the right side of the road "*in a speed*" but then it hit the dead end on account of red light point. He spoke about the black Santro car coming to a halt and having hit another car in the front in the process. His word about the black Santro car having dashed against another vehicle in the front finds corroboration from the damage suffered by the former vehicle as noted in the seizure memo (Ex. PW24/C).

75. PW-1 further narrated that since the car could not move further, all the occupants including driver Paramjeet Singh (PW-8) had got down and started running in different directions. But, meanwhile, the Indica car from which the firing had come also reached the place. He identified all the five appellants as persons travelling in the Indica car at that point of time stating that appellant Hemant Garg (A-2) was in the driving seat, appellant Sushil Arora (A-1) behind him on the rear seat, appellant Rajesh Pandey (A-5) on the left of Sushli Arora (A-1) again in the rear seat, other two appellants namely Vishnu (A-4) and Sonveer @ Pinku (A-3) occupying the front and rear seats on the left side. He elaborated that both these appellants (A-3 and A-4) had rolled down the window panes of the Indica car on the left side and were protruding out at the time while firing with the weapons held in their respective hands. As can be seen from other ocular evidence on record, all such witnesses have identified these appellants respecting their position in the Indica car in the same manner as set out in the deposition of PW-1.

76. PW-1 further deposed that Surender (PW-8) had also been hit by a bullet in his hip while trying to escape. He also deposed that Ankit (the victim) had opened the right side window of the car. According to him, he had learnt later that Ankit was unable to escape and instead hit by

bullet in the head though he confirms that Ankit had fallen down, due to the injury suffered earlier, close to the stationary black Santro car. It is quite obvious that PW-1 while attempting to flee from the scene could not notice the part of the incident wherein Ankit was shot in the head.

77. PW-1 deposed that he was unable to note down the number of the Indica car while narrating the events that followed. He spoke about having run for a considerable distance and both he and Paramjeet Singh (PW-8) having joined together and after informing Mahender Singh Tikla (PW-9) on phone and learning in the process about Ankit having been taken to AIIMS trauma centre, reaching there. It is at the trauma centre that the police recorded his statement (Ex. PW1/A) which forms the basis of the FIR. PW-1 further affirmed that Surender (PW-8) who had suffered gunshot injury had also reached the same hospital in due course.

78. There is one element missing in the examination-in-chief of PW-1 recorded on 08.03.2010, when compared to his initial examination-in-chief on 06.10.2010. In the former examination-in-chief, PW-1 had identified the appellants other than Sushil Arora (A-1) and Rajesh Pandey (A-5) as the persons who were present with others outside the Chintoo Car Point, the spot which had been left just prior to the firing incident. While being examined afresh on 08.03.2010, the learned additional public prosecutor failed to put any question to Sunil Kumar (PW-1) on this score. The evidence in this regard, however, figures in the testimonies of certain other witnesses to which we shall advert shortly. The question which, however, would need to be addressed is, as to whether omission on the part of PW-1 to so identify A-2, A-3 and A-4 vis-à-vis their role outside Chintoo Car Point is to be treated as a contradiction going to the root of

the case. To put it simply, the question would be as to whether the evidence of PW-1 is rendered suspect on account of such omission.

79. Paramjeet Singh @ Monu (PW-5) deposed that the black Santro car driven by him had come to the cold drink vend at about 1.50 p.m. He testified that one cold drink bottle and one water bottle had been purchased and as he was ready to move the car, the Indica car bearing silver colour had come by wherein appellant Sonveer @ Pinku (A-3) was protruding outside the rear left window to the extent of upper half part of his body and firing a shot which pierced through the small glass pane and hit Ankit in the arm-pit. This witness PW-5 spoke about the same Indica car having been earlier seen by him outside Chintoo Car Point office. Since this part of his court deposition does not find reflection either in his statement (Ex. PW5/D1) under Section 161 Cr. PC or in the eye-witness account of others, it deserves to be ignored. But, it is clear that he was deposing about the same Indica Car respecting which his surviving companions in black Santro car and other witnesses of the scene had testified. He stated that he had tried to accelerate but the Indica car came on the left side *katcha* portion of the road and had pursued. The black Santro car driven by PW-5, however, reached red light traffic point and ended up hitting against a Maruti car in the front. Thereafter, it was not possible for the vehicle to move ahead. The Indica car had followed.

80. Paramjeet Singh @ Monu (PW-5) deposed about all the five occupants of the black Santro car having come down and started running. He identified appellant Vishnu (A-4) as the other person holding a fire arm occupying the front left seat of the Indica car. He also identified appellant Hemant Garg (A-2) as the driver of the Indica car with

appellants Sushil Arora (A-1) and Rajesh Pandey (A-5) on the rear seat of Indica car sitting besides the appellant Sonveer @ Pinku (A-3). He testified that appellants Sushil Arora (A-1) and Rajesh Pandey (A-5) were exhorting others using abusive language asking them to kill ("*maro salo ko maro salo ko*"). He stated that he had run away from the place and had joined Sunil (PW-1) to eventually go to trauma centre in an auto, after Sunil (PW-1) had a telephonic talk with Mahender Singh Tikla (PW-9) informing him about the incident. It is clear from his testimony that he did not see Ankit being shot in the head. He spoke about this on the basis of information seemingly gathered later. Similarly, he had learnt about Surender (PW-8) having suffered bullet injury on his back side only later. He identified appellants Hemant Garg (A-2), Sonveer @ Pinku (A-3) and Vishu (A-4) as the persons who were standing outside the Chintoo Car point earlier, amongst those with whom the appellant Rajesh Pandey (A-5) had been in constant touch midway the talks underway between Mahender Singh Tikla (PW-9) and Sushil Arora (A-1), the same group as had been involved in the altercation in the parking lot.

81. Surender (PW-8) corroborated the word of PW-1 and PW-5 by narrating the sequence of events broadly on the same lines including about Ankit (the victim) being hit by bullet, it having pierced through the window glass even while both vehicles were on the move. He positively identified the appellants Sonveer @ Pinku (A-3), Vishnu (A-4) as the persons who were holding and using the fire-arms for targeting the group in the black Santro car while sitting on the left rear and front seats of the Indica car which, he is positive, was driven by the appellant Hemant Garg (A-2), though he was not sure as to the identity of the others in the Indica

car and was silent as to the role of the appellant Sushil Arora (A-1) and Rajesh Pandey (A-5) vis-à-vis the firing incident involving the Indica car. He testified that as he had come out of the black Santro car, he was hit on the left side in the hip region by a bullet but he somehow had been successful in running away. He confirmed that Ankit had been hit by a bullet in his head but then was unable to throw more light on this and would not speak about the identity of the author of such injury. He identified appellants Sonveer @ Pinku (A-3) and Vishnu (A-4) besides Rajesh Pandey (A-5) as the persons he had seen outside Chintoo Car Point office, and they being amongst those with whom there had been an altercation involving Varun (PW-6) and Ankit (the deceased). It appears the prosecution expected this witness also to confirm the role of the appellants Sushil Arora (A-1) and Rajesh Pandey (A-5) particularly about exhortation given by them while travelling in the car, as is the version attributed to him in his statement (Ex. PW8/PA) recorded under Section 161 Cr. PC. The witness, however, deposed that he had neither heard any such exhortation by A-1 or A-5 nor seen them in the Indica car at the relevant point of time.

82. Varun (PW-6) identified the Indica car by the last digits of its registration number (2192). He deposed about the sequence of events concerning the firing from the Indica car towards black Santro car in which he was travelling confirming the word of above noted witnesses, positively identifying appellants Sonveer @ Pinku (A-3) and Vishnu (A-4) as the ones who were wielding the fire arm and using them in the direction of the black Santro car and its occupants also stating that both of them were virtually hanging out of the left window in the process. He

identified appellant Hemant Garg (A-2) as the driver of the Indica car. He would not identify the appellant Sushil Arora (A-1) and Rajesh Pandey (A-5) as one of those who had been seen at or outside Chintoo Car point office in addition to Hemant Garg (A-2), Sonveer @ Pinku (A-3) and Vishnu (A-4), particularly at the time of the brawl. When confronted with his statement (ex. PW6/PA) under Section 161 Cr. PC, this witness reiterated the prosecution case as to the presence of the appellant Rajesh Pandey (A-5) in the Indica car at the time of incident near Buddha Garden but he persisted with his statement that he had not seen appellant Sushil Arora (A-1) at that point of time.

83. According to the arguments on behalf of the appellants, all the above mentioned individuals, namely Sunil (PW-1), Paramjeet Singh (PW-5), Varun (PW-6) and Surender (PW-8), are tutored witnesses. It has been submitted that these persons were never in a position to see the appellants or testify as to their identity. It is also argued that Surender (PW-8) could not possibly have been hit by a bullet in the same incident in which Ankit (the deceased) had suffered the fatal fire-arm injuries and that the possibility of injuries suffered by Surender (PW-8) being self-inflicted, or sustained elsewhere, cannot be ruled out.

84. Before I deal with the arguments of above nature, seeking exclusion of the evidence of PW-1, PW-5, PW-6 and PW-8, it would be proper to also take note of the evidence of Manveer Singh (PW-2) and Ranjeet Singh (PW-4), the two persons presented by the prosecution as independent witnesses.

85. Manveer Singh (PW-2), a resident of Malviya Nagar, deposed in the court that on 22.02.2009 (Sunday) around 2.00 p.m. he was coming

from Karol Bagh after getting his motor cycle repaired and had reached Buddha Garden, Main Road, and his attention having been drawn to a cyclist with caged birds, he had stopped on roadside. It was around that time that the Indica car came by proceeding from Karol Bagh side in the direction of Dhaulan Kuan at a very high speed. According to his testimony, soon after the Indica car had gone ahead some distance (100 to 150 metres), he heard the sound like that of a "cracker fired". His deposition indicates that his curiosity having been aroused, he started moving on his motor cycle in the direction where Indica car had gone. As he reached close to Indica car, he noticed that it was moving slowly and two or three persons were "*in the process of boarding it from both sides*". He stated that he had also seen the black Santro car in stationary position on the roadside with two or more persons running towards Buddha Garden side, besides a young boy in orange colour jersey and sky blue jeans with white colour sports shoes on his feet lying close to the said Santro car bleeding profusely from his head, blood coming out with such pressure as if it were water, his legs and hands shaking and he writhing in pain. Given the other extensive evidence available on record, it is quite apparent that the person described by PW-2 is none other than Ankit (the victim / deceased). He followed the assailants' vehicle concentrating on registration plate and noted the registration number describing it same as that of the Indica car belonging to the appellant Hemant Garg (A-2), which fact also finds mention in the PCR forms (Ex. PW29/A and PW30/A). He stated that he had given two calls to the PCR from his mobile phone with some interval in between. The PCR forms (Ex. PW29/A and PW30/A) corroborate his word about the two calls made to

PCR, the first at 13:58:22 hours and the second at 14:04:29 hours of 22.02.2009. Though the name of the caller in the said PCR logs is mentioned as Narender Singh, it is quite apparent that the said error was on account of the receiver at PCR not hearing the name properly, the mobile phone number indicated in the said documents and the name of the caller being Manveer having been duly confirmed by further inputs from the PCR vans also recorded in same very proceedings at PCR. [*State of U.P. Vs. Krishna Master (supra)*]

86. Having informed the PCR by the aforementioned two calls from his mobile phone, Manveer Singh (PW-2) stayed back at the scene and saw, before arrival of the police, a white Santro car arriving, picking up Ankit (the victim) for taking him to hospital and moving away. He described the white Santro car by its full particulars. This also finds reflection in the PCR forms (Ex. PW29/A and PW30/A) contemporaneously logged on the inputs from the three PCR vans that had converged on the scene one after the other, the car clearly being in use at that time of Narender Singh (PW-12). Though the defence seeks to condemn the evidence of PW-12 with regard to his such role on various grounds, which we shall discuss a little later, we may observe even at this stage that given the chain of events presented, there can be no doubt as to the fact that the victim having been shot was actually lifted in a vehicle by someone having some familiarity with him. This impression is strengthened by the word of PW-2 who deposed that from the manner the white Santro car had stopped and the injured person had been lifted, he had got the impression that the victim boy was known to its occupants.

87. Besides identifying the Indica car used by the assailants, it being one belonging to the appellant Hemant Garg (A-2), corroborating the prosecution case as to the firing resulting in Ankit sustaining gunshot injury in the head and he being picked from the place of incident and being shifted to hospital in the white Santro car, the same vehicle as PW-12 claims to be in his use, the evidence of PW-2 also established that in the process of firing some of the assailants travelling in the Indica car had come out of the said vehicle to re-board it before fleeing away from the scene. But, PW-2 was not in a position to say anything concerning the identity of the assailants. He explained that the incident had occurred "*for a very small duration*" and therefore, he was unable to identify the occupants of the Indica car except describe them as young persons. He stated that police had come and recorded his statement.

88. Ranjeet Singh (PW-4) was an elderly person touching the age of 60 years on the relevant date. He is a resident of Pahari Dhiraj area of North Delhi. According to his evidence, he was engaged in a business from a premises in Sadar Bazar area, his wife employed as a lecturer in a college of Delhi University and his children settled abroad. His widowed sister lives in village Adchini area of South Delhi with her two sons, both working. According to him, on 22.02.2009, he was on his way to the house of his sister in Village Adchini driving down on his two-wheeler scooter. He had set out from his house at about 1.15 p.m. and had reached near Buddha Garden gate at about 2.00 p.m. While driving, he had noticed the Indica car. He mentioned it by colour and registration number, it being driven in a very high speed, its driver clearly intending to move ahead to stop another vehicle described as the black Santro car, both

in the direction of Dhaula Kuan, same as the direction he was taking. He stated that as Indica car had gone ahead of him by about 10-15 metres he had heard a sound like that of "a fire cracker". He deposed that he had then seen two persons with their heads out from the front and rear left side window of the moving Indica Car upto the shoulder level, both holding a fire-arm each in their respective hands. He identified the appellant Sonveer @ Pinku (A-3) as the one on the rear left seat and the appellant Vishnu (A-4) on the front left seat of Indica car. He testified that Indica car had stopped and its five occupants had come out. But, with the black Santro car moving ahead, swerving to make its way towards Dhaula Kuan, the five occupants of the Indica car had hurriedly boarded it again, and following the black Santro car. PW-4 further testified that he was also proceeding towards Dhaula Kuan and when he had reached the red light traffic signal at a place where Simon Boliver Marg connects with the main road proceeding towards Dhaula Kuan, he saw that the traffic had stopped for about 100-125 metres. At that stage, his scooter was also at a halt. He saw that the black Santro car had been fired at and that its occupants had come out, one of them in orange coloured shirt, apparently referring to Ankit (the victim), had come out of the rear right side but at this point of time, Indica car had also arrived and stopped just behind the black Santro car. According to his testimony, appellant Vishnu (A-4) had come out of the left front seat of the Indica car holding the fire arm, aiming it at the head of the victim Ankit, who was resting against the body of the black Santro car, and firing at him, thereby injuring him making him fall on the mettled road. He stated that the four other occupants of the Indica car had also, in the meanwhile, come out, identifying them as appellants

Sushil Arora (A-1), Rajesh Pandey (A-5), Hemant Garg (A-2) and Sonveer @ Pinku (A-3). He stated that the appellant Sonveer @ Pinku (A-3) was firing with the weapon in his hand towards the other persons who had alighted from the black Santro car and were running towards the forest area adding that one of such persons running away had sustained a bullet injury, apparently referring to Surender (PW-8), his such impression being based on the fact that he could see the person hit in the process of running having "*started limping*". He also deposed that while the appellant Sonveer @ Pinku (A-3) and Vishnu (A-4) were firing with their respective weapons, the other three, namely Sushil Arora (A-1), Rajesh Pandey (A-5) and Hemant Garg (A-2), were exhorting them (using the words "*maro salo ko maro salo ko*").

89. PW-4 stated that the traffic light turning green, all the five appellants had boarded Indica car and had gone away towards Dhaula Kuan while he had parked his scooter on the roadside with another public person who had given a call to the PCR, apparently referring to PW-2. He confirmed the statement of PW-2 about arrival of the white Santro car, same as that claimed by PW-12 to be in his use, and having picked up the victim (Ankit) taking him away to the hospital. He also deposed about arrival of the police and his statement having been recorded around 8.00 p.m.

90. According to the submissions of the appellants, both the above mentioned witnesses namely Manveer Singh (PW-2) and Ranjeet Singh (PW-4) are of doubtful variety. It is the argument of the defence that these witnesses were planted and their evidence is full of contradictions rendering their word highly suspect, not worthy of reliance. The learned

counsel urged that the testimony of these witnesses be discarded, their conduct being highly unnatural, they having described the sequence of events at the place of firing with such graphic details as would not be possible for a passerby to either notice, or be privy to, particularly when the events were unfolding in the face of fire-arms being used openly and continuously.

91. *Per contra*, the learned additional public prosecutor submitted that the evidence of PW-1, PW-5, PW-6 and PW-8 deserves to be believed with regard to the role of each of the 5 appellants particularly because their testimony finds full corroboration from that of PW-2 and PW-4, totally independent and dispassionate witnesses. It is her argument that the trial court having appreciated the evidence in proper perspective, this court must uphold the findings returned affirming the complicity of each of the five appellants, especially because the ocular testimony as to their respective role is corroborated by the other evidence of unimpeachable character.

92. I may consider the arguments concerning the veracity of each of the above mentioned witnesses at this stage.

ARGUMENTS AGAINST WITNESSES OF THE SCENE

93. The appellants argued that the ocular testimonies of above mentioned witnesses are full of substantial discrepancies which affect their credibility, also for the reason their conduct has not been natural. Reliance is placed on *Gopal Singh and Ors. Vs. State of Madhya Pradesh, (2010) 6 SCC 407; Shivasharanappa and Ors. Vs. State of Karnataka, AIR 2013 SCC 2144; Lahu Kamlakar Patil and Anr. Vs. State of Maharashtra, 2013 (1) Crimes 386 SC; Joseph @ Jose Vs. State of*

Kerala, 2003 (2) Crimes 459 (SC); State of Maharashtra Vs. Sukhdeo Singh and Anr., 1992 (3) Crimes 5; and Yudhister Vs. State of Madhya Pradesh, 1971 SCC (Crl.) 1390.

94. The learned additional public prosecutor, on the other hand, submitted that the evidence adduced by the prosecution is consistent and that there are no such exaggerations or embellishments as may affect its credibility arguing that the omissions or discrepancies arising out of normal wear and tear of human memory, or difference in perception of various individuals, cannot give rise to "reasonable doubts". She placed reliance on the following observations of the Supreme Court in *Mritunjoy Biswas Vs. Pranab Alias Kuti Biswas and Ar., (2013) 12 SCC 796* :

> *"...It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (see Leela Ram vs. State of Haryana, Rammi Vs. State of M.P. and Shyamal Ghosh vs. State of W.B.)..."*

95. The learned additional public prosecutor further referred to *Jodhan vs. State of Madhya Pradesh, (2015) 11 SCC 52* to submit that the evidence of Surender (PW-8) carries an inherent assurance of its veracity since he had suffered injuries in the course of the same incident :

> *"...It is beyond doubt that the testimony of the injured witness has its own significance and it has to be placed reliance upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and inconsistencies. As has been stated, the injured witness has been conferred special status in law and the injury sustained by him is an inbuilt guarantee of his presence at the place of occurrence..."*

96. *Reference* may also be made to the judgment in *State of U.P. v. Anil Singh, 1988 Supp SCC 686* wherein the Supreme Court observed thus :

> *"15. ...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 Bihari Maiti v. Matangini Dasi [AIR 1919 PC 157 : 24 Cal WN 626] the Privy Council had this to say (at p. 628):*
>
> > *"That in Indian litigation it is not safe to assume that a case must be a false case if some of the evidence in support of it appears to be doubtful or is clearly untrue. There is, on some occasions, a tendency amongst litigants ....to back up a good case by false or exaggerated evidence."*
>
> 16. In *Abdul Gani* v. *State of Madhya Pradesh* [AIR 1954 SC 31 : 1954 Cri LJ 323] 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.*

17. 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."

(emphasis supplied)

97. I am not impressed with the submissions on behalf of the appellants that the evidence of Sunil (PW-1), Paramjeet @ Monu (PW-5), Varun (PW-6) and Surender (PW-8) be discarded as they are all connected to Mahender Singh Tikla (PW-9) who had grouse against Sushil Arora (A-1) on account of controversy over loan transaction, they consequently being interested witnesses. This plea must be rejected outright. PW-1 may be directly related to PW-9 and all these witnesses may be closely related with each other but that by itself does not mean they would be "interested" in false implication. Given the extensive evidence available, I do not have the least doubt that these witnesses were with the deceased Ankit (the victim) in the black Santro car. Their connection with the deceased

(Ankit) rather itself is a circumstance strengthening their evidence as they would be interested more in bringing the real culprits' to book rather than falsely implicating those unconnected.

98. An eyewitness version cannot be discarded by the court merely on the ground that such eyewitness happened to be a relation or friend of the deceased. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, and statement of the witness is unworthy of credence that the court would examine the possibility of discarding such statements. But where the presence of the eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the court to discard the statements of such related or friendly witness. [see *Dayal Singh v. State of Uttaranchal, (2012) 8 SCC 263*].

99. It was submitted by the learned counsel for the appellants that the first informant Sunil (PW-1) had no occasion to see or be able to identify any of them either on the basis of the limited exposure available to him at Chintoo Car Point or as a passenger in the black Santro Car which was later targeted. It was argued that the evidence of the prosecution itself shows that though PW-1 had come to the Chintoo Car Point office of Sushil Arora (A-1) at the asking of his uncle Mahender Singh Tikla (PW-9), he had hardly spent any time inside the office of A-1 so as to become familiar with the faces or to connect them with specific names. Reference is made in this regard to the evidence showing that the office in question

was a small space and with a number of persons already sit inside, when PW-1 had tried to get in, he had to be asked by PW-9 to remain outside. It is the submission of the appellants that there was no occasion for any formal introductions to take place between PW-1 on one hand and any of the appellants on the other. Further, it is argued that when both the black Santro car driven by Paramjeet (PW-5), and the Esteem Car used by Mahender Singh Tikla (PW-9), had left the parking area of the shopping complex where Chintoo Car Point office is located, each had gone away with seemingly no discussion having taken place concerning the identity of any of the individuals involved. It has come to be admitted during the course of evidence by the relevant witnesses of the prosecution that the glass panes of side window of black Santro Car were tinted to the extent of 50% (black shade) and further that the windows had been rolled up. On this basis, it is submitted that it was very difficult for the persons travelling in the said vehicle, particularly, PW-1 occupying the rear middle seat, to see and be in a position to identify other persons travelling in another car (Indica car), more so since, witnesses for the prosecution concede, there were head-rests fixed in the latter which also would have blocked a clear view. The defence argues that since PW-1 admitted ruing his cross-examination that he had not seen or met appellant Sushil Arora (A-1) earlier and further that his name was learnt by him subsequently (after the incident), from his uncle Mahender Singh Tikla (PW-9) when both of them had met in the hospital, the version of PW-1 in the FIR cannot be acted upon, particularly about the identity of the assailants. Closely connected to this line of argument is the submission on

behalf of the appellants that this is a case where the registration of the FIR was deliberately delayed and that such action was ante-timed.

100. I shall deal with the argument of belated FIR a little later. I am not impressed with the other above-noted criticism of the evidence of PW-1. The submissions of the defence ignore the unchallenged testimony of Mahender Singh Tikla (PW-9) about his preceding visit to Chintoo Car Point on 20.02.2009 when he was accompanied by PW-1. While it is correct that when examined afresh on 08.03.2010, PW-1 was not called upon to state the facts about such earlier visit, it cannot be ignored that this very witness, when examined previously on 6.10.2009, had deposed about such earlier visit of 20.02.2009. Since that part of the testimony was taken in the course of trial against A-1, he cannot wish it away. While it is correct that the facts concerning such earlier visit should have been reflected even in his fresh deposition, the omission in the narration cannot be attributed as conscious or intentional one on his part. It was a failure of the public prosecutor to properly assist the trial court at that stage. A criminal trial is a quest for truth. Its fate cannot depend on the whims, fancies, callousness or lethargy of those involved in the process. Since the ability of PW-1 to identify the appellant Sushil Arora (A-1) and appellant Rajesh Pandey (A-5) is being questioned on account of what transpired inside Chintoo Car Point office, reference to the unimpeached deposition of PW-9 about the previous visit is sufficient to reject the contentions of the defence.

101. While it is correct that Sunil (PW-1) had entered the office of Chintoo Car Point midway the deliberations, that would have given him enough opportunity to become familiar with the face of the person who

was incharge which, in the facts and circumstances, was concededly Sushil Arora (A-1). It is not that PW-1 having been asked to stay outside had left the place. He remained present with others who had accompanied him to the office of A-1 in the black Santro Car. He is also on record to say that he had seen appellant Rajesh Pandey (A-5) coming out and talking to three-four persons who had gathered there. In these circumstances, there was further occasion for PW-1 to come across not only Rajesh Pandey (A-5) but also the other appellants who have been identified as part of the group which was stationed there and in constant touch with the former (A-5). I accept the defence argument that there was no formal introduction of PW-1 with any of the appellants, in general, and Sushil Arora (A-1), in particular, at least not by names. But, it is not disputed by Sushil Arora (A-1) that Mahender Singh Tikla (PW-9) knew him from before. Similarly, appellant Rajesh Pandey (A-5) is in no position to refute that Mahender Singh Tikla (PW-9) had met him at least twice in the office of appellant Sushil Arora (A-1) within a space of two days. In these circumstances, it can be safely concluded that after the shooting incident when Sunil (PW-1) had reached the Trauma Centre at AIIMS where Ankit (deceased) had been taken and where Surender (PW-8), the other injured also arriving in due course, he had met Mahender Singh Tikla (PW-9) and having narrated the incident of firing would have learnt from him the names of Sushil Arora (A-1) and Rajesh Pandey (A-5). This exchange of information between Mahender Singh Tikla (PW-9) and Sunil (PW-1) apparently took place before the investigating officer recorded the statement (Ex.PW1/A) of the latter leading to registration of the FIR. I, however, am not impressed with the defence argument that the

above facts and circumstances render the version of PW-1 in the FIR either hearsay or evidence which cannot be acted upon. PW-1 narrated in the FIR facts which were within his knowledge, facts concerning what he had seen happening and facts concerning what he had himself heard. Information taken from Mahender Singh Tikla (PW-9) only would have added names to the faces. This was necessary since, in absence of such additional information, the version of PW-1 in the FIR concerning the role of different individuals would have been difficult to comprehend.

102. The theory of black tinted glasses, or rolled up windows, of the black Santro Car or the headrests fixed inside Indica car cannot be of any assistance to the defence. The incident was occurring in broad daylight (around 2 p.m.). It is not the case of any side that the visibility outside was poor. Black tinted glasses to the extent of 50% do not block the view to the extent that the images seen outside would become hazy. On the contrary, the sunlight on the other side would assist the persons sitting behind tinted glasses to continue to be able to see clearly. The fact that Indica car had come parallel to the black Santro car more than once in the midst of firing, coupled with the fact that the appellants Sonveer (A-3) and Vishnu (A-4) were jutting out of the left side rear and front door windows respectively, using the firing arms to target the occupants of black Santro car, renders the defence argument about inability of PW-1 and other witnesses of the scene to see or identify the assailants meritless. I may add that the evidence also shows that the occupants of Indica car had come out, midway the attack, including at the time when Ankit (the deceased) was shot in his head and further that, while Sonveer (A-3) and Vishnu (A-4) were firing, the other three appellants were exhorting them

openly. I may note here that though the defence has questioned the veracity of the evidence about exhortation but for reasons set out a little later we are rejecting the said argument.

103. The PCR logs (Ex.PW29/A and PW30/A) indicate that the Santro car had taken the victim Ankit to Safdarjung Hospital. The evidence of Sunil (PW-1) and Paramjeet Singh @ Monu (PW-5) shows that after they had run to safety from the red traffic light point from where black Santro car had not been able to move ahead due to the traffic jam, the assailants having come out of Indica car openly firing at them, each of them had moved to a safe distance where-after they had got together to hire an auto eventually to reach AIIMS trauma centre, prior to which PW-1 had made a telephonic contact with Mahender Singh Tikla (PW-9) to be instructed by the latter to come the said hospital since Ankit (the victim) had been brought there. This also is broadly the version of Mahender Singh Tikla (PW-9). The defence argues that it is a mystery as to how Mahender Singh Tikla (PW-9) knew that Ankit had been taken to AIIMS and further as to how PW-1 and PW-5 would know that they were to go to trauma centre, AIIMS rather than to Safdarjung Hospital. The argument is wholly devoid of substance. PW-1 has clearly explained that, after he and PW-5 had joined together, they had first returned to the red traffic signal where the car had been earlier abandoned. It is at that place that they learnt that the victim had been taken to trauma centre. Similar is the version of PW-9 who, having reached, in the Esteem car, in the vicinity of Hyatt Regency Hotel had returned to the place of occurrence and from there, learnt about Ankit having been shifted to trauma centre, proceeded in that direction. The evidence is quite convincing and consistent. The initial error in

reference to Safdarjung Hospital in the PCR forms (Ex. PW29/A and PW30/A) cannot distract us.

104. It must be observed that both Safdarjung Hospital and AllMS are located across the same road opposite each other. The trauma centre of AIIMS rather is beyond Safdarjung Hospital when one takes the route from the direction of AIIMS. It is common knowledge that the location of these hospitals is commonly known and referred to as "Safdarjung" which is what came to be recorded as the first input in the PCR forms. Noticeably, even the input of PCR van VTR-70 is recorded (at 15:25:02 hours) in PCR log (Ex. PW30/A) and refers to its initial position as "Safdarjung Hospital" followed by further input at 15:43:36 hours about Ankit (the victim) having been brought to Safdarjung trauma centre and having been put on ventilator. Thus, the expression "Safdarjung Hospital" has been loosely used though all concerned were well aware throughout that the hospital where the victim had been shifted was known none other than the trauma centre of AIIMS.

105. The reasons set out earlier for rejecting the argument of inability of Sunil (PW-1) to see and identity the assailants clearly from inside the tinted glasses of the black Santro car also hold good vis-à-vis the capability of Paramjeet Singh (PW-5), Varun (PW-6) and Surender (PW-8). While it is correct that these witnesses had not entered the office of Chintoo Car point at any stage, their evidence concerning the identity of the assailants travelling in the Indica car has remained unshaken. In this context, one may need refer yet again to the consistent evidence about the appellant Rajesh Pandey (A-5) having come out of the office of A-1 to be

in regular touch and communication with the appellants Hemant Garg (A-2), Sonveer @ Pinku (A-3) and Vishnu (A-4) who were present outside.

106. PW-5 admitted during his cross-examination that a case involving offence punishable under Section 308 and 506 IPC had been pending against him at Patiala House Courts, it having been registered at the instance of some residents of Kishangarh area, it arising out of what he explained to be "transport rivalry". This, in our view, is inconsequential. Neither the said case nor the persons involved therein (the complainants) are shown to have any connection with the case at hand. Mere pendency of the case does not mean PW-5 was guilty of the conduct with which he had been charged there. Even if he were actually guilty of such offences vis-à-vis others, it does not mean he becomes an incredible witness.

107. The defence argued that the versions of PW-1, PW-5, PW-6 and PW-8 as to the directions in which each of them had run for cover, in the midst of firing are at variance. It has been argued that the inconsistencies in their versions on this score show the possibility that the events they are narrating may have been fabricated. I find no merit in this argument.

108. It is trite that a contradiction arising out of omission to state a relevant fact or on account of improvement made over the earlier version in the testimony of a witness, or the account given by one when contrasted against the narration of the same set of facts appearing in the deposition of another similarly placed witness, to be of import must relate to a circumstance as goes to the root of the matter. It is not every contradiction that would give rise to the veracity of the witness to be rendered suspect. In a judgment of this Court in *Criminal Appeal*

No.453/2016, titled *Rohit @ Mona vs. Govt. of NCT of Delhi, decided on 24th August, 2016*, the law on the subject was summed up thus:-

> *"34. Small embellishments or variations in the statements of material witnesses, not of any significant import, cannot be allowed to be used to question the credibility of their version which is otherwise consistent and corroborative of each other and carrying a ring of truth. Some exaggerations or embroidery in the description of the sequence of events witnessed by them, particularly when they are called upon to depose in the court at some distance of time from the date of the incident, are quite natural. After all, they depend on human memory which is generally susceptible to become fainter with each passing day and definitely cannot be photographic, nor synchronizable with a universal watch giving the ability to each individual to peg a particular event to a particular stroke of the hour with exactitude."*

109. The small contradictions in the narration as to the sequence in or the doors through which the occupants of the black Santro car came out or the directions taken by them for running to safety do not go to the root of the matter. It has to be borne in mind that these witnesses, as indeed Ankit (the victim), were under a deadly attack with two of the persons on the other side openly using fire-arms. The events would have happened in quick succession. Each individual would be concerned about rushing to some cover. In these circumstances, variations in their description of coming out of the car or direction taken by others can hardly be the touchstone of the credibility of their respective word. For the same reason, I also reject the arguments of the appellants based on some contradiction in the testimony of these witnesses as to whether the car was still stationary near the cold drink vendor or had started moving when the first shot was fired. The witnesses unmistakably speak in unison to the

effect that the firing had begun just as the transaction with the cold drink vendor had been concluded.

110. The learned counsel for the appellants argued that the story of Surender (PW-8) being hit by a bullet is unbelievable. They referred to the MLC (Ex. PW39A) indicating that this witness had reached the trauma centre at 4.01 p.m. on 22.02.2009 and had given the history of sustaining the bullet injury in an incident that had occurred at Connaught place. It was argued that the sequence narrated by PW-8 as to how he had run away from the place of firing so as to reach the trauma centre is unsubstantiated, it suffering from inherent contradictions, facts mentioned therein being *per se* unbelievable. It is pointed out that the MLC of this witness notes that the examining medical officer had found a round wound over the left hip region, about 1 cm in diameter, with charring present. The argument is that the fact that there was charring around the wound would imply the fire arm used was held close to the body of the person. The defence submits that the ocular evidence, in contrast, seeks to show that Surender (PW-8) was hit with the bullet discharged from the fire-arm used by the appellant Vishnu (A-4) from some distance. It has been submitted that if the ocular evidence were to be believed, the charring effect would not have occurred and, conversely, if charring around the small wound had been found, it could not be an injury suffered in the firing incident as described by the witnesses in this case. The defence submits that there is no explanation as to the place of incident (Connaught Place) mentioned in the MLC which clearly had no connection with the case at hand. Further, MLC shows that Surender (PW-8) was accompanied to the hospital by one Yogesh described as his brother. This

was not true as has been admitted by PW-8 himself. According to PW-8, he had first gone to Mehrauli office of PW-9 and from there had gone to the trauma centre, as instructed by his employer (PW-9) accompanied by another employee Yogesh. The defence submits that these admissions show that the word of PW-8 cannot be relied upon. It is also argued that the medical record (Ex. PW-39/A) shows the bullet had never entered the body of PW-8. Arguing that there is no corresponding proof of any damage to the trousers worn by PW-8 at the relevant point of time, it has been submitted that the possibility of injuries of PW-8 being self-inflicted cannot be ruled out.

111. Dr. Anindaya (PW-39) had examined Surender (PW-8) in the trauma centre and also prepared the MLC (Ex. PW-39/A) on such basis. He confirmed in his testimony that the round wound, 1 cm in diameter was inflicted by the bullet shot on the left hip and had charring around it. But, he was unable to state as to the distance from which the shot would have been fired to inflict such injury saying that this was a subject for forensic expert to comment on. The clothes of Surender (PW-8) were collected by the examining medical officer and passed on to the IO vide seizure memo (Ex. PW15/A) which also concerns seizure of the clothes of the deceased. The said set of clothes of PW-8 (trousers and underwear) were sent, with other exhibits, to the FSL and it was found that both bore blood stains of human origin (reports Ex. HC/C-1 and 2). It does appear that the examination by FSL did not reveal presence of any gun-shot residue on these set of clothes. This, however, only confirms the ocular testimony that the bullet was fired at PW-8 from some distance. The bullet had not entered the body. It is quite apparent that it had grazed past

the cheek of the hip, the heated projectile causing the injury across the wearing apparel and leaving the charring effect.

112. I do find that the sequence of events following the firing incident as narrated by PW-8 is not very convincing. He claims to have suffered the gun-shot injury at the place of occurrence, such injury having given rise to profuse bleeding. He claims to have travelled upto Mehrauli by bus, taken from a place at some distance from the place of firing. The bus in which he travelled upto Mehrauli did go from near Safdarjung / AIIMS hospital. He did not get down at any of the said hospitals for medical aid. He was profusely bleeding and the blood had been noticed by the crew of the bus in which he was travelling, such crew even being his acquaintance. Yet, no one asked him nor assisted him during that journey to rush for medical aid. Indeed, the bullet did not enter his body. As observed above, it grazed past his hip area. The reference to Connaught Place as the place of incident in his MLC, however, cannot be attributed to him. It is not explained as to who gave the said wrong information to the examining medical officer. Indeed, the person accompanying him named Yogesh is not his brother. But then, given the deadly attack on the group of which he was a member just two hours prior to his examination in the hospital, it is apparent that PW-8 would have been shaken. This is confirmed by the evidence showing he to be not fit for statement when the IO met him for the first time in the hospital. The argument about absence of corroboration from his wearing apparel (trousers) ignores the evidence in the form of seizure memo [Ex. C-14(a)], affirming the said article having been taken over by the IO during investigation and the FSL report (Ex.

HC-C/1) affirming it to have eventually been submitted for forensic examination which showed the presence of darker stains.

113. The incredible narration of his journey from the place of incident to trauma Centre, AIIMS, via Mehrauli, by itself cannot render unbelievable the evidence of the prosecution witnesses about Surender (PW-8) having been hit by a bullet discharged from the weapon used by the appellant Vishnu (A-4). As already noted, the evidence of his companions corroborating the word of Surender (PW-8) about his injury is confirmed by independent witnesses as well. There were no suggestions given, not even a remote one, about the injury of Surender (PW-8) being self-inflicted.

114. Manveer Singh (PW-2) is an independent witness who has confirmed the firing incident in the manner narrated by the above mentioned occupants of black Santro car. There can be no doubt as to his presence at the scene since he is the one who gave the first input to the police by calling the PCR twice. His name and such role finds due reflection in the official record of PCR contemporaneously prepared. Though the argument of the defence that his version should have been the basis of the FIR needs to be considered, which one shall take up later, for the present, it only needs to be noted that the deposition of this independent source confirms the prosecution case not only about the victim (Ankit) being shot in the head but also about his companions having run away and the assailants travelling in the Indica car (which he positively identifies by its registration number) having come out in the open, midway the attack. The appellants argued that since this witness does not confirm their involvement, the prosecution case ought not be

believed. I reject this submission for the simple reason that PW-2 has duly explained as to why he is unable to identify any of the assailants and he being in a position to narrate only what he had perceived happening. The fact that he clearly expressed his inability to identify the appellants rather adds to the credibility of his word.

115. Ranjeet Singh (PW-4) is a witness who has identified each of the five appellants as members of the assailant party travelling in the Indica car. The defence terms him as a planted witness. I have given my anxious consideration to the submissions made in this regard but see no reason why his testimony should be treated as suspect.

116. Pertinent to note that in its impassioned appeal for evidence of Ranjeet Singh (PW-4) to be acted upon, reference was made by the State to the judgment of the Supreme Court in *Savelife Foundation and Anr. Vs. Union of India and Anr., 2016 (3) Scale 522*, it having been rendered in a Public Interest Litigation initiated on a petition filed under Article 32 of the Constitution in public interest for the development of supportive legal framework to protect good Samaritans, that is bystanders and passer-by, founded on the reasoning that such individuals can play a significant role in order to save lives of the victims by either immediately rushing them to the hospital or providing life saving first aid. Pursuant to a series of orders passed by the court in the said matter, *inter alia*, suggesting the "Standard Operating Procedure" initially issued to be given statutory status, the Ministry of Road Transport and Highways of the Government of India had issued a notification containing guidelines on 12.05.2015 for protection of good Samaritans and a further notification issued on 21.01.2016 in accordance with para 1(7) and 1(8) of the guidelines dated

12.05.2015 which required standard operating procedures to be framed and issued for examination of good Samaritans by the police or during trial. The court took note of the said notification dated 12.05.2015 in its judgment and directed it to be implemented with certain modifications.

117. Though the above said notifications came to be promulgated in slightly different context, it may be noted here that the expression "bystander" or "good samaritan" is described in the guidelines as to include a person who is also an eye-witness to the incident and is required to be examined for the purposes of investigation by the police or during the trial or one who makes a phone call to inform the police or emergency services for the person lying injured on the road. Noticeably, the further notification dated 21.01.2016 on the above subject contained, *inter alia*, the following "standard operating procedure" :-

> *"2. Any person who makes a phone call to the police control room or police station to give information about any accidental injury or death, except an eyewitness may not reveal personal details such as full name, address, phone number etc.*
>
> *3. Any police official, on arrival at the scene, shall not compel the good Samaritan to disclose his / her name, identity, address and other such details in the record form or log register.*
>
> *4. Any police official or any other person shall not force any good Samaritan who helps an injured person to become a witness in the matter. The option of becoming a witness in the matter shall solely rest with the good Samaritan.*
>
> *5. The concerned police official(s) shall allow the good Samaritan to leave after having informed the police about an injured person on the road, and no further questions shall be asked if the good Samaritan does not desire to be a witness in the matter..."*

118. It does appear that PW-4 lives broadly in the same area as where the family of the deceased would live. He did speak about his acquaintance with the father of the deceased and he having assisted the latter on some occasions. But the instances of such acquaintance / association or assistance relate to the period after the incident which is subject matter of the case at hand. There is nothing before the court to infer that PW-4 knew the family of the deceased or him from times prior to the incident. *Pahari Dhiraj* is an area which is very thickly populated. Merely because PW-4 would live in the same area (*Pahari Dhiraj*) does not mean he would know each and every resident of the surrounding neighbourhood. His keenness to help out the victim's family later obviously stemmed from empathy he would have developed over the period in the wake of the incident. It does appear that PW-4 seemed reluctant at some stages of his testimony to share detailed information as to his family or that of his sister (resident of Adchini.) But, it has to be borne in mind that neither his family nor that of his sister would have had any connection whatsoever with the acts of commission or omission statedly indulged in by the appellants. PW-4 is entitled to insulate members of his family, or kith and kin, from undesirable roving scrutiny in a matter with which they do not have even a remote concern. I must observe that the manner in, and the extent to which, PW-4 was cross-examined, at times too intrusive and at times too repetitive, his deposition spread over several dates recorded over a period of almost ten months, was undesirable.

119. It was argued with reliance on *State of Maharashtra Vs. Syed Umar Sayed Abbas and Ors., (2016) 4 SCC 735* that since a commotion must have been created after the firing, with everyone around running to take

shelter, there was no occasion for the eye-witnesses to see the assailants properly or to observe their distinguishing features so as to be able to identify them at the trial.

120. I am not impressed with the argument of the defence that the conduct of PW-4 is unnatural, reflective of a person showing undue interest. There is no room for the general proposition that no public person would be curious or keen to be a witness where one group of persons is indulging in indiscriminate firing at another in a public place or that everyone around including the persons intended to be the prey, or those present by chance, would either duck for cover or run away and, consequently, not be able to note, or be in a position to narrate, facts concerning the sequence of events or identity or role of the individuals involved. There can be no rigid rule or one of universal application, as to how an individual would react in a situation in a case of shoot out. It all depends on the psyche, strength of character or sensibilities or duty towards fellow human beings in the case of those not directly connected, and the survival instinct of the person targeted. An individual in the latter category may scurry for cover to escape being hit or, if this were not possible, even be ready to confront the attacker to ward him off.

121. The fact that Ranjeet Singh (PW-4) was not deterred on account of the indiscriminate firing and, rather than rushing away from the scene, he chose to follow, on his scooter, the two motor vehicles in question right upto the place from where the black Santro car could not move ahead due to traffic jam, the place where Ankit (deceased) was shot in the head and generally from which location Surender (PW-8) was also hit by the bullet, cannot be said to be an unnatural conduct. Ranjeet Singh (PW-4), after

all, was not the lone person around. It is quite obvious that he was not the focus of attention for the perpetrators of the attack. He, thus, had the advantage of anonymity, one amongst scores of people on the road, his presence apparently not having attracted the attention of the assailants, omission on his part to pro-actively intervene serving as a camouflage. I do not find anything unnatural in his conduct wherein he narrated his visit to the hospital. After the victim had been removed from the place of occurrence, the said visit was more out of his curiosity to know the fall-out of the deadly attack which he had happened to be a witness of. It does appear that he also used the expression "Safdarjung Hospital" but then referred to trauma centre where the dead body was seen by him lying on a stretcher.

122. Ranjeet Singh (PW-4) claimed that he had noted the particulars of the two motor vehicles involved (Indica car and the black Santro car) on a piece of paper. He also claimed that he had met the PCR officials and had given them his name and particulars. He also stated that he had gone ahead to visit his sister and it was only on return journey that he met the police again to have his formal statement recorded.

123. The fact that the piece of paper on which PW-4 had noted the particulars of the motor vehicles was not seized is inconsequential. The witness had explained that he had not preserved the said piece of paper. The purpose stood served after his statement had been recorded. For his purposes, the jottings on the piece of paper were only for immediate memory. Such piece of paper even otherwise could not have added anything more to what is already available substantially in the form of contemporaneous inputs via PCR. It may be that his name was not

communicated by the PCR officials. It has to be borne in mind that the local police had arrived at the scene on the close heels of PCR vans. After arrival of the local police, the role of PCR officials would stand reduced. The visit of PW-4 to his sister's place cannot be referred to dilute the importance of his deposition. In natural course, his widowed sister expecting a visit by him would have been alarmed if he were not to show up at her place. Since events were happening in quick succession, the police yet in the process of taking control of the situation and the scene of crime, there was apparently no clarity as to when the police would require his presence for formal statement to be recorded. PW-4 could not wait indefinitely. His moving away from the scene of the incident as to the hospital and then to visit his sister, thus, is of no adverse effect.

124. Narender Singh (PW-12), as mentioned earlier, is the individual who had the white Santro car in his use at the relevant point of time. As per his deposition, he was moving with one Jagmohan in the car on the same road where the firing took place and had come across the victim lying in a pool of blood. He had seen at the place the black Santro car which he knew to be of PW-5. He stated that he had picked up and taken the victim to the trauma centre of AIIMS. There are indeed a number of issues concerning the wholesomeness of the evidence provided by PW-12. He is not the registered owner of the car. Jagmohan, the person he claims to be with him at the relevant point of time, was not examined. Concededly, he did not reveal his own particulars to the medical officer when MLC (Ex. PW50/A) of the victim was being recorded. He rather chose to give a false name and particulars. The car in which the victim was carried would have become blood-stained on account of profuse

bleeding. Yet, the car was not offered immediately as piece of evidence. PW-12 is on record to state that he had washed off the blood stains from the car.

125. In the above circumstances, I am inclined to keep the testimony of PW-12 out of purview. This, in my opinion, however, cannot impact the prosecution case adversely for the simple reason there is enough evidence to show (as already noted at length) that black Santro car was intercepted and Ankit was shot at the place indicated in the prosecution charge and further (as also noted) that Ankit was brought to the trauma centre for his MLC (Ex. PW50/A) to be recorded soon thereafter. The fact that Ankit was transported from the place of occurrence to the hospital in the white Santro car is borne out from the contemporaneous inputs by PCR vans. PW-12 may or may not have been the person at the wheel of the Santro car at that point of time. The role of the person who was driving the white Santro car being limited to the transportation to the vehicle, it cannot have any bearing on the question of culpability of the appellants in the crime.

126. Having carefully gone through the evidence on record in entirety, in my considered opinion, the evidence of all the witnesses from the scene of firing, most of whom (*i.e.* excluding the two independent witnesses) were also present inside or outside Chintoo Car Point, office deserves to be accepted. The omissions, variations or so-called contradictions pointed out in their depositions by the defence are consequential to either the difference in their perception or the result of normal wear and tear of human memory or, as noticed at the initial stages of this judgment, due to defaults of the public prosecutor. The omission on the part of PW-1 to identify A-2, A-3 or A-4 respecting their role outside Chintoo Car Point

office cannot disturb the larger picture which emerges. After all, he had come avisiting the said place for securing early refund of loan and interest. He had been closeted with A-1 inside his office most of the time. Though it appears that the brawl outside the office in the parking area did catch his attention but it was for a few moments only. That may not have been sufficient for him to take note, in detail, of the role of such of the assailants at that location. The evidence of other witnesses, particularly those present outside, having vantage positions, make up for the deficiency, if there be any.

127. I do not accept the arguments that the survivors of the black santro car were interested witnesses or that they have been tutored. Their evidence in the court inspires confidence. Since they had faced the brunt of the attack, and provide the version as perceived by each of them, the same being consistent with the account of the other witnesses, particularly the two independent witnesses, their word must be accepted.

128. In my opinion, the evidence of Ranjeet Singh (PW-4) is the most crucial of all, he having opted to stand out as a vigilant citizen ready to assist the judicial process as a good samaritan. The criticism directed against him is wholly unfair and, therefore, needs to be rejected outright. It must be added here that Manveer Singh (PW-2), is similarly placed witness who lends total corroboration to the version of PW-8 and, to his credit, does not go beyond what he was privy to, as demonstrated by his candid admission that he was unable to identify the assailants due to small duration for which he had the occasion to see them. His inability to identify the appellants as the assailant party, however, does not come in the way of the prosecution in bringing home its case on account of other

sufficient evidence being available. I, thus, record satisfaction as to the wholesomeness of the ocular testimony given by the above-mentioned witnesses of the prosecution.

ARGUMENTS CONCERNING FIR

129. It has been the argument of each of the appellants that the FIR in this case was ante-timed and that the statement (Ex.PW1/A) attributed to Sunil (PW-1) leading to registration of FIR, could not have been treated as the first information in as much as the IO had come across a number of other persons privy to the sequence of events ahead of him. The defence referred to, in particular, the eye witness account given by PW-2 and PW-4 and the version that could have possibly come through the account narrated by the cold drink vendor. The submission is that the fact that PW-2 and PW-4 were not chosen as the first informants, even though they had become available to the police prior to PW-1 gives rise to the possibility that the former (PW-2 and PW-4) may have been planted. The defence further argued that the evidence of PW-2, PW-4, and that of the cold drink vendor, were in the nature of "best evidence" and since the same were not so presented, the cold drink vendor having not even been included in the evidence relied upon, adverse inference on that account also should be raised and benefit accorded to the appellants.

130. Referring to the view taken in *Tomaso Bruno and Anr. Vs. State of U.P., Criminal Appeal No.142/2015 (arising out of SLP (Crl.) No.1156/2013)*, it was submitted that "best evidence" which could have thrown better light on the facts and circumstances of the case, though available has not been collected during investigation and consequently withheld, and so the court must take recourse to the permissible

presumption under Section 114(g) of the Evidence Act to draw an adverse inference against the prosecution story.

131. While submitting that the FIR in the present case has been ante-timed, designedly to create a version after concert, reliance was placed on *Shyam Sunder vs. State, 1996 JCC 35; Meharaj Singh Vs. State of U.P.. 1994 SCC (Crl.) 1390; Balwant Singh vs. The State, 1976 C.L.R. Delhi; and Ghan Shyam and Ors. Vs. State, 2007 (II) DLT (Crl.) 54 (DB)* to urge that the plea for benefit of doubts be accorded to the appellants.

132. Submitting that it is a case of biased and tainted investigation, the appellants pleaded through counsel that they have been falsely implicated, praying for reversal of the view taken by the trial court relying on *Samadhan Dhudaka Koli vs. State of Maharashtra, 2009 (1) CAR (SC); State of Andhra Pradesh Vs. Punati Kamulu and Ors., 1994 SCC (Crl.) page 734; Balwant Singh Vs. State, 1976 Chandigarh Law Reporter, page 43; Kailash Gour and Ors. vs. State of Assam, Crl. Appeal No.1068/2006; Chotan Mahton and Ors. Vs. State of Bihar, AIR 1959 (Patna) 362; and State vs. Khem Chand 1993, JCC page 490.*

133. The learned counsel for the appellant Sushil Arora (A-1) argued that the investigation in the present case has not been fair and that the evidence presented in its wake ought not be accepted. He relied upon on the following observations of the Supreme Court in *Kishore Chand Vs. State of Himachal Pradesh, (1991) 1 SCC 286* :

> *"12. Before parting with the case, it is necessary to state that from the facts and circumstances of this case it would appear that the investigating officer has taken the appellant, a peon, the driver and the cleaner for ride and trampled upon their fundamental personal liberty and lugged them in the capital*

offence punishable under Section 302, I.P.C. by freely fabricating evidence against the innocent. Undoubtedly, heinous crimes are committed under great secrecy and that investigation of a crime is a difficult and tedious task. At the same time the liberty of a citizen is a precious one guaranteed by Article 3 of Universal Declaration of Human Rights and also Article 21 of the Constitution of India and its deprivation shall be only in accordance with law. The accused has the fundamental right to defend himself under Article 10 of Universal Declaration of Human Rights. The right to defence includes right to effective and meaningful defence at the trial. The poor accused cannot defend effectively and adequately. Assigning an experienced defence counsel to an indigent accused is a facet of fair procedure and an inbuilt right to liberty and life envisaged under Article 14, 19 and 21 of the Constitution. Weaker the person accused of an offence, greater the caution and higher the responsibility of the law enforcement agencies. Before accusing an innocent person of the commission of a grave crime like the one punishable under Section 302, I.P.C., an honest, sincere and dispassionate investigation has to be made and to feel sure that the person suspected of the crime alone was responsible to commit the offence. Indulging in free fabrication of the record is a deplorable conduct on the part of an investigating officer which undermines the public confidence reposed in the investigating agency. Therefore, greater care and circumspection are needed by the investigating agency in this regard. It is time that the investigating agencies, evolve new and Scientific investigating methods, taking aid of rapid scientific development in the field of investigation. It is also the duty of the State, i.e. Central or State Government to organise periodical refresher courses for the investigating officers to keep them abreast of the latest scientific development in the art

of investigation and the march of law so that the real offender would be brought to book and the innocent would not be exposed to prosecution..."

134. The learned counsel further referred to the following observations in *Jamuna Chaudhary and Ors. Vs. State of Bihar, (1974) 3 SCC 774* :-

"11. The duty of the Investigating Officers is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth. It is apparent that the prosecution witnesses had tried to omit altogether any reference to at least the injuries of the appellant Ramanandan because there was a cross case in which such an admission could have been made use of to support the prosecution in that case.

x x x

12. As neither the prosecution nor the defence have, in the case before us, come out with the whole and unvarnished truth, so as to enable the court to judge where the rights and wrongs of the whole incident or set of incidents lay or how one or more incidents took place in which so many persons, including Laldhari and Ramanandan, were injured, Courts can only try to guess or conjecture to decipher the truth if possible. This may be done, within limits, to determine whether any reasonable doubt emerges on any point under consideration from proved facts and circumstances of the case..."

135. The State through additional public prosecutor submitted that though the investigation in the case at hand has been fair and above board, even if there have been some omissions, that cannot become a ground to order acquittal of persons who have been brought to book on the basis of a case substantiated by extensive and cogent evidence. She placed reliance on the following observations in *C. Maniappan and Ors. Vs. State of Tamil Nadu, 2010 (9) SCC 567* :-

"10. ...The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation..."

136. I am not impressed with defence arguments. It does appear that the name and address of the cold drink vendor (Niranjan son of Jitender) had been ascertained and find mention in the record (rough site plan Ex. PW-26/B). But, the IO (PW-26) has explained that no material fact came during the interrogation of the said vendor. It is clear from the record that PW-2 and PW-4 were available at the scene when the PCR, followed by local police, had arrived. Those were the initial moments of police proceedings. The Investigating officer and the SHO at that stage were only trying to comprehend the basic facts. With the victim (Ankit) already removed to the hospital, it was incumbent on their part to first ascertain the state of his health and, if possible, to record his version. Thus, presence of PW-2 and PW-4 at the scene notwithstanding, the police officers engaged in the preliminary steps, chose to rush, and rightly

so, to the trauma centre. Even if it be assumed that the police officers had become aware of the availability of PW-2 and PW-4 as eye witnesses to the firing incident before they set out for the trauma centre, it was quite obvious that these witnesses would not be privy to the background story. After all, they were persons unconnected to the parties involved and would not be in a position to assist beyond stating the broad facts as to the number of assailants, victims, their general description, identity of vehicles, etc. In these circumstances, Sunil (PW-1) came across as the first witness present in the hospital whose version (Ex. PW1/A) provided the necessary details about the background story, motive, the role of different individuals with their names or particulars duly supplied. In the above fact situation, the cold drink vendor could not have been treated as the first informant, leave alone as the best evidence. With PW-1, PW-2 and PW-4 available to the IO, it was incumbent on him to choose. Obviously, the choice would fall on the person carrying a more comprehensive version, it being that of PW-1. In these circumstances, I do not find any merit in the above noted arguments of the defence about "best evidence".

137. It has come in the deposition of PW-1 that having arrived at the trauma centre he had met PW-9 and discussed the facts with him before his version came to be recorded by the police. It is also clear from the deposition of these witnesses that the name of the appellant Sushil Arora (A-1) came to be confirmed by PW-1 from PW-9 before it was reflected in his version (Ex.PW1/A) forming the basis of FIR. I do not accept the criticism of the defence that this renders the word of PW-1 as to the role of A-1 hearsay. As already noted, PW-1 had paid a visit to the office of

A-1 at least once prior to the date of incident. He had been assisting his uncle PW-9 in the matter relating to non-payment of loan / interest by A-1. It is not disputed that he had entered the office of A-1, at least once, during the meeting of 22.02.2009. In these circumstances, admission of PW-1 about he having confirmed the name of the latter from PW-9 before mentioning it to police is indicative of his honesty rather than rendering his statement inadmissible.

ARGUMENTS ON FABRICATION OF DISCLOSURE / ALIBI/ MOTIVE/ IDENTITY

138. It has been the argument of the appellant Sushil Arora (A-1) that he had no motive to kill Ankit (the victim), or attempt to kill any of the other occupants of the black Santro car including Surender (PW-8). His submission is that, if at all, there was a dispute over money which was between him and Mahender Singh Tikla (PW-9). He did not even know the presence of others outside his office. The dispute over repayment of loan and interest had been amicably resolved in the meeting with PW-9. The firing incident that took place later at another location had no concern with him. After the meeting with PW-9 was over, he had gone on his own errand on way to his residence in Rohini. Relying on the evidence of his brother, Pushkar Raj (DW-6) he claimed that he was nowhere near the scene of firing at the relevant point of time. It was argued on his behalf that he had tried to share with the Investigating Officer, evidence in the nature of call detail records (CDRs) of the mobile phone in his house to substantiate the plea of *alibi* but, the investigating police, unfairly would not take the same into consideration. His submission is that the firing incident, in all probability, was an act of "road rage" directed against

Ankit (the victim) and Varun (PW-6) with whom the persons in the car parking had had an altercation. A-1 submitted, and he is joined in this argument by Rajesh Pandey (A-5) and Hemant Garg (A-2), that their names have been wrongly dragged in through the mouthpiece of witnesses who or whose version have been planted / manufactured. In developing these arguments, A-1 submitted that the disclosure statement (Ex. PW-26/J) attributed to him is a record falsely prepared which cannot be used against him. Taking the said argument further, it was submitted on behalf of the appellants Rajesh Pandey (A-5) and Hemant Garg (A-2) that order dated 20.04.2009 (page 2263-65 of the TCR) on the application for anticipatory bail moved on behalf of Hemant Garg (A-2), passed by the learned additional sessions judge reveals that the police was clueless as to the identity of the perpetrators except for the fact that the name of the appellant Sushil Arora (A-1) had figured in the FIR and that he had surrendered on 24.02.2009 on his own. The submission is that if disclosures as to the involvement of others in general and of A-2 and A-5 in particular had been made by A-1 on 24.02.2009, as Ex. PW26/J purports to show, the report of the Investigating Officer, as noted in the order on the anticipatory bail application passed on 20.04.2009, would not have shown the others to be "yet to be identified".

139. Arguing that the present case is one of dock identification and that it is not safe to rely on ocular testimony attributing various roles to the appellants at the scene of the firing incident particularly for the reason five persons are said to have been members of the assailant group, it being difficult, per the submissions, for the eye-witnesses to note their specific acts of commission or omission, reliance was placed on *Vijayan Vs. State*

of Kerala, (1993) 3 SCC 54; Ramesh Vs. State of Karnataka, (2009) 15 SCC 35; Iqbal and Anr. Vs. State of UP, (2015) 6 SCC 623; State of Maharashtra Vs. Syed Umar Sayed Abbas and Ors., (2016) 4 SCC 735; Kanan and Ors. vs. State of Kerala, (1979) 3 SCC 319; State of Maharashtra vs.Subhaiya Kanak Moniah and Ors., 1993 (Crimes) 466 SC; Ghanshyam @ Babloo vs. State, 2010 (1) JCC 2010; and State of Maharashtra vs. Sukhdeo Singh and Anr., 1992 (3) Crimes 5.

140. Relying upon the view taken by a learned single judge of this court in *Arjun Vs. State, 2014 4 SCC 2882*, it was submitted that since the identity of the suspects was not known to most of the witnesses, it was incumbent upon the Investigating Officer to arrange proper test identification parade only where-after the evidence on identity could be accepted.

141. It was also argued that the proceedings of TIP in the present case have not been fair and therefore, no reliance on their result can be taken by the prosecution. [*Ten Singh vs. State, 1995 JCC 585; Pramod Kumar Vs. State, 1990 Crl. J. 68; and Gamder Singh Vs. State, 1990 Ch. C. Cases 82 (HC)*.]

DISCLOSURE BY APPELLANT SUSHIL ARORA (A-1)

142. On careful examination of the record, I find no merit in the above line of arguments. The fact that the disclosure statement (Ex. PW26/J) runs into three sheets with signatures of the appellant Sushil Arora (A-1) only on the last one, does not mean the previous two pages have been surreptiously added. The document is clearly one written by the Investigating Officer comprehensively and at the same time, using more

than one sheet on account of the length of the narration. The sketchy reference to the status of investigation as prevailing at that stage in the order dated 20.04.2009 of the additional sessions judge cannot mean the corresponding police record, or other court proceedings, would stand effaced. The names of appellant Rajesh Pandey (A-5) and Hemant Garg (A-2) had also figured in the police investigation almost from the beginning, that of the former (A-5) even in the FIR. The visit of the Inspector Jagat Singh (PW-47) to the house of A-2 and A-5 on 23.02.2009 and the application of the IO moved on 24.03.2009 (page 2725 of TCR) to seek non-bailable warrants (NBWs) against others may be referred as such other material on record sufficient to reject the defence plea. It must, however, be added at the same time that the disclosure statement (Ex. PW26/J) attributed to A-1 cannot be read in its entirety in view of the inhibition contained in the provisions of Sections 24 to 27 of the Evidence Act. I shall discuss the relevant legal position on this subject later at some length in another context. For the present, suffice it to note that the observations made here are only to consider and deal with the defence argument noted above vis-à-vis the sequence in which the names of others, particularly Hemant Garg (A-2) had come up during the investigation.

PLEA OF ALIBI

143. The plea of *alibi* in based on the theory that it is physically impossible for the accused to be present at a particular place at the time of commission of the offence for the reason he was present at the said point of time at another place. It is well settled that for such a plea to succeed, it

is incumbent that the accused shows, by evidence, that he was so far away at the relevant point of time that he could not be present at the place alleged by the prosecution. Such a plea rests on the rule of evidence recognized in Section 11 of the Evidence Act rendering facts which are inconsistent with the fact in issue to be relevant. The law on the subject of *alibi* was succinctly explained by the Supreme Court in *Binay Kumar Singh vs. State of Bihar (1997) 1 SCC 283* as under:-

> *"The Latin word alibi means 'elsewhere' and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would no doubt, be a sound proposition to be laid down that in such circumstances, the burden on the*

accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi."

(emphasis supplied)

144. There can be no quarrel with the proposition that evidence tendered through defence witnesses cannot be appreciated on the assumption that it would generally be tainted. It is trite that defence witnesses are also entitled to equal treatment and equal respect as that of the prosecution on the issues of credibility and trustworthiness. It is also equally well settled that prosecution cannot depend on the weaknesses of the defence since the prime onus to prove its case beyond all reasonable doubts lies at its door. [see *State of Haryana Vs. Ram Singh, (2002) 2 SCC 426; Dudh Nath Pandey vs. The State of U.P., 1981 SCR (2) 771; and Lalit Kumar vs. State of Delhi, Crl. Appeal No.470/2006*].

145. The plea of *alibi* of the appellant Sushil Arora (A-1) is, however, wholly meritless. He has claimed, primarily relying on the evidence of his brother Pushkar Raj (DW-6), and the CDRs of mobile phone no.9811071400 (which he claims to be in his use) that after the meeting with PW-9 was over, he had to leave the Chintoo Car Point office in his Santro car bearing no.DL-8CN-5173 in connection with some phone calls from other dealers respecting certain car deal and some miscellaneous work in the general area of Karol Bagh. He stated that at about 2.30 p.m., the appellant Sushil Arora (A-1) had left the place for Karol Bagh from where he was to proceed to Rohini. From the CDRs (Ex. DW5/A) brought on record through the evidence of Israr Babu (DW-5), alternate Nodal Officer of the service provider (Vodafone Mobile Services Ltd.), the witness also proving, *inter alia*, the cell CD ID chart (Ex. DW5/C),

reflecting the locations of the said mobile phone instrument, it has been claimed that A-1 was connected to cell tower no.11781-3 (at 18/4, West Extension area, Karol Bagh) at 13:59:32 hours, 14:11:41 hours, 14:12:18 hours, 14:12:46 hours, 14:13:34 hours, 14:13:44 hours, 14:14:22 hours and, in between, the said timings he was in the general area of 17, Pusa Road connected to cell tower no.29002 at 14:02:13 hours and near plot no.1, site no.1, Old Rajinder Nagar, New Delhi-110 060 connected to cell tower no.32921 at 14:04:06 hours. The submission is that such connectivity of the mobile phone instrument of A-1 reflects that he was more than 3 kms away from the scene of firing at the crucial time and thus, could not have been present in the black Santro car as is the account given by the eye witnesses.

146. The evidence of DW-6 about A-1 having left Chintoo Car Point office around 2.30 p.m. is contradicted by the CDRs produced by DW-5. The CDRs instead show that A-1, assumably in use of the above noted mobile phone instrument, was on the move sometime prior to 13:59:32 hours when he was connected to cell tower no.11783 which is different from the tower (cell bearing no.29001) located near his office from where he had made the preceding call at 13:29:11 hours. It is common knowledge that the mobile phone instruments get connectivity with the aid and assistance of the nearest cell tower depending on the volume or use of the network at that point of time. The connectivity with the cell towers depends on the air distance (as the crow flies) and not distance by road. There is indeed some limit to which the connectivity may be accessed but weather conditions also play some role. The PCR logs are based on timing mentioned manually. The making of a call to PCR, its receipt at

the other end, resulting in the information being formally jotted down would also need to be factored in.

147. A-1 is shown by evidence to be member of the group travelling in the Indica car. He would not have been using his mobile phone instrument mid-way the attack. There are gaps between the different calls logged by his mobile phone. The attack was definitely over by 2.00 p.m. In these circumstances, movement of the car away from the said area would be of no assistance to the defence plea. No one saw A-1 leaving the office in a particular vehicle. Even his brother (DW-6) is on record to state that he had remained in the office continuing with his work. The claim that A-1 had gone home to Rohini remains unsubstantiated. The fact that his name had figured as amongst the assailants in the FIR had concededly come to the knowledge of his brother (DW-6) by the same evening (he himself speaks about visit of the police around 7.15 p.m.). There is no explanation why A-1 was not available to the police either at the shop or at his residence or anywhere else till he surrendered on 24.02.2009. In the facts and circumstances, I reject the plea of *alibi* observing that A-1 has not shown himself to be at such distance away from the scene of crime as from where it was well nigh impossible for him to be a participant in the firing incident.

ON MOTIVE

148. The argument of "road rage" being the reason behind the attack is nothing but speculation. From the sequence of events narrated by the witnesses, as noted elaborately earlier, it is clear that 3-4 persons present outside Chintoo Car Point office, which statedly included appellants Hemant Garg (A-2), Sonveer @ Pinku (A-3) and Vishnu (A-4) had

collected there at the instance of the appellant Rajesh Pandey (A-5), working in close co-ordination with the appellant Sushil Arora (A-1), specifically in the context of the meeting with Mahender Singh Tikla (PW-9). There is no explanation given for the regular contact maintained, midway the said meeting, by appellant Rajesh Pandey (A-5) with such others present outside, except for the theory of the prosecution that their presence had been arranged particularly for dealing with Mahender Singh Tikla (PW-9). I have already concluded that what was settled in the meeting was not what PW-9 would have been ready or happy to accept. The language used by the appellant Rajesh Pandey (A-5) inside the office was meant to be intimidatory. It was he, obviously speaking for the appellant Sushil Arora (A-1), who had made it plain and clear that Mahender Singh Tikla (PW-9) was left with no choice. He was cornered and had to agree to the terms being dictated. The fact that the appellants Sonveer @ Pinku (A-3) and Vishnu (A-4) were part of the group arranged outside and were persons armed with weapons reflects that they were musclemen specially arranged for this meeting, their design being to exert pressure. In this scheme of things, it is all too obvious that the musclemen brought in would also know the errand they were expected to carry out. Mahender Singh Tikla (PW-9), on his part, also would have anticipated that the situation might turn ugly. This is why he arranged for the presence not only of two immediate companions in the car he was using but also five others, including his nephew Suhil (PW-1), who followed him to the place.

149. The altercation in the car parking area between the group of which A-2, A-3 and A-4 were a part on one hand and the other – all associates of

PW-9, they having come in the black Santro car – in the facts and circumstances, in my opinion, was a result of flexing of muscles by the two groups, in the warm up for the possible show down. I am unable to accept the ignorance pleaded by A-1 as to what was going on outside his office in as much as his brother Pushkar Raj (DW-6), admittedly present with him throughout, himself deposed about the altercation having turned into a fight resulting in a large number of persons having gathered, some reporting the same to the police (on phone no.100) and some even intervening and separating the parties. This information, given the topography of the area, could not have escaped the office of A-1.

150. The heat generated by the altercation outside Chintoo Car Point office in the above facts situation, would have only added fuel to the fire. There is no dispute as to the fact that the assailants very well knew that the persons who had come to the place in black Santro car were associates of Mahender Singh Tikla (PW-9). The objective apparently was to bear pressure on PW-9. The fight that had erupted in the parking lot had only added fuel to the fire. Dragging PW-9 directly would have been too obvious and immediately brought A-1 in the needle of suspicion. Even otherwise, PW-9 had sped away from the scene in his Esteem car. I may recall that he was already way beyond reach having gone upto Hyatt Regency hotel by the time the assailants in Indica car were able to intercept the black Santro car. In these circumstances, the occupants of black Santro car becoming the target of the attack does not mean the original motive had been replaced by motive in the nature of "road rage".

151. While rejecting the above line of argument, I must also observe that in a case of direct evidence, the question of motive even otherwise pales

into insignificance. [see: *Bipin Kumar Mandal vs. State of West Bengal (2010) 12 SCC 91]*.

ON IDENTITY OF APPELLANT HEMANT GARG (A-2)

152. The appellant Hemant Garg (A-2) has questioned the evidence of witnesses of the scene of incident stating that it is a case of dock identification as the Investigating police did not take the necessary precautions to protect his lawful interests. He points out that TIP in his context was inexplicably split into two parts, one conducted on 26.08.2009 and the other on 28.08.2009, witnesses Ranjeet Singh (PW-4) and Paramjeet Singh (PW-5) participating in the former failing to identify him, while Sunil (PW-1) and Surender (PW-8) participating in the latter had positively identified him. His argument is that he had nothing to do with the incident or with any of the individuals on both sides and the accusations against him are unfounded.

153. The appellant Hemant Garg (A-2) was formally arrested in this case on 10.08.2009. But, the record clearly shows, his name had come up during investigation almost from the beginning, the use of the Indica car of which he is the registered owner and concededly the then user, being the beginning, followed by the disclosure (Ex. PW26/J) attributed to the appellant Sushil Arora (A-1). The fact that he was not named in the FIR is of no consequence in as much as Sunil (PW-1) would not know him by name from before, not even courtesy the information gathered from his uncle (PW-9). As already mentioned, the Investigating Officer had paid a visit to the house of A-2 on 23.02.2009 but he could not be located. As also mentioned, the Investigating Officer was constrained to make a formal application to seek NBW, *inter alia*, against A-2 since he

continued to be unavailable till 24.03.2009. A-2 was well aware that he was wanted by the police for investigation of this crime. This is reflected vividly in his move in August 2009 when he surrendered in the rape case of police station Timar Pur from which proceedings he had been all along absconding, alongside the applications through counsel referring to the present case. The application was moved by the Investigating Officer for TIP to be arranged in his respect.

154. I have closely examined the trial court record and find that the application for TIP (Ex.PW49/B) in respect of A-2 had been moved by the I.O. on 10.08.2009 itself, the short order recorded by the Metropolitan Magistrate thereupon showing him (A-2) having been produced in muffled face and referred to the link Magistrate for further proceedings on the same date, the appellant (A-2) was sent to judicial custody immediately thereafter. The TIP was eventually conducted on 26.08.2009 by Mr. Jitender Mishra, Metropolitan Magistrate (PW-35), link Magistrate. The proceedings recorded on 26.08.2009 have been proved by PW-35 as Ex. PW4/D2. Two witnesses took part in the proceedings vis-à-vis Hemant Garg (A-2) on the said date, they being Ranjeet Singh (PW-4) and Paramjeet Singh (PW-5) both failing to identify him at that stage. It, however, is also proved by the prosecution that the IO was constrained to move another application (Ex. PW49/C) on 27.08.2009 stating that out of the four witnesses only two had participated and TIP had to be arranged qua Hemant Garg (A-2) with remaining eye-witnesses also. These proceedings were marked to, and conducted by, Ms. Surya Malik Grover (PW44), Metropolitan Magistrate on 28.08.2009. PW-44 proved the said proceedings as Ex.PW44/A. The said record of TIP on

28.08.2009 reveals appellant Hemant Garg (A-2) was positively identified by witnesses Sunil (PW-1) and Surender (PW-8).

155. I agree with the submission of the defence that ideally the TIP with all the four witnesses should have been completed on 26.08.2009 itself. PW-35 who had presided over the TIP proceedings on 26.08.2009 has not mentioned any reasons why the exercise respecting the remaining two witnesses could not be concluded on the same date. The Investigating Officer has explained that the Magistrate had asked him to move afresh for the remaining two witnesses. The time gap between the two TIPS, however, cannot mean that the TIPs were dishonestly managed by the Investigating Officer. The fact that the proceedings on record show that the appellant Hemant Garg (A-2) was produced on his own request with he himself keen to join TIP, he being kept in muffled face and the fact that he was sent to judicial custody immediately thereafter, the request for police remand coming only on 29.08.2009 after conduct of the TIP with all the four witnesses shows that there has been no compromise with the legitimate rights of the appellant Hemant Garg (A-2).

156. It does appear that the failure of witnesses Ranjeet Singh (PW-4) and Paramjeet Singh (PW-5) to identify the appellant Hemant Garg (A-2) in the TIP renders it to be case of dock identification respecting A-2 by the said witnesses at the trial. Further, the fact that witness Paramjeet Singh (PW-5) at one stage of his deposition referred to presence of the Verna car at the Chintoo Car Point office parking is reflective of some confusion prevailing in his mind. But, the prosecution rests on the evidence of other witnesses including Sunil (PW-1) and Surender (PW-8) about the presence and role of the appellant Hemant Garg (A-2) not only

outside the Chintoo Car Point office but also as the driver of the Indica car at the time of the firing incident which cannot be wished away by the defence.

157. I must add that there is no explanation worth the name as to how Indica car of which A-2 is the registered owner was in use by the assailants and as to, in what circumstances, or for what reason, the said car had been abandoned by A-2 so as to be eventually seized on 09.04.2009 by Inspector Jagat Singh (PW-47). The evidence of his wife Shalini (DW-2) about Hemant Garg (A-2) not being adept in driving a car and he having engaged one Ankur as the driver, or about the eventual intention to sell the Indica car, are claims which cannot *per se* be believed or acted upon, particularly, in the face of consistent testimony showing that it was appellant Hemant Garg (A-2) who was driving the Indica car at the time of the incident, he being earlier present with the two appellants who were using the fire arms.

158. The claim of Shalini (DW-2) respecting use of mobile instrument with sim no.9999010588 by the appellant Hemant Garg (A-2) based, *inter alia*, on the CDRs (Ex. PW49/D5) (pages 2539-2547 and 3041) preserved on his request by the application dated 01.10.2009 (page 2901 of TCR) is also of no help to him in his defence in as much as the argument that if Hemant Garg (A-2) was driving, he could not have been using the mobile phone instrument around the same time is too far-fetched.

ON IDENTITY OF APPELLANT SONVEER @ PINKU (A-3)

159. The appellant Sonveer @ Pinku (A-3) is one of the two persons – appellant Vishnu (A-4) being the other – who were statedly using fire-arm in the incident, the witness noted earlier showing he to be travelling

in the rear left seat of the Indica car. He has been identified with that role by witnesses Sunil (PW-1), Paramjeet Singh (PW-5), Varun (PW-6), Surender (PW-8) besides independent witness Ranjeet Singh (PW-4). The first four witnesses also connect him to be one of the persons outside Chintoo Car point office in which context witness Hemant (PW-10), Gajender Singh (PW-11) provide the corroboration. As mentioned earlier, the disclosures about A-3 had come up in the initial investigation qua appellant Sushil Arora (A-1). This, per the other evidence, was followed by disclosures made by Vishnu (A-4) (vide Ex. PW49/R). Since A-3 was absconding, NBWs were got issued but he could not be located. As mentioned earlier, this appellant was arrested on 27.08.2009 and, upon interrogation, he made a disclosure (Ex. PW17/D), *inter alia*, indicating that the weapon of offence used in the crime had been disposed of in Faridkot (Punjab). This disclosure made on 27.08.2009 did not result in any recovery. Since no fact was discovered in its wake, the evidence in this respect will have to be totally ignored. The evidence shows that on 04.09.2009, the necessary TIP proceedings in his respect had been conducted, the Investigating Officer applied for and was granted police remand qua A-3 on 04.09.2009. It is during this police remand that A-3 is shown by the evidence to have made further disclosure (Ex. PW17/E) on 08.09.2009 revealing that the firm-arm used in the crime at hand had been passed on to one Sanjay @ Sanju @ Khatta of Mangolpuri in May 2009 and that the said person Sanjay @ Sanju @ Khatta had been arrested by the police of police station Mangol Puri, Delhi leading to recovery of the said weapon.

160. The evidence led by the prosecution about recovery of the fire-arm of the automatic pistol made in Italy (Ex.PW-37/B) from the possession of Sanjay @ Sanju @ Khatta on 13.05.2009 (vide Ex.PW 37/B), it leading to registration of FIR (Ex. PW36/A) under Section 25 Arms Act of PS Mangol Puri by SI Ajay Kumar Sharma (PW-37) has remained unchallenged. The evidence of Inspector Arun Kumar (PW-48A / 49) based, *inter alia*, on his application (Ex. PW49/I) to the Metropolitan Magistrate on 09.09.2009 leading to the proceedings recorded on 14.09.2009 (Ex. PW45/A) followed by seizure (vide memo PW49/J) has unmistakably proved that the pistol seized from the possession of Sanjay @ Sanju @ Khatta alone was transferred and passed on to PW-49 by the Moharrer Malkhana of police station, Mangol Puri, pursuant to the direction of the Metropolitan Magistrate, cartridges seized with it from said Sanjay @ Sanju @ Khatta having been separated and put in a different parcel which was duly returned to the Malkhana of PS Mangol Puri. The evidence further clearly shows that this fire arm connected to the case, pursuant to the disclosure of appellant Sonveer @ Pinku (A-3), was sent alongwith the cartridges recovered from the scene of incident and the bullets recovered from the dead body of Ankit to the FSL for examination by the ballistic expert. While the pistol was confirmed by the FSL report (Ex.HC-A) to be a fire-arm, it being an improvised pistol 7.65 mm bore designed to fire a standard 7.65 mm cartridge and in working order, further report of FSL (Ex. HC-B) duly established that the said firm-arm had been used to fire the two fired cartridges recovered from the scene of firing, thereby confirming the use of the said weapon in the subject incident.

161. The argument of the appellant Sonveer @ Pinku (A-3), however, is that nothing in the disclosure statement (Ex. PW17/E) is admissible since the weapon in question had already been seized in May 2009 from Sanjay @ Sanju @ Khatta in the case of Mangol Puri, the submission being that it is not a case of any fact "thereby discovered" within the meaning of the saving clause in Section 27 of the Evidence Act.

162. On the admissibility of the evidence concerning discovery of fact pursuant disclosure made by an accused in custody, reliance was placed on *Jafar Hussain Dastagir Vs. State of Maharashtra, (1969) 2 SCC 872* and *State of UP vs. Jageshwar and Ors, (1983) 2 SCC 305* to argue that since the police was already in possession of the pistol, it having been seized from the possession of Sanjay @ Sanju @ Khatta, the facts concerning the said evidence could not be treated as one discovered pursuant to disclosure by the appellant Sonveer @ Pinku (A-3). In this context, reference was also made to the view taken by this court in *Chandrakant Jha Vs. State (GNCT) of Delhi, Crl. Appeal No.655/2013 and death reference no.3/2013, decided on 27.01.2016*.

163. Section 25 of the Evidence Act prohibits evidence to be led as to confession made by an accused to a police officer, its object being to ensure that no one is induced by any threat, coercion or force to make a confessional statement about complicity in crime in as much as to do so would be in breach of the fundamental right against self-incrimination as guaranteed by Article 20(3) of the Constitution of India. Section 26 of the Evidence Act expands the said prohibition by stipulating that a confession made in the custody of police shall not be proved against the marker unless it is made in the immediate presence of a Magistrate.

Section 27 of the Evidence Act, however, carves out an exception to the general rule and partially lifts the inhibition contained in Section 25 and 26, the provision reading thus :-

> *"27. How much of information received from accused may be proved:*
>
> *Provided that when any fact is deposed to as discovered in consequences of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether if amounts to a confessions or not, as relates distinctly to the fact thereby discovered, may be proved."*

164. Since the expression "fact" is crucial to Section 27 of Evidence Act, its meaning as given in Section 3 also needs to be noted as under :-

> *"Fact" – "Fact" means and includes-*
>
> *(1) any thing, state of things, or relation of things, capable of being perceived by the sense;*
> *(2) any mental condition of which any person is conscious.*

165. In *Rakesh Vs. State, GNCT of Delhi, (2016) 227 DLT 92 (DB)*, a division bench of this court of which one of us (R.K. Gauba, J.) was a party had the occasion to take note of the development of law concerning interpretation of Section 27 of Evidence Act. The following paragraphs from the judgment in the said case may be extracted :-

> *"40. The provision contained in Section 27 of the Evidence Act has been the subject-matter of a series of authoritative and illuminating pronouncements, the earliest landmark decision being one reported as Pulukuri Kotayya vs. Emperor AIR 1947 PC 67, the exposition of law therein in the following words having ever since been treated as locus classicus:-*

"It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user or the past history, of the object produced is not related to his discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of the knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

41. In Mohd. Inayatullah vs. The State of Maharashtra, (1976) 1 SCC 828, it was held that the expression 'fact discovered' includes not only the physical object produced but also the place from which it is produced and the knowledge of the accused as to the same. Interpreting the words "so much of such information .... as relates distinctly to the fact thereby discovered ", the court held that the word "distinctly" means "directly", "indubitably", "strictly" or "unmistakably". The word has been advisedly used to limit and define the scope of provable information. The phrase "distinctly" relates "to the fact thereby discovered". The phrase refers to that part of the information supplied by the accused which is the direct cause of discovery of a fact. The rest of the information has to be excluded.

42. In State of Maharashtra vs. Damu Gopinath Shinde and others, (2000) 6 SCC 269, the law was summarised thus:-

"35. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of the Privy Council in Pulukuri Kottaya v. Emperor [AIR 1947 PC 67 : 74 IA 65] is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.

36. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability..."

43. In State vs. Navjot Sandhu @ Afsan Guru (2005) 11 SCC 600 while examining the issue as to whether discovery of fact referred to in Section 27 should be confined only to the discovery of a material object and the knowledge of the accused in relation thereto or the discovery should be in

respect of his mental state or knowledge in relation to certain things – concrete or non-concrete, the Supreme Court traced the jurisprudential development on the subject and observed that:-

> *"125. We are of the view that Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is an authority for the proposition that "discovery of fact" cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place".*

44. Pertinently, this decision also refers to ambit and scope of Section 8 of the Evidence Act and quotes with approval the following passage from Prakash Chand vs. State (Delhi Administration) AIR 1979 Sc 400, in two paragraphs extracted as under :

> *"190. ……It would be admissible under Section 8 of the Evidence Act as a piece of evidence relating to the conduct of the accused person in identifying the dead bodies of the terrorists. As pointed out by Chinnappa Reddy, J. in Prakash Chand v. State (Delhi Admn.): (SCC p. 95, para 8)*
>
> *"There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a police officer in the course of an investigation which is hit by Section 162, Criminal Procedure Code. What is excluded by Section 162, Criminal Procedure Code is the statement made to a police officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a police officer during the course of an investigation. For example, the evidence of the*

circumstance, simpliciter, that an accused person led a police officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act (vide H.P. Admn. v. Om Prakash)."

206. We have already noticed the distinction highlighted in Prakash Chand case between the conduct of an accused which is admissible under Section 8 and the statement made to a police officer in the course of an investigation which is hit by Section 162 CrPC. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where stolen articles or weapons used in the commission of the offence were hidden, would be admissible as "conduct" under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct, falls within the purview of Section 27, as pointed out in Prakash Chand case. In Om Prakash case this Court held that: (SCC p. 262, para 14)

"[E]ven apart from the admissibility of the information under Section 27, the evidence of the investigating officer and the panchas that the accused had taken them to PW 11 (from whom he purchased the weapon) and pointed him out and as corroborated by PW 11 himself would be admissible under Section 8 of the Evidence Act as conduct of the accused..."

166. Taking note of certain other cases - (*Ranjeet Kumar Ram @ Ranjeet Kumar Das vs. State of Bihar, 2015 SCC Online SC 500; AIR 2015 SC (suppl) 1374 and Mehboob Ali vs. State of Rajasthan, 2015 SCC Online SC 1043; 2015 AIR SCW 6123; and Anuj Kumar Gupta vs. State of Bihar,*

(2013) 12 SCC 383 - this court summarised the legal position in *Rakesh Vs. State (supra)* as under :-

> *51. It is well settled that the bar against admissibility of what is prohibited by Sections 25 and 26 of the Evidence Act is partially lifted by Section 27 in respect of such information given by accused to the police as relates distinctly to the discovery of a "fact" thus far unknown; this, subject to the riders of the information being immediate and proximate cause of discovery and the discovered fact being relevant to prove his complicity through confirmation by subsequent events. We have also quoted observations of the Supreme Court in Navjot Sandhu (supra) referring to Section 8 of the Evidence Act. The contours of the said provision are wider. It is sufficient if the information given by the accused provides the lead to the Investigating Officer to unravel facts and material which were not known to him and which could not have been known but for such information coming from the accused. Further, in a given case when established the relevant facts discovered consequent to the information given by the accused may not lead to recovery directly from the person or the place towards which the information given by the accused pointed. The fact that there was an intermediate person respecting whom the accused made the disclosure and who, in turn, leads to the discovery and recovery does not disrupt the elements of immediacy and proximity; this, so long as the special knowledge of the accused with regard to the fact eventually discovered can be gathered from the circumstances, since that is what provides the requisite confirmation of what was initially disclosed…"*

167. In the present case, the weapon used in this crime had been recovered by SI Ajay Karan Sharma (PW-37) of police station Mangol Puri on 13.05.2009. It is clear from the record produced that PW-37 did not have even the remotest cause for suspicion as to use of such weapon in any crime including that of murder, not the least about the crime at hand.

A connection between the weapon thus seized on 13.05.2009 by PS Mangol Puri and the case at hand could not conceivably have been drawn except when the disclosure by the person who was privy to such use of the weapon. In these circumstances, the court must uphold the argument of the prosecution that the fact discovered in the situation at hand is the use of the weapon in question and consequently the disclosure attributed to the appellant Sonveer @ Pinku (A-3) is admissible under Section 27 of Evidence Act.

168. There is no substance in the submission that interrogation of Sanju @ Sanjay @ Khatta could have revealed facts about the use of the weapon in the case at hand. There is no evidence showing that Sanjay @ Sanju @ Khatta had prior knowledge about such use of the weapon in the incident antecedent to the date on which he was found in its possession.

169. I must also mention, only to reject, further argument on behalf of the appellant Sonveer @ Pinku (A-3) that the absence of opinion about the third cartridge recovered from the scene of crime and about the two bullets found in the dead body of Ankit erodes the value of discovery of weapon at the instance of the appellant Sonveer @ Pinku (A-3). It needs only to be observed that the ocular evidence shows that two fire arm were used, the other by the appellant Vishnu (A-4). As already noted, the eye-witness account establishes that the bullet lodged in the skull of Ankit was fired by Vishnu (A-4) and possibly the other bullet which pierced through the arm-pit of Ankit had also come from the said weapon used by the appellant Vishnu (A-4). In these circumstances, the absence of any further connection cannot be a good defence. Two of the spent cartridges found at the scene of crime having been positively connected with the

weapon about use of which appellant Sonveer @ Pinku (A-3) had clear knowledge are sufficient to bring home the prosecution case on this score.

170. As noted earlier, the appellant Sonveer @ Pinku (A-3) has been positively identified by the four surviving occupants of the black Santro car and by eye-witness Ranjeet Singh (PW-4). The evidence of the Investigating Officer, Inspector Arun Kumar (PW-48A/49) read with that of Sh. Jitender Mishra, Metropolitan Magistrate (PW-35) speaking on the basis of proceedings (Ex. PW49/F) of 04.09.2009 shows that though the Investigating agency had arranged for TIP, appellant Sonveer @ Pinku (A-3) refused to participate on the specious plea that he had been shown to the witness in the police station without specifying at any stage of the proceedings as to who the said witness was.

ON IDENTITY OF APPELLANT VISHNU (A-4)

171. It was noted earlier, that the appellant Vishnu (A-4) was arrested on 29.09.2009. He had been involved in a case of hurt registered in 2007 by police station Prasad Nagar and had been absconding from such proceedings. The evidence reveals his name had also figured in the first disclosure of the appellant Sushil Arora (A-1) and also in the disclosures of the appellant Hemant Garg (A-2) and Sonveer @ Pinku (A-3). It is clear that he was aware that police wanted to interrogate him in the present case and yet he remained unavailable, obviously an absconder. The prime evidence relied upon by the prosecution is that of he being identified by Sunil (PW-1), Paramjeet Singh (PW-5) and Varun (PW-6), the three survivors from the black Santro car in addition to Ranjeet Singh (PW-4). It has been argued on his behalf that the evidence of Manveer Singh (PW-2) shows that it was not possible to identify him (A-4) as one

of the persons travelling in the Indica car. The submission is that the evidence of PW-1, PW-4, PW-5 and PW-6 is unreliable. For reasons already stated at length in earlier part of this judgment, I find no merit in this broad argument. There is no reason, in particular for PW-4, to drag the name of A-4 in this crime. He is an independent witness who did not have any axe to grind. The other witnesses confirmed the presence of A-4 outside Chintoo Car Point office, particularly at the time of brawl in the parking, he also being one of those with whom appellant Rajesh Pandey (A-5) was in constant touch. The ocular evidence clearly shows that it is this person (A-4) who had come out in the open, gone upto Ankit lying with arm-pit bullet injury near black Santro car and shooting him in the head.

172. It is true that the weapon of offence used by A-4 could not be recovered but, in my considered opinion, non-recovery of the weapon in the case at hand cannot result in any doubts being entertained as to his complicity. In *Lakhan Sao Vs. State of Bihar, (2000) 9 SCC 82: 2000 SCC (Crl.) 1163*, the Supreme Court observed thus :-

> *"18. The non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is acceptable.*

173. In *State of Rajasthan Vs. Arjun Singh, (2013) 12 SCC 812*, the court expressed that :

> *"18. ...mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place.."*

174. The same view was reiterated in *Mritunjoy Biswas Vs. Pranab Alias Kuti Biswas and Ar., (2013) 12 SCC 796* and again in *Nankaunoo Vs. State of Uttar Pradesh, (2016) 3 SCC 317.*

ON EXHORTATION

175. The ocular evidence already noted indicates that while the appellants Sonveer @ Pinku (A-3) and Vishnu (A-4) were using fire-arms in the attack for targeting the occupants of black Santro car, others namely Sushil Arora (A-1), Rajesh Pandey (A-5) and Hemant Garg (A-2), the latter driving the Indica car were exhorting them (A-3 and A-4) to kill. It has been the argument on behalf of the said three appellants that the evidence of exhortation (*maro salo ko maro salo ko*) cannot be construed so as to impute common intention to kill. The learned counsel representing appellant Rajesh Pandey (A-5) put the argument thus : the appellants, if present in car, were mute spectators; exhortation is inherently a weak circumstance; exhortation must be proved by cogent and reliable evidence which is missing in the present case; and if evidence about exhortation were to be believed, it must be further shown that it was such exhortation only that has led to the firing from which inference of prior concert could be drawn. The learned counsel pointed out that though charge under Section 120B IPC had been framed, conviction had not been recorded thereupon.

176. Arguing that mere presence with the assailants or exhortation cannot lead to the conclusion that appellants Sushil Arora (A-1), Hemant Garg (A-2) or Rajesh Pandey (A-5) shared the common intention with or were party to the common object of the assembly of which others were a

member, they being appellants Sonveer @ Pinku (A-3) and Vishnu (A-4) who the evidence suggests had used the fire-arms in the attack, reliance is placed on *Barendra Kumar Ghosh vs. The Emperor, AIR 1925 PC 1; Chikkarange Gowda Vs. State of Mysore, AIR 1956 SC 731; 1956 Cr. LJ 1365; Balkar Singh vs. State of Punjab, AIR 1994 SC 1133; Sumitra BAnik Vs. State of West Bengal, AIR 1999 SC 2594; 1999 (9) SCC 24; Chandrakant Murgyappa vs. State of Madhya Pradesh, AIR 1999 SC 1557; Suresh vs. State of Uttar Pradesh, (2001) 3 SCC 673; Sukadev Giri vs. State of Orissa JT 2012 10 SC 424; and Nagaraja Vs. State of Karnataka, AIR 2009 SC 1522, 2008 17 SCC 277*.

177. In my considered opinion, the arguments of the defence cannot be accepted in the present case for the reason it is not a case only of exhortation. The appellants Sushil Arora (A-1), Hemant Garg (A-2) and Rajesh Pandey (A-5) are shown to have indulged in a series of acts of commission, starting with the conduct inside or outside the Chintoo Car Point office earlier, after Mahender Singh Tikla (PW-9) had left the place, with his associates, provenly threatened and coerced into accepting terms with which he could not have been happy. There is no explanation offered as to why these three appellants in particular were in the Indica car of appellant Hemant Garg (A-2), driven by him, chasing and intercepting the black santro car, also carrying along the two other appellants who were not only carrying fire-arms in their respective hands but also openly using them to target. The exhortation at such stage of the sequence of events was apparently much beyond that of a mute spectator or of an innocent bystander. They were brazenly aiding and abetting the assailants who, the evidence has demonstrated, had come to render their services

upon being solicited by Rajesh Pandey (A-5), with whom they were in regular touch, obviously, in the given facts and circumstances, at the instance of appellant Sushil Arora (A-1).

ADDITIONAL THOUGHTS NECESSITATED BY CONTRARIAN VIEW

178. This opinion, now representing my view on the subject cannot be complete unless I add some more thoughts giving expression to the reasons as to why I do not find it correct or proper to subscribe to the view taken by my learned sister, Gita Mittal, J., in her separate opinion.

179. It is trite that every criminal case has its own peculiar facts and circumstances. Undoubtedly, the jurisprudential evolution has brought out certain well accepted principles on the touchstone of which the evidence adduced at the criminal trial is tested or appreciated for its intrinsic worth and, for such purposes, precedents or the past decisions, particularly of the higher authorities, come as useful and handy guide. It is well settled, however, that it is not everything said by a judge while giving judgment that constitutes a precedent. The only thing in a judge's decision which can be said to be binding is the principle upon which the case is decided, such principle being culled out from the analysis of the decision isolating it from the *ratio decidendi*. [*CIT Vs. Sun Engineering Works (P) Ltd., (1992) 4 SCC 363 and Union of India Vs. Dhanwanti Devi, (1996) 6 SCC 44 & Madhav Rao Jivaji Rao Scindia Vs. Union of India, (1971) 1 SCC 85*]. At the same time, it has to be borne in mind that the doctrine of *stare decisis* (meaning "to stand by decided cases") in the context of criminal law has to be applied with even greater circumspection. In criminal cases, the principles drawn from previously decided cases are meant to be used for proper appreciation of facts having

regard to the overall factual matrix of the case and not as mathematical formulae.

180. In the particular context of criminal jurisprudence, in a decision reported as *State of Orissa v. Mohd. Illiyas*, *(2006) 1 SCC 275*, it was held as under :

> *12. "...According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. (see State of Orissa v. SudhansuSekharMisra (1968) 2 SCR 154 : AIR 1968 SC 647 and Union of India v. Dhanwanti Devi (1996) 6 SCC 44]. A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament. In Quinn v. Leathem[1901 AC 495 : 85 LT 289 : (1900-03) All ER Rep 1 (HL)] the Earl of Halsbury, L.C. observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides."* (emphasis supplied)

181. As observed by V.R. Krishna Iyer, J. in a judgement reported as *Mamleshwar Prasad v. Kanhaiya Lal, (1975) 2 SCC 232 :-*

> "8. *... it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law, indistinguishably identical, and that ruling must bind*."
>
> (emphasis supplied)

182. More than six decades ago, a bench of three Hon'ble Judges of the Supreme Court in a judgment reported as *Pandurang v. State of Hyderabad*, (1955) 1 SCR 1083, AIR 1955 SC 216, 1955 Cri LJ 572 dealing with a criminal case involving offences, *inter alia*, of culpable homicide brought out the risks inherent in application of precedents *dehors* the factual matrix in which the same are rendered and observed thus :-

> *"35. ...At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". (Sarkar's Evidence, 8th Edn., p. 30).*
>
> *36. The learned counsel for the State relied on Mamand v. Emperor [AIR 1946 PC 45] because in that case the accused all ran away and Their Lordships took that into consideration to establish a common intention. But*

there was much more than that. There was evidence of enmity on the part of the accused who only joined in the attack but had no hand in the killing, and none on the part of the two who did the actual murder. There was evidence that all three lived together and that one was a younger brother and the other a tenant of the appellant in question. There was evidence that they all ran away together: not simply that they ran away at the same moment of time when discovered, but that they ran away together. As we have said, each case must rest on its own facts and the mere similarity of the facts in one case cannot be used to determine a conclusion of fact in another. In the present case, we are of opinion that the facts disclosed do not warrant an inference of common intention in Pandurang case. Therefore, even if that had been charged, no conviction could have followed on that basis. Pandurang is accordingly only liable for what he actually did."

(emphasis supplied)

183. That the above approach to criminal cases has stood the test of time and has been consistently followed is demonstrated by the following views expressed in decision of a yet another bench of three Hon'ble Judges of the Supreme Court, it having been reported as *Kalyan Chandra Sarkar v. Rajesh Ranjan, (2005) 2 SCC 42, 2005 SCC (Cri) 489*, in the following words :-

"*42. While deciding the cases on facts, more so in criminal cases the court should bear in mind that each case must rest on its own facts and the similarity of facts in one case cannot be used to bear in mind the conclusion of fact in another case. (See Pandurang v. State of Hyderabad [(1955) 1 SCR 1083 : 1955 Cri LJ 572]). It is also a well-established principle that*

while considering the ratio laid down in one case, the court will have to bear in mind that every judgment must be read as applicable to the particular facts proved or assumed to be true since the generality of expressions which may be found therein are not intended to be expositions of the whole of the law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides, and not what logically follows from it. See: (1) Quinn v. Leathem [1901 AC 495 : (1900-03) All ER Rep 1 : 85 LT 289 (HL)] , State of Orissa v. SudhansuSekhar Misra [(1968) 2 SCR 154 : AIR 1968 SC 647] , (3) Ambica Quarry Works v. State of Gujarat[(1987) 1 SCC 213 : AIR 1987 SC 1073] .

(emphasis supplied)

184. In the contrasting opinion, a finding is proposed to the effect that the prosecution has failed to establish any motive to commit the murder of Mahender Singh Tikla (PW-9) or anyone associated with him and further that there is no proof adduced as to existence of any argument or dealings with the accused persons to commit such crime. The well settled law, however, needs to be borne in mind that criminal conspiracies, particularly of such nature, are generally hatched in secrecy and executed in stealth. Though the present case mercifully is based on eye witnesses accounts, some of the key prosecution witnesses, in my opinion, identifying all the appellants connecting them with various acts of commission or omission which collectively constitute sufficient proof of they having acted in concert. If search for something more were to be made, one would hardly come across a case where direct evidence of prior agreement to commit a crime has been unearthed or successfully proved

by direct evidence before the court. The failure of the trial court to return a clear verdict on the charge under Section 120-B IPC, coupled with the omission of the State to pursue appropriate remedy against such omission, only means conviction cannot be recorded for the said substantive offence. This, however, cannot distract one from appropriate appreciation of the evidence.

185. With respect, I do not think it is fair to disbelieve one witness on the ground his version does not match wholly with that of the other, even though both may be substantially similarly placed vis-a-vis relevant facts and circumstances. While discussing the credibility of the evidence concerning the conduct attributed to Rajesh Pandey (A-2) vis-a-vis the others, statedly positioned outside Chinto Car Point office, it has been observed that Mahender Singh Tikla (PW-9) and Gajender Singh (PW-11) would not even remotely suggest that Rajesh Pandey (A-2) was "going in and out" for meeting such other persons. Every individual has a different perception of the events he or she witnesses which, in turn, may be dependent upon various factors that include the focus of his or her attention at that point of time. Mahender Singh Tikla (PW-9) was more interested in taking the talks to fruition so that he could get his money with interest back. He had no cause for apprehending that some sinister design to launch a deadly attack was being cooked up. He may have not even noticed Rajesh Pandey (A-5) going in and out of the office during discussions. In contrast, those standing outside had the vantage position to notice the activities with more acute detail.

186. Similarly, it is not fair to pick up stray sentences from the deposition of one witness to hold the other to be totally discredited on

such account as done vis-a-vis Ranjeet Singh (PW-4) whose continued presence at the scene of crime was not endorsed by Manveer Singh (PW-2) while the latter was waiting for the police to return from the hospital to take formal note of his account of the incident as appearing in the discussion on the challenge to the very presence of the former who, in contrast, and very noticeably, has accounted for his absence for certain duration while, *inter alia*, avisiting his sister in village Adchini.

187. It is generally seen that when the police begins investigation into a criminal case that has been reported, it depends substantially on the information gathered either from the scene of crime or the circumstances attendant thereupon or the facts collected from the individuals involved, be they witnesses who are directly privy to the necessary background facts or otherwise conversant with the relevant material or even the persons who are suspected (or accused) to be involved. The inputs received from the last mentioned category - that is, the suspects or the persons accused - are, of course, generally inadmissible unless they can be introduced in evidence, if so permissible, illustratively under Section 27 of the Evidence Act. After the investigating agency has gathered all the requisite background facts, and has collected sufficient evidence to substantiate it during inquiry or trial before the criminal court, it presents its case in the form of a report under Section 173 Cr. PC ("chargesheet") seeking trial of such persons whose involvement is borne out, in its opinion, from the material submitted therewith. This, ideally, would be a stage where the investigating agency (from which the prosecution takes over) presents its case in entirety leaving out, in the interest of fairness of the process, nothing from the gaze of the court. But, experience also shows that during

the course of the trial, some of the facets of the case are either rendered redundant or irrelevant (for example on account of duplication or being repetitive) and, therefore, fall on the side making it unnecessary for the prosecutor to add to the formal production of evidence in such regard, this particularly in cases where the prosecution rests its case on direct evidence.

188. It is not the requirement of criminal jurisprudence that the prosecution must prove each nugget of the facts as alleged in the beginning by the charge-sheet in order to succeed. The court is eventually called upon to take a view, and give its decision, on all the facts which are actually proved during the trial. In case the prosecution has omitted to bring on record formal proof of certain facts which the court perceives to be crucial, there are ample powers in the Code of Criminal Procedure to call for further evidence in such respect. [see, for illustration, Sections 311 and 391 Cr. PC).

189. A criminal case is not like a jigsaw puzzle, such that it cannot succeed unless all the pieces of the maze are in place. This is not so even in cases founded on circumstantial evidence, what to say of cases supported by direct evidence. If the prosecution does not have any direct proof and depends on proof of circumstances, it has to bring home, to the satisfaction of the court, all such circumstances that collectively form a complete chain pointing towards the guilt of the accused. The prosecution may have begun the quest with a large volume of facts but may end up proving less than what those gamut of circumstances were and, yet, if the circumstances that are proved beyond all reasonable doubts and are sufficient to point towards the complicity of the accused, a conviction may

still be called for on such basis; this, notwithstanding the fact that some of the circumstances have remained unproved.

190. In the contrary opinion, there are at least three circumstances on which the learned author of such opinion seems to be not satisfied and which are quoted as deficiencies of import. This, to my mind, would not be a correct approach. The three circumstances concern lack of clear proof as to the presence of the Indica Car outside Chintoo Car Point office; lack of clarity as to the identity of the individual who introduced the particulars of Ankit (the victim) on arrival at the hospital, particularly against the backdrop of the evidence of Narender Singh (PW-12) who statedly carried him in his car from the scene of incident showing some hesitation on his part; and, there being no proof of any telephonic contact between the appellants either prior or subsequent to the date of the incident.

191. In my considered opinion, all the above conclusions are inconsequential to the result of the prosecution. The presence of Indica Car outside Chintoo Car Point office, if proved, may have added strength to the prosecution case. But, the converse does not mean the case stands disproved because it is the presence and use of the car in the crime which has been otherwise brought home through credible evidence. As discussed at length in my opinion, there is no doubt that Ankit suffered a fatal bullet injury at the place alleged in the prosecution version. There is also no doubt that such injury was in the head leaving him virtually in no state to be communicative with the doctors by the time he was brought to the hospital. The fact that he was brought to the hospital only means someone would have carried him there from the place of incident. There

is no dispute that the particulars of Ankit given in the MLC are accurate. In these circumstances, the hesitation of Narender Singh (PW-12) cannot dent the prosecution case in any manner. Similarly, proof of prior communication through telephone between prime accused and others would have been of great assistance in proving the charge. But inability of the prosecution to muster such proof cannot necessarily mean that they would have no connection with each other.

192. With due deference to the overall view taken by my senior colleague on the bench, I must say that certain conclusions reached by her are founded on wrong assumptions, which I illustrate thus :-

(i). While taking note of the initial input received through the agency of PCR (under the heading "Information received by the police regarding the incidents of shooting"), she has observed that though information of the complete incident, names, witnesses, full particulars of the incident, the alleged motive for the crime and full details of the assailants' vehicle were available, yet no steps were taken to register any case. This is factually not correct. As is noted in the same very opinion, some pages later, while discussing the evidence from the perspective of possibility of bystanders to effectively make identification "of other occupants of the car", "no person" is named in the elaborate police records of the corresponding period.

(ii). The discourse on the "financial dealings" between the prime accused (A-1) on one hand and PW-9 (Mahender

Singh Tikla) on the other has been taken note of from the perspective of Pushkar Raj (DW-6), the brother of the former prime accused (A-1), with the observation it is "best revealed" by such account. Elaborate evidence on the subject has been adduced by the prosecution which merits equal consideration, particularly when the same is also in the nature of "unchallenged" testimony in all material aspects, the points of difference between the prosecution evidence and that of the defence essentially being relating to the two crucial meetings only.

(iii). In reaching the conclusion that there was no "acrimony" and no "hot altercation" between A-1 and PW-9, the evidence about the intimidatory talks stands totally sidelined and ignored.

(iv). The conclusion that it was impermissible for prosecution witnesses to have properly seen the assailants at the time of the incident because of the tinted window glasses, head rests or the high speed of the car ignores the crucial evidence that the assailant's car may have initially come on the scene at high speed but then it ran parallel for some distance to that of the victims and further that the assailants had come out on the road in open public view particularly at the stage when Ankit (the victim) was shot in the head while lying injured behind the black santro car.

193. The contrary opinion is critical of the evidence concerning disclosure attributed to the appellant Sushil Arora (A-1) in several which ways including by referring to the fact of absence of his signatures on initial sheets of the said document; submissions made by the investigating agency (referred to by other opinion as "pleadings" in the nature of applications for remand, issuance of warrants, chargesheet, etc.) wherein at some places, the co-appellants have been referred to as "unknown" persons or associates; also highlighting at the very beginning the contents of the formal charge framed on 22.08.2009 wherein, aside from appellant Sushil Arora (A-1), the name only of the appellant Rajesh Pandey (A-5) was mentioned, the rest having been described as "three other unknown".

194. I have given elaborate reasons as to why absence of signatures of Sushil Arora (A-1) on the initial sheets of the disclosure statement does not render it a document of doubtful veracity. In criminal cases, the applications moved by the investigating agency cannot be construed as "pleadings" in the same sense as done in the civil jurisprudence. Ideally, the investigating agency must be meticulous in putting down all the necessary facts before the court. But then, the narration of such facts at each stage need not be a comprehensive account of the entire result of the investigation till such stage. A police officer making an application or report has to narrate facts bearing in mind the purpose of such application or report and restrict the submissions to what is the requisite for prayer made therein. It may be added that the investigating agency would be within the limits of its legitimate discretion to even withhold from formal inclusion of certain facts in the application (or report) if the status of the investigation at that stage, and the need for confidentiality of the leads

being developed then, were to so require. This, however, does not mean that the investigating police withholds such information from the court (of the Magistrate) at the stage of investigation inasmuch as it is duty bound to produce, and conversely, the Magistrate is duty bound to call for, for perusal the police case diary at each stage of import.

195. The fallacy of the submission of the defence concerning omissions of full particulars of appellants other than the appellant Sushil Arora (A-1), in some formal police reports or application lies, as highlighted in my opinion, in the fact that the first chargesheet submitted on 23.05.2009 had itself set out the evidence that had come till then indicating involvement of the said others by name. This also is sufficient not to accept the logic on account of reference to three of the appellants as persons "unknown" in the formal charge framed on 22.08.2009. If at all, it was an error on the part of the court. It is trite that such error in the charge is mere irregularity.

196. In the same context as above, I must record my dissenting views also on the comparison of the disclosure statement (Ex. PW26/J) of appellant Sushil Arora (A-1) with the ocular evidence presented through its witnesses by the prosecution, as done in the other opinion recommending rejection of such material in the section dealing with this part of the evidence.

197. Section 24 of the Evidence Act contains a clear prohibition against consideration of any statement made by an accused (or suspect) to the police during investigation. Sections 25 and 26 of the Evidence Act add further to the said very cardinal principle. Section 27 of the Evidence Act carves out a very small window for some part of such statement to be

looked into. It says in clear terms that only "*so much of such information*" as has been received from the accused by the police "*may be proved*" as "*relates distinctly to the fact thereby discovered*". It is expected that a fair investigating police officer would scrupulously record whatever is disclosed to him by the suspect during interrogation. If such statement (or information thereby given) leads to discovery of any fact only so much of the statement (or information) may be presented to the court as evidence as is relevant and admissible. But, the disclosure statement in its entirety cannot be looked into by the court. To use such statement, that too in entirety, as the touchstone to ascertain the veracity of the prosecution evidence is something unheard of – totally unacceptable. Conversely, the prosecution evidence cannot also be used by the court to record a satisfaction that the statement given by the suspect to the police (noted for such exercise in entirety) even beyond what is admissible under Section 27 of the Evidence Act was truthful or otherwise. Such reasoning, to my mind, is taboo and cannot be adopted.

198. Again, in the same context as above, a confusion seems to be prevailing as to what is relevant or admissible under Section 27 of the Evidence Act – whether it is discovery of a fact or some "recovery" as is the expression used in the context of the weapon of offence with which the prosecution sought to prove the appellant Sonveer @ Pinku (A-3) to be connected. I may add that it is not the recovery of the weapon either from appellant Sonveer @ Pinku (A-3), or at his instance which was proved at trial; instead, it is the "discovery" of the fact concerning knowledge on the part of the said appellant vis-a-vis the weapon in question as used in the crime at hand which was brought home.

199. Though the learned Judge recording the other opinion seems to have intended to record her conclusion on the defence argument concerning the testimony of prosecution witnesses to be questionable on account of their "unnatural conduct", it is noted that after recording the submissions of the appellants and taking note of case law relied upon, no conclusion whatsoever has been added at the end of the relevant section of the judgment. The learned Judge, however, has accepted this argument inasmuch as this impression manifests at other places. I need not dwelve at length on most of the aspects concerning this line of defence plea since my opinion recorded above deals sufficiently with the same. I would only add that it is not fair to disbelieve Ranjeet Singh (PW-4) or to doubt his credibility for such reasons as it being "impossible" that he would have "voluntarily returned to the spot" after having been a witness to such "violence" as would have "shocked" him into "silence". It is dangerous to lay down such broad propositions as the principles on which human conduct – which has no bounds - is to be tested.

200. In my separate opinion, I have already rejected the argument of unfair investigation. Five hours delay in registration of the FIR, in the given facts and circumstances, concededly wherein events were happening at fast pace, cannot be rejected as *ante timed*. The contrary opinion itself takes note of the judgment in *Munshi Prasad Vs. State of Bihar, (2002) 1 SCC 351* and *Bhajan Singh @ Harbhajan Singh and Ors. Vs. State of Haryana, (2011) 7 SCC 421*, holding that delay in compliance with Section 157 (1) Cr. PC in forwarding a copy of the FIR to the *Illaqa* Magistrate by itself cannot demolish or denounce the other positive and trustworthy evidence on record. There is no rule of law that the

prosecution would fail if the receipt of the such report under Section 157 (1) Cr. PC at the end of the Magistrate is not proved The delay in preparation of inquest papers, even if assumed, in the facts and circumstances of the case does not take the defence any further, particularly as the arrests came in the wake of post-mortem examination that was conducted in due course. In the context of argument concerning unfair investigation, the learned author of the contrary view, *inter alia*, observes that certain events "cast further suspicion on the events sought to be proved by prosecution witnesses" and refers in this context to the events of "the unfortunate demise of Ankit; the requirement of conducting the autopsy on the dead body; the site position and presence of persons getting captured in photographs" also observing that these were events "over which the police had no control and could not postpone." I am unable to comprehend the logic behind these observations.

201. My learned sister proposing acquittal by her separate opinion has taken note of certain judgments on the subject, *inter alia*, of dock identification. To add some material to the subject, I would like to refer to decisions of the Supreme Court in two relatively recent cases, they being *Ravi Kapur* v. *State of Rajasthan*, (2012) 9 SCC 284 and *Prakash v. State of Karnataka*, (2014) 12 SCC 133. In *Prakash v. State of Karnataka* (supra), the discourse on the said issue has been summarised thus :

> *"15. An identification parade is not mandatory [Ravi Kapur v. State of Rajasthan, (2012) 9 SCC 284 : (2012) 4 SCC (Civ) 660 : (2012) 3 SCC (Cri) 1107] nor can it be claimed by the suspect as a matter of right. [R. Shaji v. State of Kerala, (2013) 14 SCC 266 : (2014) 4 SCC (Cri) 185]. The purpose of pre-trial identification evidence is to assure the investigating*

agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim later in court at the trial. [Rameshwar Singh v. State of J&K, (1971) 2 SCC 715 : 1971 SCC (Cri) 638]. If the suspect is a complete stranger to the witness or victim, then an identification parade is desirable [Mulla v. State of U.P., (2010) 3 SCC 508 : (2010) 2 SCC (Cri) 1150; Kishore Chand v. State of H.P., (1991) 1 SCC 286 : 1991 SCC (Cri) 172] unless the suspect has been seen by the witness or victim for some length of time. [State of U.P. v. Boota Singh, (1979) 1 SCC 31 : 1979 SCC (Cri) 115]
In Malkhansingh v. State of M.P. [(2003) 5 SCC 746 : 2003 SCC (Cri) 1247] it was held: (SCC pp. 751-52, para 7)

> *"7. ... The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade.They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact."*

16. However, if the suspect is known to the witness or victim [Jadunath Singh v. State of U.P., (1970) 3 SCC 518 : 1971 SCC (Cri) 124] or they have been shown a photograph of the suspect or the suspect has been exposed to the public by the media [R. Shaji v. State of Kerala, (2013) 14 SCC 266 : (2014) 4 SCC (Cri) 185] no identification evidence is necessary. Even so, the failure of a victim or a witness to identify a suspect is not

always fatal to the case of the prosecution. In Visveswaran v. State [(2003) 6 SCC 73 : 2003 SCC (Cri) 1270] it was held: (SCC p. 78, para 11)

> *"11. ... The identification of the accused either in a test identification parade or in court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence."*

(emphasis supplied)

CONCLUSION

> *"23. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case."*
>
> *[State of U.P. v. Awdhesh,* (2008) 16 SCC 238 : (2010) 4 SCC (Cri) 257]

202. In the overall conspectus of the case at hand, I find no substance in any of the contentions urged on behalf of the appellants in these appeals. The learned trial court, in my considered view, has appreciated the evidence in proper light and has reached correct conclusions on facts. The prime facts showing complicity of each appellant have been proved

through cogent evidence by the prosecution beyond the pale of all doubts. I find no reason for interference on the finding on facts.

203. It was argued that the trial court did not record conviction for the offence on the charge under Section 120-B IPC, and, therefore, it must be construed that the appellants stand acquitted of the said charge. The charge having been framed, also for the offence under Section 120-B IPC, it was incumbent on the trial court to give a clear conclusion in such respect. The judgment is conspicuously silent on this aspect. At the same time, however, it must be observed that from the manner in which the formal charge was framed, it appears that the charge under Section 120-B IPC was in the alternative in as much as the charge for the substantive offences under Section 302 IPC and 307 IPC were also framed with the provision of Section 34 IPC having been invoked thereby indicating the trial to be on the basis of case of the prosecution to the effect that the five appellants had acted together in furtherance of their common intention.

204. The omission of the trial court to return a clear conclusion as to the charge under Section 120-B IPC not having been challenged by any appeal by the State, the necessary corollary being that the order has to be construed as one of acquittal on the said charge I, however, find no substance in the plea in as much as the acts of commission or omission proved at the trial by the prosecution through cogent evidence have brought home facts, the conduct manifesting wherefrom shows sharing of common intention and thus, binding all the appellants together under Section 34 IPC.

205. By the order on sentence dated 26.08.2015, the learned trial judge awarded imprisonment for life with varied amounts of fine for offence

under Section 302 read with Section 120-B IPC to each of the five appellants. It is correct that reference to Section 120B IPC was improper as no conviction has been recorded for the said substantive offence. It has been further pointed out that no punishment has been awarded separately for offence under Section 307 IPC. The order on sentence thus must be modified so as to be enforced in context of conviction for offences under Section 302 read with Section 34 IPC and Section 307 read with Section 34 IPC.

206. I, therefore, find no merit in the appeals challenging the conviction returned by the trial court through the impugned judgment. Having regard to the facts and circumstances. I am of the view that the punishments awarded by the order on sentence passed by the trial Court deserve to be enforced for both offences i.e. under Section 302 and Section 307 IPC each read with Section 34 IPC, the substantive sentence (imprisonment for life) on each count to run concurrently.

207. Thus, but for partial modification of order on sentence as above, the appeals must fail and are liable to be dismissed. But, the division bench being divided in opinion and not having come to a consensus on the result, these appeals are liable to be placed before Hon'ble the Chief Justice for appropriate directions under Section 392 of the Code of Criminal Procedure, 1973.

(R.K. GAUBA)
JUDGE

FEBRUARY 08th, 2017
yg/vk/nk

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

% Date of decision : 08th February, 2017

+ CRL.A. 1284/2015

SUSHIL ARORA ..... Appellant

Through: Mr. Vikas Arora and Ms. Radhika Arora, Advs.

versus

STATE ..... Respondent

Through: Ms. Aashaa Tiwari, APP for the State

+ CRL.A. 53/2016

RAJESH PANDEY ..... Appellant

Through: Mr. Vivek Sood, Sr. Adv. with Mr. Ashim Shridhar, Adv.

versus

STATE(GOVT. OF NCT OF DELHI) ..... Respondent

Through: Ms. Aashaa Tiwari, APP for the State

+ CRL.A. 190/2016

HEMANT GARG ..... Appellant

Through: Mr. K. Singhal, Adv.

versus

STATE NCT OF DELHI ..... Respondent

Through: Ms. Aashaa Tiwari, APP for the State.

+ **CRL.A. 1338/2015**

VISHNU S/O PANCHU RAM ..... Appellant
Through: Mr. M.N. Dudeja and
Mr. Rajesh Kaushik, Advs.

versus

STATE NCT OF DELHI ..... Respondent
Through: Ms. Aashaa Tiwari, APP for the State

+ **CRL.A. 283/2016**

SONVEER alias PINKU ..... Appellant
Through: Mr. Rajeev Mohan, Adv.

versus

STATE ..... Respondent
Through: Ms. Aashaa Tiwari, APP for the State.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE R.K. GAUBA

JUDGMENT

GITA MITTAL, J.

"*…Any restraint by way of abundant caution need not be entangled with the concept of the benefit of doubt. Abundant caution is always desirable in all spheres of human activity. But the principle of benefit of doubt belongs exclusively to criminal jurisprudence. The pristine doctrine of benefit of doubt can be invoked when there is reasonable doubt regarding the guilt of the accused. It is the reasonable doubt which a conscientious judicial mind entertains on a conspectus of the entire evidence that the accused might not have committed the offence, which affords the benefit to the accused at the end of the criminal trial. Benefit of doubt is not a legal*

dosage to be administered at every segment of the evidence, but an advantage to be afforded to the accused at the final end after consideration of the entire evidence, if the Judge conscientiously and reasonably entertains doubt regarding the guilt of the accused."

- ***{KT Thomas, J**. in **State of Haryana v. Bhagirath, (1999) 5 SCC 96}***

1. I have had the privilege of reading the judgment proposed by my ld. brother *R.K. Gauba, J.* with tremendous erudition in criminal law and the wide experience on the subject at his command. However, I have carefully scrutinized the record of the case, the impugned judgment as well as the proposed judgment more than once. It would have been very easy to agree with the ld. trial judge. At first blush, it would seem difficult to disagree with the findings and conclusions of my ld. Brother. With profound respect to the views expressed, I find myself unable to agree with either the findings reached by my ld. Brother or the conclusions that these appeals deserve to be dismissed.

2. I have done so, bearing in mind the solemn caution posed by ***KT Thomas, J***. in ***State of Haryana v. Bhagirath, (1999) 5 SCC 96,*** as noted above. On a holistic consideration of the cases, I, therefore, am compelled to hereby attempt to express a divergent opinion on both, the findings of guilt as well as the sentences which have been imposed upon the appellants.

3. Given the nature of the evidence, charges and the legal issues which arise as well as the fact that this is not the end of the

road for these appeals which have to be now further tested in our court, it has become necessary to discuss the evidence led by the prosecution and to examine the questions raised in detail.

4. Inasmuch as the mandate of Section 392 of the Cr.P.C. would require to be complied with, to facilite further examination, I have incorporated a reference to the page numbers of the paper book and, wheresoever necessary, the reference to the page numbers of the original documents as available in the Trial Court Record. If the reference is to the page number of the Trial Court Record, the same is prefixed as "*TCR*".

5. The appellants in the present case stand subjected to a joint trial in Sessions Case No. 07/2009 arising out of FIR No.35/09 registered by P.S. Chanakya Puri under Sections 302/307/34/120B/34 of the IPC and Sections 25/27/54/59 of the Arms Act with regard to an incident dated 22nd February, 2009. The appellants were convicted by means of the impugned common judgment dated 2nd July, 2015 and consequently sentenced by the order on sentence dated 26th August, 2015. For the purposes of convenience, I tabulate hereunder the statutory provisions under which the chargesheet was filed against them; the provisions under which the charges were framed; the statutory provisions under which they stand convicted as well as the sentence imposed upon them :

Accused	***Chargesheet***	***Charge***	***Conviction for offences under***	***Sentence***
Sushil Arora	*Sections 302/307/120B/34 IPC & Sections*	*Sections 302/307/34/*	*Sections 307/302 r/w 34*	*Imprisonment for Life and fine of Rs. 15,000/- (for*

	25/27 Arms Act	*120B IPC*	*IPC*	*commission of offence under Section 302 r/w 120B IPC)* *In default of payment of fine, to undergo simple imprisonment for six months.*
Rajesh Pandey	*Sections 302/307/120B/34 IPC & Sections 25/27 Arms Act*	*Sections 302/307/34/ 120B IPC*	*Sections 307/302 r/w 34 IPC*	*Imprisonment for Life and fine of Rs. 20,000/- (for commission of offence under Section 302 r/w 120B IPC)* *In default of payment of fine, to undergo simple imprisonment for eight months.*
Hemant Garg	*Sections 302/307/120B/34 IPC & Sections 25/27 Arms Act*	*Sections 302/307/34/ 120B IPC*	*Sections 307/302 r/w 34 IPC*	*Imprisonment for Life and fine of Rs. 15,000/- (for commission of offence under Section 302 r/w 120B IPC)* *In default of payment of fine, to undergo simple imprisonment for six months.*
Vishnu	*Sections 302/307/120B/34 IPC & Sections 25/27 Arms Act*	*Sections 302/307/34/ 120B IPC and Sections 27 Arms Act*	*Sections 307/302 r/w 34 IPC*	*Imprisonment for Life and fine of Rs. 25,000/- (for commission of offence under Section 302 r/w 120B IPC)* *In default of payment of fine, to undergo simple imprisonment for one year.*
Sonveer	*Sections 302/307/120B/34 IPC & Sections 25/27 Arms Act*	*Sections 302/307/34/ 120B IPC and Sections 27 Arms Act*	*Sections 307/302 r/w 34 IPC*	*Imprisonment for Life and fine of Rs. 25,000/- (for commission of offence under Section 302 r/w 120B IPC)* *In default of payment of fine, to undergo simple imprisonment*

				for one year.
The benefit under Section 428 of the Cr.PC was allowed to the accused persons.				

6. It is noteworthy that in the present case, three chargesheets came to be filed under Section 173 of the Cr.P.C. inasmuch as the appellants were arrested on different times. Sushil Arora *(appellant in CRL.A.No.1284/2015)* came to be arrested on the 24th of February 2009 and the prosecution filed a chargesheet dated 23rd of May 2009 against him.

7. After the filing of the chargesheet against Sushil Arora, by the order dated 4th of August 2009, the case was committed to the Court of Sessions. After considering the material on record, the ld. Additional Sessions Judge passed an order dated 22nd August, 2009 noting the implication of Sushil Arora, Rajesh Pandey and "*three unknown persons*" for commission of the offences.

8. On 22nd August, 2009, the following charge was framed against Sushil Arora :

> *"That on 22/2/2009, in or around your office premises Chintu car point shop No.1, 17 Pusa Road, Delhi, you* ***entered into a criminal conspiracy with co-accused persons namely, Rajesh Pandey and three others unknown*** *to commit offence of murder and attempt to murder and in execution of that criminal conspiracy*
>
> *and pursuant to that criminal conspiracy and in furtherance of common intention of you all five accused persons, you at around 9.50 pm on Ridge Road near Siamon Boliver T point within the jurisdiction of Police Station Chanakyapuri, Delhi, you* ***all five occupants*** *of an Indica car DL3CAX 2192 while overtaking black*

colour Santoro car No.DL2FFK 0002 in which complainant Sunil S/o Hoshiar Singh and his friends Varun, Ankit and Surender and Paramjit were travelling and near Budha Garden ***someone of you five accused persons fired fire armbullet shot aiming at occupants of Santro car and that bullet hit victim Ankit****.*

And at some distance at redlight point where Santro vehicle had to stop and its occupants came out of the vehicle to escape and started running that ***you accused persons fired bullets on the victims*** *wherein* ***Surender suffered a bullet injury****.*

And victim Ankit died because of shock and hemorrhage due to ante mortem fire arm injury in the Parieto occipital region and fire arm injury on the right arm postcco lateral aspect upper one third region which were sufficient to cause death in the ordinary course of nature.

And Surender sustained bullet injury would over the left hip region.

And you thereby committed offence punishable u/s 302 IPC & 307 IPC read with Section 34 IPC & 120-B IPC within my cognizance.

And I hereby direct that you be tried by this Court for the aforesaid offence."

(Emphasis by us)

9. Hemant Garg *(appellant in Crl.A.No.190/2016)* was then arrested on 10th of August 2009 while Sonveer @ Pinku *(appellant in Crl.A.No.283/2016)* came to be arrested on 26th August, 2009 and Vishnu *(appellant in Crl.A.No.1338/2015)* came to be arrested on 29th September, 2009.

The first supplementary chargesheet came to be filed on 24th October, 2009 in the court of Sh. Pritam Singh, Metropolitan

Magistrate, Patiala House Courts, New Delhi against these appellants.

Thereafter Rajesh Pandey *(appellant in Crl.A.No.53/2016)* came to be arrested on 11th November, 2009 resulting in the filing of the second supplementary chargesheet on the 2nd of January 2010.

10. By an order dated 29th January, 2010, the trial court found a *prima facie* case for commission of offences under Section 302/307/34/120B of the IPC against all four of them as well as offences under Section 27 of the Arms Act against Vishnu and Sonveer. The following charge was framed against the other four accused persons :

> *"That on 22/2/2009, you all four accused along with Sushil Arora in or around office premises Chintu car point shop No.1, 17 Pusa Road, Delhi, you entered into a* ***criminal conspiracy*** *with co-accused Sushil Arora to* ***commit offence of murder*** *and* ***attempt to murder*** *and* ***in execution of that criminal conspiracy*** *and pursuant to that criminal conspiracy and in* ***furtherance of common intention of you all five accused persons****, you at around 1.50 pm on Ridge Road near Siamon Boliver T point within the jurisdiction of Police Station Chanakyapuri, Delhi,* ***you all five occupants of an Indica car*** *DL3CAX 2192 while overtaking black colour Santro car No.DL2FFK 0002 in which complainant Sunil S/o Hoshiar Singh and his friends Varun, Ankit and Surender and Paramjit were travelling and near Budha Garden* ***you accused Vishnu and Sonveer*** *fired fire arm bullet shot* ***aiming at occupants of Santro car*** *and that* ***bullet hit victim Ankit****.*
>
> *And at some distance at redlight point where Santro vehicle had to stop and its occupants came out of*

the vehicle to escape and started running that you ***accused persons fired bullets on the victims wherein Surender suffered a bullet injury****.*

And victim Ankit died because of shock and hemorrhage due to ante mortem fire arm injury in the Parieto occipital region and fire arm injury on the right arm postcco lateral aspect upper one third region which were sufficient to cause death in the ordinary course of nature.

And Surender sustained bullet injury would over the left hip region.

And you thereby committed offence punishable u/s 302/307/34 IPC & 120-B IPC within my cognizance.

And I hereby direct that you be tried by this Court for the aforesaid offence."

(Emphasis by us)

11. A separate charge dated 29th January, 2010 was framed under the Arms Act, 1959 against Sonveer and Vishnu which reads as follows :

"*That on 22/2/2009 at about 1.50 pm at Ridge Road near Siamon Boliver T point with the jurisdiction of Police Station Chanakyapuri while committing the offence of murder as separately charged against you, you both used firearm country made pistols and thereby committed the offence punishable u/s 27 Arms Act and within my cognizance.*

And I hereby direct that you both be tried by this Court for the aforesaid offence."

All the appellants pleaded not guilty and claimed trial.

12. For the purposes of expediency, I extract the brief facts of the prosecution case as set out in the second supplementary chargesheet dated 2nd January, 2010 hereunder :

"***Brief Facts of the case***

The brief facts of the case are that on 22/02/09, on receipt of DD No.15-A at P.S. Chanakya Puri, Inspsr. Surender Singh Rana alongwith Inspr. Jagat Singh, SHO/Chanakya Puri, driver Const. Satpal, No. 1134/ND with Govt. Vehicle reached near the red light ridge road T-point, Simon Boliver Marg, where on the road side which is going towards Dhaula Kuan, a black colour Santro car No.DL 2FF K 0002 was found parked. ASI Nand Kishore alongwith Const. Pradeep No.754/ND also found to be present at the spot. On inspection of above said car, a round hole with cracks was found on the triangular glass of right back window door's, which seems to be due to bullet hit. In the front portion of the car at the right side of bonnet there was one dent. In the front right side of the car near head light there was a dent on bumper. On the back side bumper of the car there was rub mark with blood stains. At the back side of the car there was a lot of blood on the road. At the right side of the car on the road there was blood mark, but it seems that the said blood mark was overrun by traffic. Near the blood clot behind the car, in the kacha one empty cartridge having mark KF 7.65 MM in the bottom was found. In front of the car, at some distance in the kacha one emptier cartridge with dent having same mark on bottom was found. Crime Team with photographer was summoned at SOC, who arrived at the scene, inspected and photographed the SOC. In the mean while information was received vide DD No.17-A, P.S. Chanakya Puri stating that one person namely Ankit S/O Unknown R/O 35-A, Ward No.1, Mehrauli aged 22 yrs, is admitted with bullet injury at Trauma Centre, AIIMS. On this information, Inspr. Surender Rana directed ASI Nand Kishore and other staff to cordon SOC. There after Inspr. Driver and Govt. Vehicle reached to Trauma Center AIIMS, where Ankit was found to be treated of gun shot wound vide MLC No.154179/09. His MLC was collected. At

this stage it was learnt that one more victim of the same shoot out who also sustained a gun shot injury was got admitted by his brother Yogesh meanwhile it was learnt that Ankit who was being treated of gun shot vide MLC No.154179 succumbed due to injuries. One person, namely Shri Sunil S/O Late Hoshiar Singh R/O H.No.138/9, Village Kishangarh, Mehrauli was found present at Hospital, who stated that he was co-occupant of aforesaid Santro car and was a victim of shoot out, but he was able to escape. His statement was recorded which is as follows.

Case registered and investigation commenced

On the basis of the statement of Shri Sunil Kumar and on perusal of the contents of MLCs and on the basis of circumstances the ingredients of Section 302/307/34/120-B IPC R/W Section 25,27/54/59 Arms Act were found to be attracted. Hence a rukka was prepared by Inspr. Surender Singh Rana and case was got registered at P.S. Chanakya Puri, which was further investigated by Inspr. Surender Singh Rana himself. During the course of investigation, Inspr. Surender Singh Rana alongwith Sunil (the complainant) came back to SOC and inspected alongwith Crime Team at the site near Budha Garden gate where the first shoot out was reported. On the pointing out of the complainant an un-scaled site plan was prepared, statements of other eye-witnesses were recorded, the site (SOC) was got photographed and inspected by Crime Team. One emptier cartridge with same bottom mark was found in kacha near Budha Garden gate which is stated to be place of first shoot out. Near to that one led portion which is top of a bullet was also found in kacha. Earth controls were lifted. Blood stains were lifted. Santro Car, No.DL 2 FF K 0002 was checked and one mobile phone and a Pepsi bottle found inside the car. All the exhibits along with Santro car mobile phone and Pepsi bottle were seized through separate seizure

memos and got recorded. Statement of one of the eye witness namely Manvir Singh S/O Sh. Harnam Singh R/O H.No. 54, PTS Colony, was recorded who stated that registration No. of assailant Indica car as DL 3C AX 2192. ***The details were collected and the said Indica car was found to be owned by one Hemant Garg*** *S/O Brij Mohan Garg r/o H.No.10/2444, Beedanpura, Karol Bagh, Delhi. Search was made for him and other accused namely Rajesh Pandey and Sushil Arora and all were found to be absconding.*

Post-mortem examination

On 23.02.09 the post-mortem of the deceased Ankit Minocha S/O Sh. Rajeev Minocha was got conducted at AIIMS Trauma Centre vide TC-135/09 dated 23.02.09. The body of the deceased was handed over to his father.

The following sealed exhibits were handed over to I.O. by concerned Autopsy surgeon at AIIMS trauma Center.

1. *Blood sample in gauze piece*
2. *Bullet recovered from liver (size 1 x 0.7 Cm)*
3. *Bullet recovered from left side neck (size 0.9 x 0.7 Cm.)*
4. *Matelic fragment recovered from brain of size 0.8 x 0.6 x 0.25 CMs (base of Lt. Tamporal).*

P.M. report was collected, opinion for cause of death was given by concerned Autopsy surgeon "in this case is shock and hemorrhage due to ante mortem fire arm inury No.8 & 10 as mentioned which were sufficient to cause death in ordinary course of nature individually as well as collectively".

Other investigation done on 23.2.2009

Cheque No.504611 and 504612 in original were produced by Sh. Mahender Singh S/O Sh. Chandgi Ram R/O H.No. 54/9, Village Kishangarh, Mehrauli, New Delhi. The same were seized and his statement and

statement of other witnesses were recorded. Search was made for the accused persons.

Arrest of one accused

On 24.02.2009, one of the accused namely Sushil Arora S/O Sh. Nand Lal Arora R/O Shop No. 17, Pusha Road, Delhi, permanent r/o H.No.113, State Bank Nagar, Pashchim Vihar surrendered at P.S. Chanakya Puri. His disclosure statement was recorded. In his disclosure statement, he named other four assailants sitting in Indica car No.DL 3C AX 2192 on 22.2.09, as Hemant Garg, Vishnu, Sonveer and Rajesh Pandey. He further stated that the Indica car used by them owned and was being driven by Hemant Garg during the time of incident. On the instigation of his, Rajesh Pandey and Hemant Garg their other associates namely Vishnu and Sonveer fired on the occupants of Santro car No.DL 2FF K 0002 at two placed on Ridge road near Budha Garden. He was produced before the concerned court and his 4 days PC remand was obtained. He was taken to SOC, where he pointed out at the scene of incident chain wise. Pointing out memo duly signed by him was prepared. On his instance raids were conducted, but all the accused persons were found to be absconding.

Further investigation done

On 25/02/2009, Santro Car No. DL 2FF K 0002 was got inspected by the senior Scientist of Biology and Ballistic Department of FSL, Rohini and report was obtained. On their advice some more exhibits were collected from the car, which were seized and deposited with malkhana.

On 26.02.2009 the investigation of the case was transferred to Inspr. Jagat Singh, SHO, P.S. Chanakya Puri. Thereafter he resumed the further investigation of the case.

On 23.03.09 the SOC was visited by Drafts man. He was got acquainted with all the facts and details

including un-scaled site plan. Thereafter, a scaled site plan was prepared by him and handed over the same to I.O. on 31.3.09.

Cheque Nos.504611 and 504612 issued by Barclays Bank, Nehru Place were got verified and they were found to be issued to A/C holder Sh. Sushil Arora against A/C No.484097. But the said account was found to be closed since 13.12.2008. The signature on the both cheques was got tallied with the record held with the bank and it was found to be identical. A report in this regard was obtained from the concerned branch manager.

On 09/04/09, Indica car No. DL 3C AX 2192 was found abandoned near Metro station AG-1, Vikas Puri, Delhi, which was brought at police station. It was got inspected by Crime Team. Thereafter the said car was seized and deposited with Malkhana.

On 21.05.09, the complainant Sh. Sunil Kumar S/O Late Sh. Hosiyar Singh was produced before the Hon'ble Court of Sh. Saurabh Kulshreshtha, Link MM, Patiala House Court. His statements u/s 164 CrPC were got recorded.

On 23.05.09 the specimen writing of accused Sushil Arora was obtained after taking due permission from the Hon'ble Court.

On the basis of facts revealed during investigation and statements of eye witnesses there were sufficient evidence on the case file against accused Sushil Arora, who was is in JC. So challan against accused Sushil Arora u/s 302/307/34/120-B IPC was prepared by the then I.O. Inspr. Jagat Singh, SHO/Chanakya Puri and submitted before the Hon'ble Court. The case is under trial in the Hon'ble Court of Shri J.S. Aryan, ASJ Court, Patiala House.

The arrest of other accused persons namely Rajesh Pandey, Hemant Garg, Vishnu and Sonveer was to be effected. Hence the further investigation of the present case had been retained u/s 173(8) Cr.P.C.

Thereafter, the present case was entrusted to me by the order of Deputy Commissioner of Police, New Delhi Distt., New Delhi Dt. 12/07/2009.

On 10/08/2009, Hemant Garg was produced before the Hon'ble Court through production warrant. With the permission of Hon'ble Court, he was interrogated and arrested in the present case. During the course of interrogation he corroborated the facts revealed by Sushil Arora. His Judicial TIP was conducted by shri Jitendra Mishra & Ms. Surya Grover Malik, Hon'ble Link MM, Patiala House Court through 4 eye-witnesses. Out of 4 eye witnesses, 2 (The complainant of the case namely Mr. Sunil Kumar & one of the injured namely Shri Surender Singh) have correctly identified him. His PC remand could not be granted, as 15 days from his date of arrest were elapsed.

On 27/08/2009, on receipt of secret information Sonveer @ Pinku was arrested from Coffee Home Parking, Hanuman Mandir, Connaught Place, where he came to met his friend. He was arrested, as per procedure at 7.00 PM and information about his arrest was given to his brother-in-law through mobile phone. His judicial TIP was fixed in the Central Jail Tihar, Delhi. He refused for his Judical TIP before Shri Jitendra Mishra, Hon'ble Link MM, Patiala House Court. His 3 days PC remand was obtained for recovery of his confession statements of accused Sushil Arora & facts disclosed by Hemant Garg during interrogation, he further confessed that he had given firearm used by him in the present case to his friend Sanju @ Khatta of Mangolpuri. He further disclosed that the said firearm has been recovered by the Police of Mangolpuri from his friend. On verification, it was found that one pistol was recovered by the Police of P.S. Mangolpuri from Sanjay @ Sanju @ Khatta vide FIR No. 150/09 U/s 25A, Act, P.S. Mangolpuri. Point out memo of SOC was prepared at the instance of accused

Sonveer @ Pinku. Sanjay @ Sanju @ Khatta was convened in Patiala House Court through production warrant and after getting permission from Hon'ble Duty MM his statement U/s 161 CrPC was recorded. Application was moved before the Hon'ble court for recording statements of Sanju @ Khatta U/s 164 CrPC, for which date was fixed by Shri Jitendra Mishra, MM, but at last time Sanju @ Khatta, has refused for the same.

Thereafter, application was moved before the court of Shri Vishal Singh, MM, Rohini Court for transferring the case property (Pistol) from the P.S. Mangolpuri case to present case. The Hon'ble Court was pleased to pass order accordingly. The case property in sealed pulanda was produced before the court and the same was opened by the court and resealed with the seal of Hon'ble Court. The said pistol was taken into police possession and sent to FSL Rohini for expert opinion, result is awaited.

On 29/09/2009, Vishnu was produced in the Hon'ble Court through production warrant. With the permission of Hon'ble Court, he was interrogated and formally arrested in the present case. His judicial TIP proceeding was fixed, but he refused for the same before Shri Sourabh Kulshreshtha, link MM, Patiala House Court at Tihar Jail. Thereafter his 2 days PC remand was obtained for recovery of firearm used by him in the present case. During the course of interrogation, his disclosure statements have been written, in which he corroborate the disclosure statements of accused Sushil Arora, Sonveer & facts disclosed by Hemant Garg during interrogation. He further disclosed that after the incident he along with co-accused Rajesh Pandey went to Bihar, after some time he returned back to Delhi by train. During the journey, in the way, he had thrown the pistol at unknown place.

Accused Rajesh Pandey was absconding who had been declared P.O. by the Hon'ble Court vide order

Dt.30/07/2009.

On the basis of facts revealed during investigation and statements of eye witnesses & other records on file, there were sufficient evidence on the case file against accused Hemant Garg, Sonveer @ Pinku, Vishnu & Rajesh Pandey (who was been declared P.O.) all the three were running in JC in Tihar Jail, Delhi. Hence supplementary challan against Hemant Garg, Sonveer @ Pinku, Vishnu & Rajesh Pandey (P.O.) u/s 302/307/34/120-B IPC R/W Section 25,27/54/59 Arms Act was prepared and filed before the Hon'ble Court.

On 11/11/2009, on the basis of secret information, accused Rajesh Pandey had been arrested from outside New Delhi Railway Station. He was thoroughly interrogated and next day he was produced before the Hon'ble Court in muffled face as his TIP was to be conducted. His judicial TIP proceeding was fixed, but he refused for the same before Shri Jitender Mishra, link MM, Patiala House Court at Central Tihar Jail. Thereafter his 3 days PC remand was obtained. During the course of interrogation, his disclosure statements have been recorded, in which he corroborate the disclosure statements of accused Sushil Arora, Sonveer, Vishnu & facts disclosed by Hemant Garg during interrogation. He further disclosed that after the incident he along with co-accused Vishnu went to Bihar.

On the basis of facts revealed during investigation and statements of eye witnesses & other records on file, there are sufficient evidence on the case file against accused Rajesh Pandey (Column No.11), all are presently running in JC in Tihar Jail, Delhi. Hence supplementary challan against Rajesh Pandey (Column No.11) u/s 302/307/34/120-IPC R/W Section 25, 27/54/59 Arms Act has been prepared and being submitted before the Hon'ble Court. Accused running in judicial custody, may be summoned before Hon'ble

Court through production warrant and witnesses may be summoned through summon, please."

13. In support of its case, the prosecution examined 50 witnesses in the joint trial against all the accused persons. The incriminating circumstances and the evidence against them were put to each of the appellants under Section 313 of the Cr.P.C. and they were given an opportunity to give their explanations. Sushil Arora, Rajesh Pandey, Hemant Garg, Sonveer and Vishnu led evidence in their defence. Finally after considering the material on record, by the judgment dated 2nd July, 2015, the ld. Trial Judge has convicted them as above. As a consequence, by the order dated 26th August, 2015, the aforedetailed order on sentence was passed. This common judgment of 2nd July, 2015 and the order dated 26th August, 2015 have been assailed by way of these separate appeals. Inasmuch as identical questions of appreciation of the evidence as well as law are pressed, we have taken up these appeals together for consideration and decision.

14. We have heard Mr. Vikas Arora, ld. counsel for Sushil Arora in Crl.A.No.1284/2015, Mr. Vivek Sood, ld. Senior Counsel for Rajesh Pandey in Crl.A.No.53/2016; Mr. K. Singhal, ld. counsel for Hemant Garg in Crl.A.No.190/2016; Mr. M.N. Dudeja, ld. counsel for Vishnu in Crl.A.No.1338/2015 and Mr. Rajeev Mohan, ld. counsel for Sonveer @ Pinku in Crl.A.No.283/2016 in great detail. They have carefully taken us through the voluminous record of the case. Each of them has made elaborate submissions

on the evidence and law. The State has been ably represented by Ms. Aashaa Tiwari, ld. APP who has painstakingly placed the proved facts and staunchly defended the conviction of the appellants.

Submissions of the appellants

15. Right at the outset, the appellants have submitted that though they have been convicted for commission of offences under Sections 307 and 302 IPC r/w Section 34 of the IPC, the trial judge has sentenced them for commission of offence under Section 302 IPC r/w Section 120B IPC. Ld. counsel for the appellants have also pointed out that the appellants have not been sentenced for commission of the offence under Section 307 of the IPC, with which they were convicted.

16. Accused Sonveer was acquitted for commission of offence under Section 27 of the Arms Act for lack of sanction under Section 39 of the enactment.

17. The challenge to the prosecution case on behalf of the appellants rests on similar grounds. Mr. Vivek Sood, ld. Senior Counsel appearing in Crl.A.No.53/2016 filed by Rajesh Pandey as well as Mr. Vikas Arora, Advocate appearing for Sushil Arora (appellant in Crl.A.No.1284/2015) have urged on behalf of the appellants that the prosecution has completely failed to establish its case regarding the genesis of the crime. The submission is that there is neither any relationship of any kind, business or otherwise, nor any evidence of animosity between the appellants on the one

hand and the deceased Ankit or the allegedly injured Surender on the other. The appellants challenge existence of any motive on their part for commission of the offence.

18. No evidence has been led to support the prosecution case of motive that the financial transaction between Tikla (PW-9) and the appellant Sushil Arora was the genesis of the crime inasmuch as the witnesses do not even remotely suggest that Tikla (PW-9) was at all targeted.

19. The further submission is that the prosecution has completely failed to establish any connection let alone common intention or prior meeting of minds between the appellants. The contention is that no overt or covert act has been even alleged against Sushil Arora and Rajesh Pandey, let alone established by credible evidence. False evidence of exhortation has been introduced to rope them in. It has been further urged on behalf of the appellants that they have been falsely implicated and that the prosecution has miserably failed to connect them to the commission of the crime.

20. Mr. K. Singhal, ld. counsel representing Hemant Garg (appellant in Crl.A.No.190/2016) contends false implication only because he happened to be the registered owner of a silver grey Indica. He challenges his dock identifications as well as the manner in which a TIP was conducted by two witnesses. A strong plea is urged that Hemant Garg does not even know how to drive and reliance is placed on his defence and evidence of call records as well as the deliberate failure of the police to place before the

court the outcome of its investigations of Yogender to whom this appellant claims the vehicle stood handed over on the fateful day.

21. Hemant Garg has strongly challenged the seizure of the Indica vehicle allegedly involved in the offence as well as a pistol alleged to have been used by the appellant Sonveer in the shooting.

22. Sonveer has filed Crl.A.No.283/2016 and is represented by Mr. Rajeev Mohan before us. It is pointed out that the prosecution has led evidence of the presence of Sonveer outside the Chintoo Car Point; his involvement in an altercation between Vishnu and him on the one side, with Varun and/or Ankit on the other and has attributed the role of shooting from the rear left window of the silver grey Indica bearing registration No.DL 3CAX 2192.

23. On behalf of all the appellants, the submission is that the prosecution case about the manner in which events unfolded on the 22nd of February 2009, rendered it impossible for any bystander or the prosecution witnesses to effectively view the assailants, all of whom were complete strangers to the witnesses. The submission is that the prosecution witnesses have given false evidence regarding the incidents, their presence as well as identification of the appellants. It is vehemently contended that the witnesses have not mentioned the names or description of the accused persons in the FIR or the statements recorded under Section 161 of the Cr.P.C. As such, identification, be it in the TIP or in the court testimony, cannot be relied upon to base a conviction for commission of the offences.

24. While challenging the very presence of the prosecution witnesses especially the public witnesses especially PWs-2 and 4 at the spot, it has been submitted that the alleged injured witness Surender (PW-8), did not suffer any injury in the incidents and that he was faking injury. In this regard, our attention is drawn to the conduct of the witnesses.

25. It is pointed out that none of the prosecution witnesses who were accompanying the deceased in the vehicle, made any complaint to the police. Despite the prosecution case of availability of eye-witnesses at the spot; the unfolding of events being reported to the police control room and recorded by it, no first information report of the incidents which occurred at about 2:00 pm on the 22nd of February 2009 was registered till 7:30 pm. Instead all the witnesses gathered together at the AIIMS Trauma Centre and conferred before a statement was recorded by the police after 4:30 pm in the evening, based whereon the FIR was registered only at 7:30 pm. It is contended that there is unexplained delay of five hours in registering the FIR casting a doubt over the credibility of the prosecution case.

26. The submission is that there is no evidence of compliance with the mandatory provisions of Section 157(1) of the Cr.P.C. lending support to the defence contention that the FIR was ante timed.

27. It is the contention of the appellants that Sushil Arora did not make any disclosure statement at all; the alleged disclosure statement is ante timed to support a completely contrived case

against the appellants. The appellants would also challenge the ocular evidence vis-a-vis disclosure statement attributed to Sushil Arora as well as the site plan relied upon in the record.

28. Mr. Rajeev Mohan, ld. counsel appearing for Sonveer (Crl.A.No.283/2016) has also pointed out that the prosecution has also alleged that on the disclosure statement attributed to Sonveer, a firearm was recovered from one Sanju @ Sanjay @ Khatte, an accused in the case arising out of FIR No. 150/2009, P.S. Mangol Puri; that this weapon stood seized in that case and as per ballistic examination of markings on test bullets fired by the Forensic Science Laboratory from this weapon, the markings matched those on cartridges recovered from the site of the shootings in the present case. Simply put, the prosecution alleges that this weapon, recovered at the instance of Sonveer, was used by him for shooting on the 22nd of February 2009. To support its allegations, it is submitted that the prosecution mainly relies on the unreliable oral testimony of witnesses with regard to identification of Sonveer, a disclosure statement as involved in the commission of the offence and a disclosure statement which never made. It is also submitted that the evidence relied upon by the prosecution does not connect the weapon allegedly recovered by the prosecution to Sonveer.

29. In addition to the several common submissions, Mr. M.N. Dudeja, learned counsel representing Vishnu (Crl.A.No.1338/2015) has contended that the identity of Vishnu in the commission of the offence has not been established at all. It is further submitted that Vishnu had given an explanation for the

refusal of the TIP after his production in court on 29th September, 2009, which in the given facts, deserved to be accepted. The contention is that Vishnu made no disclosure statement as alleged. Ld. counsel further submitted that the prosecution has introduced completely false witnesses to build-up a case against the appellant. The contention is that the prosecution has miserably failed to establish any case against Vishnu by credible evidence and that suspicion cannot substitute the requirement of proof beyond reasonable doubt to convict an accused person.

30. It is a vehement submission that the prosecution witnesses have made material improvements, exaggerations and embellishments in their testimony and for this reason alone they deserve to be completely disbelieved.

31. It is further contended that the testimony of the witnesses suffers from inconsistencies and there are also contradictions amongst the testimony of the different witnesses rendering them unreliable.

32. It is submitted that there is no reliable forensic evidence to support the case of the prosecution.

33. It is contended that the prosecution has miserably failed to lead evidence of common intention as well as of any overt act on the part of the appellants. It is contended that the witnesses have concocted and attributed exhortation by two of the appellants of the other accused persons in order to invoke Section 34 IPC to rope in the appellants.

34. The appellants also submit that there is no evidence at all to support the charge of criminal conspiracy under Section 120B of the Cr.P.C. against the appellants.

35. On behalf of all the appellants, a strong challenge is laid to the manner of investigation. It is submitted that the fact that the investigation was defective is manifested from the fact that three investigating officers were changed. The contention is that material evidence and witnesses were deliberately not produced in the prosecution evidence and material record, admittedly in the power and possession of the police, which included the telegram sent by the wife of one of the appellants as well as the call detail records of the witness. Important aspects of the case, including call detail records of the phones of the witnesses and of the phone recovered from the Santro Car have not been investigated. It is urged that the investigation was biased, unfair, tainted and aimed at only supporting the prosecution, deliberately ignoring the evidence available with the police which pointed towards the innocence of the appellants. The submission is that Tikla (PW-9) had a financial motive to implicate Sushil Arora and the police has gone about simply supporting him.

36. It is submitted that the trial court has either completely ignored the evidence led by the defence or has disbelieved it without any justification. Furthermore, the submission is that the ld. trial judge has erred by not giving the same treatment to defence witnesses as he did to the prosecution witnesses.

37. Ms. Aashaa Tiwari, ld. APP for the State has on the other hand contended that the prosecution has led evidence of six eye-witnesses who established the commission of offences, with which the appellants were charged, beyond reasonable doubt. It has been submitted by Ms. Aashaa Tiwari, ld. APP that the testimony of the eye-witnesses is worthy of credence and leads to to the inevitable conclusion of the culpability of the appellants in the commission of the offence. Ms. Tiwari submits that the oral testimony is supported by strong scientific evidence, especially of the ballistic experts which connects a recovered weapon to the cartridges recovered in the case.

38. Ld. APP has contended that a hypertechnical approach has to be avoided and that minor contradictions and inconsistencies in testimony would in fact establish that the evidence of the witnesses was natural. Ld. APP submits that the appellants are unable to point out such exaggerations, embellishments or inconsistencies in the testimony of the witnesses so as to doubt them. It is contended that the ld. trial court has rightly found the appellants guilty of commission of the offence with which they were charged and that the appeals deserve to be rejected outrightly.

39. I examine these submissions under the following main headings :

I. ***<u>Information received by the police regarding the incidents of shooting</u>*** *(paras 40 to 54)*

(paras 898 to 1013)

XXXIII. ***Site plan not matching ocular testimony*** *(paras 1014 to 1016)*

XXXIV. ***Non recovery of weapon by which injuries caused – effect of*** *(paras 1017 to 1021)*

XXXV. ***Contradictions, inconsistencies, exaggeration or embellishment by witnesses – effect of hypertechnical approach to be avoided by court*** *(paras 1022 to 1057)*

XXXVI. ***Real doubts in the reliability of the prosecution evidence which would enure to the appellants*** *(paras 1058 to 1069)*

XXXVII. ***Conclusion***

XXXVIII. ***Result***

I now propose to discuss the above issues in *seriatim* :

I. *Information received by the police regarding the incidents of shooting*

40. The prosecution establishes two incidents of shooting. The first is an episode in which the black Santro was fired at when its occupants were purchasing cold drinks from a cart vendor on the road in front of the Buddha Garden by occupants of a silver grey Indica. The second incident took place on the Ridge Road in front of the Buddha Garden going towards Dhaula Kuan at the point of the intersection of the Simon Bolivar Marg.

41. Before examining the oral evidence, I note the recording of information received by the police control room, which has been proved in evidence as Ex.PW29/A (**pg 1039**).

42. So far as the earliest information received is concerned, this document notes that the following information was telephonically received :

> *"1. Date : 22nd February, 2009 Time : **13:58:22***
> *CRD No. : 22Feb091310456 Ext.No. 131*
> *2. Informer's Name : **MR. NARENDRA SINGH***
> *(ii) Phone No. **9971054074***
> *(iii) Address : **D-48 GALI NO. 9 SHIV RAM PARK NANGLOI NEW DELHI***
> *PS Name : DELHI CANTT. District SOUTH WEST*
> *Contact Name : .....*
> *Contact No. : .....*
> *Complaint : OTHERS*
> *Incident Addr. **DHOLA KAUAN SE PAHLE SHANKAR ROAD PAR DL-39 AF 2152/2182 GREY COLOUR INDICA WALO NE EK SANTRO WALE KO GOLI MAR KAR DHOLA KAUAN KI TARAF BHAG GAYE HAI**"*
> *(Emphasis by us)*

43. This document was sought to be proved through Woman Constable Saubhagiyawati (PW-29) **(pg 328**), posted at the police control room as a telephone operator at the Police Headquarters on the day of incident. In her cross-examination, PW-29 confirms that Ex.PW29/A was not certified as per the requirement under Section 65B of the Evidence Act.

44. So far as Ex.PW29/A is concerned, it records the call made by the informant Mr. Narender Singh from the phone

no.9971054074 who gave the address as reflected in the record. The name of the police station is mentioned as Chanakya Puri, District New Delhi while it also includes the name of the contact person as Banbir.

45. So far as the information conveyed to the police control room at 14:04:29 hrs (02:04 pm) is concerned, the informant had disclosed the following *:*

> *"SANKAR ROAD, PAR* ***BUDHA GARDEN KE PASS RED LIGHT*** *PAR* ***INDICA CAR NO 2192 WALE EK AADMI KO GOLI MARI*** *HAI* ***JO DHOLA KUAN KI TRAF GAYI HAI***
> *AB GADI NO.* ***DL4CAG 7179 SANTRO ME SABDARJUNG LE GAYE HAI****"*
>
> *(Emphasis by us)*

46. Pursuant to this, the message was flashed by the police control room. It appears that three police vans VTR69, TGR 41 and VTR70 had proceeded to and remained at the spot on the following time :

Van Selected Time		Mesg. Transmitted to Van No.	At
Time when Van reached the spot		Van Report Time	Van Free Time
Status	Comments		
22-Feb-2009	14:05:18	VTR-69	22-Feb-2009 14:05:18
22-Feb-2009	14:11:34	22-Feb-2009 14:17:56	22-Feb-2009 14:57:33
22-Feb-2009	14:05:34	TGR-41	22-Feb-2009 14:05:34
22-Feb-2009	14:58:33	22-Feb-2009 14:58:33	

47. The prosecution has placed reliance also on a record of the police control room with regard to information conveyed by the police vans received at 13:58 hrs and 14:04:29 hrs and thereafter, to the police control room in the police headquarters which was

recorded as **CR DD No.1110488** and proved on record as Ex.PW30/A (**pg 1039/1040**). This information was to the following effect :

> "***CALLER MANVEER S/O HARINAM MOKA PAR HAI*** *AUR SANTRO BLACK JISME KISI KO GOLI LAGI THI MOKA PAR HAI NO DL2FFK 0002 AND SHO SAHAB MOKA PAR HAI 22/02/2009 14:56:55* ***MANVEER S/O HARNAM R/O 54 PTS COLONY MALVIA NAGAR MOKA PER HAI JO M/CY PER GHAR JAA REHA THA UNNE DHAKA HAI INDICA GRAY COL DL392 192 YA DL3UAX 2192 SANTRO DL2FFK 0002*** *KO* ***DVR SIDE K PICHAY GOLI MAR*** *KE BHAG GAI* ***INJURED KO PHALAY HI PVT GADI MI HOSPITAL LAY GAYA*** *MOKA PER SIRF GADI HAI* ***HALAT*** *CALLER NE HI BATYA SHO* ***ACP MOKA PER ASI NAND KISHOR 22/02/2009*** *15:25:02* ***V/70 DEPUTED FOR SUFDERJUNG HOSPITAL*** *22/02/2009* ***15:28:31*** *PR V/70 SAFDERJUNJ HOSPITAL MI POSITION HAI TURMA CENTER MI LARKA* ***ANKIT ADMIT HAI*** *SHO BHI MOKA PER HAI HALAT K LYA WAIT 22/02/2009 15:43:36 PR V70 NO.15/4 179* ***AMLOT S/O RAJEEV*** *MANOCHA R/O 56A WARD NO.4 MEHROLI AGE 23 YRS* ***1 HEAD ME 1 RIGHT SIDE BAJU ME GOLI LAGI HAI*** *JO ICU ME ADMIT HAI SAFDARJUNG TRAUMA CENTRE ME VENTILETOR PAR HAI SHO NE BATAYA* ***1 AUR UNJURED THA NAME SURENDER*** *JO BHAG GAYA THA REWARI KA RAHNE WALA HAI MEHROULI OFFICE HAI BULWAYA HAI 22/02/2009 15:57:35 SURENDER S/O JAGPAL R/O VILL. TRIPURI GURGAON P.O. KHADWALA AGE 28 YRS.* ***KE LEFT KULHE ME GOLI LAGI HAI HOSP.*** *ME AA GAYA HAI BATAYA KI* ***MAHENDER*** *JO MEHROULI* ***ME WORK KARTA HAI USNE KAROL BAGH ME CHINTU CAR POINT KO TO 10 LAC KARJ DE RAKHA HAI JO USE LENE GAYE THE WAHA JHAGRA HUA HAI***

AUR BAAD ME GOLI KI VAARDAAT ABOVE GADI NO. NE KI HAI*"*

(Emphasis supplied)

48. The prosecution has examined Head Constable Brij Veer (PW-21) (**pg 251**) who was the incharge of the PCR vehicle Victor 70 which was at that time based at the Nehru Park point, Chanakya Puri. This witness has stated that he had received the message from the headquarters at 1:59 pm on 22nd of February 2009 which was recorded in his call book as Ex.PW21/A (**pg 817-820**); a second message at 2:08 pm with regard to the firing by the Indica Car No.2192 upon a person which vehicle had then proceeded towards Dhaula Kuan and that the victim had been removed in the Santro car No.DL4CG 7179 to the Safdarjung Hospital. The witness also proved the receipt of the third message at 2:42 pm; fourth message at 3:02 pm and a fifth message at 3:09 pm. **(pg 252).**

49. According to PW-21, after receipt of the last message at 3:09 pm, his vehicle had moved to the AIIMS Trauma Centre and learnt about the admission of Ankit with a bullet injury. Information thereof was conveyed to the police control room and recorded at 3:36 pm in the call book to implement the red alert scheme to trace the Indica vehicle DL3UAX 2192 of grey colour. At **3:50 pm**, PW-21 conveyed the message of the arrival of the second injured Surender at the Trauma Centre as well as information of a "***hot altercation***" with regard to "***an amount of Rs.10 lakhs***" given by "***one Mahender on interest to Chintu Car Point***" and that "***he had***

gone to Karol Bagh with 5/10 persons in two vehicles". The messages recorded in the call book were proved as Ex.PW21/A (**pg 817**).

50. At about 2:06 pm on the 22nd of February 2009, the wireless operator from the police control room also gave information to the P.S. Rajender Nagar to the effect that on the Shankar Road before Dhaula Kuan from an Indica car No.DL3S AF 2152, one passenger in a Santro car had been fired upon and the Indica car had escaped towards Dhaula Kuan. Information to this effect had been received from the phone no.9971054074. This information was logged as **DD No.24B** (Ex.PW26/1) (**pg 795**) and telephonically conveyed to ASI Ramphool.

51. At 2:08 pm, the duty officer Head Constable Raj Singh (PW-34), P.S. Chankya Puri recorded the same information as **DD No.15A** (Ex.PW34/A) (**pg 781**).

Copy of this report was handed over to ASI Nand Kishore (PW-24) and Constable Pradeep who thereafter proceeded to the spot. Inspector S.S. Rana (PW-26) was also informed of the same to undertake the necessary action and the crime team was also informed.

52. The record shows that telephonic information stood received in P.S. Chanakya Puri at *3:50 pm* when Duty Constable Jageshwar called from the Trauma Centre, AIIMS to the effect that *Ankit, resident of House No.35A, Ward No.1, Mehrauli aged 22 years, MLC No.154179 had been injured by a bullet near Buddha Garden* and has been admitted in the hospital by one Shri Satpal Singh r/o

H.No.61, Chattarpur Enclave This information was logged as DD No.17A (Ex.PW34/B) (**pg 760**).

53. Clearly at 3:50 pm on 22nd February, 2009, P.S. Chanakya Puri had full official information and details from Duty Constable Jageshwar that Ankit who had suffered a bullet injury had been admitted in the Trauma Centre, his full details as well as those of the person who got him admitted.

54. Ex.PW29/A, Ex.PW30/A and Ex.PW34/B thus contained the information of the complete incident, names of witnesses, full particulars of the incident, and even the alleged motive for the crime. Full details of the assailants' vehicle were also available. Yet no steps to register any case were taken.

II. Motive and financial transaction

55. As per the prosecution, the case has its genesis in a monetary transaction between the accused appellant – Sushil Arora and Mahender Tikla (PW-9). The prosecution has also made this the basis or the motive for the crime.

56. Mahender Tikla (hereinafter referred to as 'Tikla') who appeared as PW-9 (**pg 170**) discloses this financial transaction. As per Tikla (PW-9), Sushil Arora was introduced to him by an acquaintance Atul, a resident of Vasant Kunj; that Sushil Arora was in the business of sale and purchase of old used cars and that on the request of Sushil Arora, Tikla forwarded Rs.10,00,000/- to him as a loan, repayable with interest in the 6th or 7th month of the year 2008 which transaction had taken place in the presence of his

son Mohit, his cousin Sudhir and Sushil Arora's wife Saroj. In lieu thereof, Sushil Arora had given him two cheques of Rs.5,00,000/- each bearing his signatures with the amount filled and the name of the payee as having been left blank (**pg 171-172**). As per Tikla (PW-9), Sushil Arora paid interest @2% per month on the loan amount up to December, 2008 and thereafter did not pay interest despite demand for the same in January, 2009 on the ground that he did not have the money. Tikla (PW-9) claims to have gotten busy in the arrangements of marriage of his daughter which was scheduled for 14th of February 2009. Thereafter, on the 20th of February 2009, Tikla (PW-9) accompanied by his wife Sumitra Devi and nephew Sunil (PW-1), had gone to the business place of Sushil Arora at the Chintoo Car point at Pusa Road and demanded his money. At that time, besides Sushil Arora, his younger brother Pushkar Raj (DW-6) and Rajesh Pandey (one of the appellants before us) were present. Sushil Arora had replied that he did not have the money.

57. Tikla (PW-9) then claims to have revisited Sushil Arora's office on the 22nd of February 2009 accompanied by his cousin Sudhir, apart from Gajender Singh (PW-11), and Hemant (PW-10). Sushil Arora was again present with Rajesh Pandey and his brother Pushkar Raj (DW-6) in the office while four or five other boys were present outside.

58. The prosecution has relied on the testimony of Tikla (PW-9) to suggest a threat in this meeting attributed to Rajesh Pandey to the effect that Tikla was trapped and that he had to do as directed.

It appears that in an attempt to put up a show of strength, Tikla (PW-9) informed his nephew Sunil Kumar (PW-1) on his mobile that Sushil Arora did not intend to repay the money whereupon Sunil accompanied by his associates Ankit (the deceased), Paramjeet (PW-5), Varun (PW-6) and Surender (PW-8) arrived at the office of Sushil Arora around 1:00 pm in a black Santro car bearing No. DL 2FFK 0002.

59. Upon reaching the office, Sunil (PW-1) had gone inside the office of Sushil Arora but came out immediately as Tikla (PW-9) had asked him to wait outside for the reason that the matter with Sushil Arora stood resolved.

60. The status of the financial dealings between Sushil Arora and Tikla (PW-9) is best revealed in the unchallenged testimony of the defence witness Pushkar Raj (DW-6) (brother of Sushil Arora). I extract the relevant extract of the statement which revealed the following transactions :

> *"On 22.2.2009 I had reached my shop at about 1:30 PM. After parking my car I went inside my shop at Chintu Car Point and I found Mahinder Tikla was sitting with accused Sushil Arora and 6-7 more persons. I exchanged greetings with Mahinder Tikla and since there were lot of people inside the shop as such I came out of the shop. Mahinder Tikla was a regular investor with our shop and used to visit our shop many times for business purposes almost once a week. Mahinder Tikla used to invest in used cars through us and after the sale thereof his profit used to be delivered to him and for that purpose he used to visit us almost once a week. There were other investors besides Mahinder Tikla who were working with us and used to come to us."*

61. The prosecution and its witnesses have attempted to make out a case that it was this financial transaction which led to an altercation in which Ankit was murdered. This is found in police record at 3:50 pm on the 22nd of February 2009, soon after the shooting. I extract the testimony of Head Constable Brij Veer (PW-21) (**pg 251**), Incharge of the PCR Vehicle at that time based at the Nehru Park point, Chanakya Puri who has stated that after reaching the AIIMS Trauma Centre at 3:35 pm where Ankit was admitted after being injured, he has conveyed at 3:50 pm the following message to the Police Control Room :

> "*On 22/2/2009 I was posted with PCR in New* ***Delhi Zone which covered Chanakyapuri. On that day I was on duty from 9 am to 5 pm. and I was as incharge PCR vehicle Victor 70. In that duty I was present in Chanakyapuri area***. *xxx xxx xxx*
>
> *At* ***3.50 p.m I conveyed a message to our control room*** *xxx xxx xxx It is further recorded that* ***cause of the incident was that one Mahender had given an amount of Rs.10 lakhs on interest to Chintu car point situated in Karolbagh and he had gone to Karolbagh with 5/10 persons in two vehicles and there a hot altercation took place***. *The aforesaid vehicle chased then and this incident took place on Ring Road Budha Garden.*
>
> *At 4.16 p.m we reached our Chanakyapuri base point. The all above stated messages recorded in the call book are today brought by me and photocopy of these entries in call book I identify as Ex.PW21/A (original call book seen which has ben brought by the witnesses) xxx xxx xxx"*
>
> *(Emphasis by us)*

62. As per the evidence on record, by the time, PW-21 reached the AIIMS Trauma Centre, Sunil Kumar (PW-1), Paramjeet (PW-5), Varun (PW-6), Tikla (PW-9), Hemant Kumar (PW-10) and Gajender Singh (PW-11) had collected there. Though PW-21 does not disclose who gave the information of this financial transaction in Ex.PW21/A, however, it is obvious it was from Tikla (PW-9) and his men.

63. This prosecution case was also put to the defence witnesses by the prosecutor while cross-examining them. I find the summation thereof in the prosecutor's cross-examination of Sh. Pushkar Raj (DW-6) (**pg 629**). This witness denied the suggestion that Sushil Arora had taken a loan of Rs.10,00,000/- from Mahender Tikla. He had explained that his brother had drawn and delivered two cheques of Rs.5,00,000/- each to Mahender Tikla as security in connection with sale and purchase of vehicles which cheques used to be delivered back and issued afresh from time to time after settlement of accounts between them.

64. The witness denied the suggestion that Mahender Tikla had been persistently asking for repayment of "*personal loan amount of Rs.10,00,000/- advanced by him*" to Sushil Arora. The witness also denied the suggestions that he was acquainted with Rajesh Pandey or that Sushil Arora and he had complained to Rajesh Pandey about Tikla's demands for repayment of the loan.

65. The evidence on record establishes that though Sushil Arora had initially expressed inability to repay the amount, however, on the 22nd of February 2009, the money transaction came to be finally

and amicably settled and it was agreed that Sushil Arora would by repaying the amount by way of monthly instalments of Rs.2,00,000/- without interest (**pg 171**).

66. In his cross-examination, Tikla (PW-9) has admitted to a long standing business relationship with Sushil Arora and has referred to several transactions of purchase of expensive cars including *Skoda*, *Honda Civic* etc. from Sushil Arora by him as well as by his son-in-law in the recent past. The camaraderie between Tikla and Sushil Arora on the 22nd of February 2009 is revealed in Tikla's (PW-9) cross-examination (**pg 178**) when he disclosed that "*his dealings with Sushil Arora had developed to an extent like family relationship*" and that he had even invited him to the wedding of his daughter.

67. With regard to 22nd February, 2009, Tikla (PW-9) (**pg 178**) has clearly testified that inside the office of Sushil Arora, they had been served with a cup of tea and all discussions went through in a cordial manner except the said exchange of words referring to Sushil Arora's expressing his inability to pay the money upfront. With regard to the settlement, Tikla (PW-9) has stated that "*finally the talks/discussions concluded that Sushil Arora would not be paying interest and would be repaying Rs.10,00,000/- by monthly instalments of Rs.2,00,000/- and I had agreed to that".*

68. This settlement is confirmed by Hemant (PW-10) (**pg 187**) when he refers to the conclusion of the talks in the said understanding and reiterates the settlement in the matter between Tikla (PW-9) and Sushil Arora that day. (**pg 188**). Hemant (PW-

10) (**pg 193**) has clearly deposed that there was "*no occasion of any fight and the issues were settled before we came up*" (appears to be a typing mistake and should read as '*out*' instead of '*up*').

69. Gajender (PW-11) (**pg 207**) has also stated that on the date of the incident, there was no fight or quarrel inside the Chintoo Car Point and that the talks had ended in an amicable settlement.

70. Sunil (PW-1) (**pg 15 and 39**) has stated that as he "*entered*" into the office (Chintoo Car Point), his uncle Tikla had said that "*talks had concluded*". He reiterates the statement in his cross-examination that at that point of time, no quarrel or altercation or exchange of hot words took place between his uncle Tikla and Sushil Arora, and that the talks ended in a peaceful manner.

71. Paramjeet (PW-5) (**pg 93**) too confirmed that the talks were over.

72. The fact that Mahender Tikla (PW-9) had nursed no animosity or apprehension from Sushil Arora is manifested from the evidence of Inspector S.S. Rana (PW-26) (**pg 298**) to the effect that "*no complaint was lodged by Mahender Tikla in police station Chanakya Puri regarding any kind of threat or force from the side of Sushil Arora*". There is also no evidence of a prior complaint at any point of time having been lodged by Mahender Tikla (PW-9) in any other police station against Sushil Arora or any of the accused persons.

73. It is evident from the above that on the date of incident, i.e. 22nd of February 2009, so far as the financial dispute was concerned, the same stood amicably resolved between Tikla (PW-

9) and Sushil Arora, the only two persons who were concerned with the car purchase and sale transaction as well as exchange of money. No other person was involved in the same. There was no acrimony between them when they parted from the Chintoo Car Point office. There was also no "*hot altercation*" over return of "*Rs.10 lakhs on interest*" given by Tikla (PW-9) to Sushil Arora.

The prosecution thus has miserably failed to establish that on the 22nd of February 2009, the financial transaction and negotiations between Tikla (PW-9) and Sushil Arora resulted in any antipathy or left any lingering animosity between them.

III. Tikla (PW-9), Sushil Arora & Rajesh Pandey had no connection with the parking lot incident outside Chintoo Car Point

74. The only point of antagonism on the 22nd of February 2009, the fateful day, was an incident attributed as having taken place in the parking area outside the Chintoo Car Point.

75. It is in evidence that Tikla (PW-9) had gone to the Chintoo Car Point in a Maruti Esteem on the 22nd of February 2009 with Hemant (PW-10) and Gajender (PW-11) and one Sudhir. In his cross-examination (**pg 179**), he refers to an incident of altercation which had taken place outside the office on the issue of parking which was of a duration of around 2-3 minutes, by which time he had already taken his seat in his Esteem car. In order to intervene in that altercation which was "*between Ankit and three/four other boys who were present there*", he had disembarked from his car.

76. I find that there are material points of conflict with regard to this episode as well.

77. Sunil (PW-1) had come to the Chintoo Car Point along with Surender (PW-8), Varun (PW-6) and Ankit (the deceased) in the black Santro car bearing No.DL2FFK0002, driven by Paramjit (PW-5) and were standing outside waiting for Tikla (PW-9) to finish his discussions.

78. So far as the scenario outside the Chintoo Car Point is concerned, Sunil (PW-1), Surender (PW-8), Varun (PW-6) as well as Tikla (PW-9), Hemant (PW-10) and Gajender (PW-11) (in the Esteem car) have stated that 3-4 boys were "*standing outside the office*".

79. However, only Paramjeet (PW-5) puts up a new story and has claimed that while they were standing there, a silver coloured Indica car having the digits '2192' as part of its registration number, arrived there and "*three persons got down from that car*". It was also claimed that these boys appeared to be connected to Sushil Arora as Rajesh Pandey had been coming in and out of the office and conversing with them.

80. According to Sunil (PW-1) (**pg 20)**, there was a motorcycle parked behind a car outside the Chintoo Car Point and Varun had asked those two three boys to remove that motorcycle. On that issue, a physical scuffle started between Varun and Ankit on one side and the boys standing outside on the other. *His uncle Tikla (PW-9) by that time had come out of the office. Thereafter, he,*

Paramjeet (PW-5) and Surender (PW-8) separated the persons involved in the scuffle.

81. With regard to the same episode, Varun (PW-6) has referred to a brawl between Ankit and him on the one side and "*four accused persons*", present in the court, on the other adding the presence of Rajesh Pandey in the brawl (**pg 113**) over taking out of the vehicle from the parking lot. The witness had pointed out towards Rajesh Pandey, Vishnu, Sonveer and Hemant Garg as being the four accused persons with whom he had the brawl over the issue of taking out of the vehicle.

82. As per Paramjeet (PW-5) (**pg 94**), his uncle Tikla (PW-9) and Gajender@Bittoo (PW-11) were taking their white coloured *Verna* vehicle out of the parking when Varun, who was sitting inside the Santro, got down to help get the *Verna* out of the parking. According to PW-5, at that time, three boys namely, Vishnu, Hemant Garg and Sonveer who had been standing and smoking close to the Verna vehicle indulged in a physical brawl with Varun at which point Ankit also got down from the Santro and ran towards them. Thereafter all of them got down from their vehicles and Tikla (PW-9) intervened in the brawl between Varun and the other three persons. Thereafter, Tikla (PW-9) left from the parking lot ahead of the Santro vehicle.

83. Hemant (PW-10), who was inside the office with Sushil Arora, Rajesh Pandey and Tikla (PW-9), refers to "*three or four boys*" standing outside Chintoo Car Point office and that Rajesh Pandey had been in constant conversation and touch with these

boys by going out and coming inside the office (**pg 203**). He also refers to a quarrel between the boys standing outside the office with Sunil (PW-1) and his boys. They had got them separated. He also confirmed that Tikla (PW-9), Gajender (PW-11) and he were in a separate car while the five other boys were in a separate car.

84. Gajender Singh deposing as PW-11 (**pg 203**) refers to a "*tiff/quarrel*" between Ankit and Varun "*with those **4/5** boys who were present and standing outside the office who were the point of taking off a **motorbike***". He corroborates Tikla (PW-9) in his statement that they had disembarked from their car and got them separated. Gajender Singh (PW-11) had claimed that he was driving the Esteem car in which they had come.

85. So far as the duration of that scuffle is concerned, according to Sunil (PW-1), the scuffle was of barely a minute or so. According to Sunil (PW-1) (**pg 15, 20),** Tikla was accompanied by Gajender@ Bittoo (PW-11) and Hemant (PW-10) who moved out in the Esteem car ahead of the Santro. Tikla (PW-9) confirms that his Maruti Esteem preceded the Santro car out of the parking lot.

86. Thereafter, Sunil (PW-1) along with his four associates (**pg 20**) left the spot in the black Santro with Paramjeet (PW-5) at the driving seat and Varun (PW-6) seated next to him in the front seat. Ankit (the deceased) was sitting behind the driver, Sunil in the middle of the rear seat while Surender (PW-8) was on the rear extreme left.

87. It therefore, stands established from the prosecution evidence that so far as Tikla (PW-9) is concerned, there was no

dispute between him and any person either inside or outside the Chintoo Car Point at the time when he left the Maruti Esteem car in which he had come, preceding the departure of Santro car. Tikla had the role, at the most, of an intervenor who separated squabbling parties at the parking lot outside the office of Sushil Arora.

88. There is not the remotest evidence that Sushil Arora and Rajesh Pandey even came out of the Chintoo Car Point or were present while the altercation/scuffle/tiff took place between the boys who were standing outside on the one hand and Varun and/or Ankit on the other. There is also no evidence that Sushil Arora or Rajesh Pandey had even the remotest inkling about the scuffle or that the occupants of the black Santro (specifically Ankit) were connected with Tikla (PW-9).

It is undisputed therefore, that there was no altercation between the occupants of the Santro with Sushil Arora or the other persons who were inside the Chintoo Car Point.

89. To sum up, it can very clearly be held that there is nothing to connect Sushil Arora and Rajesh Pandey to the physical scuffle, altercation or tiff testified about by the witnesses in the parking area outside the Chintoo Car Point on 22nd February, 2009.

90. The prosecution has therefore, failed to establish any motive to murder Mahender Singh Tikla (PW-9) or anyone associated with him is concerned on the part of Sushil Arora and Rajesh Pandey who were inside the Chintoo Car Point.

91. In any case, if the case as propounded by the prosecution to the effect that financial dispute was the genesis and provided the motive and common intention for the fatal attack on and killing of Ankit is to be accepted, then the assailants would have had the motive to kill Tikla (PW-9), who had preceded the Santro car in the Esteem car and not any other person. The persons (alleged to be from Sushil Arora's side) in the parking lot would have the knowledge that Tikla (PW-9) had already left in the Maruti Esteem car prior to the black Santro. Tikla (PW-9) was neither attacked nor chased. The assailants, would not, as alleged, have shot at Ankit in the black Santro car or any other occupant of that car.

IV. Prosecution case that Hemant Garg, Sonveer, Vishnu were goons hired by Sushil Arora through Rajesh Pandey – unsupported by any evidence

92. One more aspect of the prosecution case needs to be noticed. The prosecution had levelled a charge of criminal conspiracy and common intention against the appellants. Keeping in view the prosecution case of the financial transactions between Sushil Arora and Tikla (PW-9) being the genesis of the intention and conspiracy, the prosecution had to establish that the appellants had the common intention and conspired to eliminate Tikla (PW-9). It was necessary to establish a linkage between Sushil Arora and the other appellants. It was also essential to establish participation in the commission of the offence by all the appellants. So what was the

prosecution case to establish this extremely important and essential fact and what was the prosecution evidence in support?

93. In the chargesheet extracted above, the prosecution does not allege any definite case in this regard against the appellants. Some indication of its case is found in the suggestions given by the prosecutor to Pushkar Raj (DW-6) while he was being cross-examined. So far as the incident on 22nd February, 2009 is concerned, while Pushkar Raj (DW-6) was under cross-examination, the prosecutor put the suggestion (which the witness denied) that since Sushil Arora had no intention to repay the loan amount, "***Sushil Arora had spoken to accused Rajesh Pandey to arrange for some hired goons to fix Mahender Tikla***". The witness DW-6 also denied the suggestion that he (Pushkar Raj) and his brother "*Sushil Arora were* ***introduced to co-accused Sonveer, Hemant and Vishnu as hard core criminals by accused Rajesh Pandey***".

94. The sum and substance of this case of the prosecution is to be found in the suggestion to DW-6 Pushkar Raj that "*a* ***deal*** *had been* ***struck to pay the accused persons a sum of Rs.5 lakhs*** *to* ***fix Mahender Tikla***".

95. This in fact is the case of the prosecution even in an application dated 7th August, 2009 filed by Inspector Arun Kumar (PW48A/49) asserting that Sushil Arora had "*hired the contract killers*" namely, the other four accused to eliminate the victims as he did not intend to return the amount of Rs.10 lakhs which he had borrowed from the uncle of one of the victims Mahender Tikla.

96. I find that the prosecution has not led any evidence to prove these allegations.

97. There is also not even a whit of evidence to connect all the five appellants with each other. Different prosecution witnesses have testified that Rajesh Pandey was coming in and out of the Chintoo Car Point to interact with two boys [at many places "*three or four boys*" as per PWs Sunil (PW-1), Paramjeet (PW-5), Surender (Pw-8), Hemant (PW-10)] who were standing outside. But these statements appear to be a desperate attempt to make out a case against Sushil Arora and Rajesh Pandey to connect them to the persons outside the office who were allegedly the other appellants. There is also not the remotest evidence that Sushil Arora had spoken to Rajesh Pandey to fix Tikla (PW-9) or to arrange hired goons to fix Tikla (PW-9) or of any deal to pay "*accused persons*" a sum of Rs.5 lakhs for such purpose. There is no evidence at all that Sushil Arora came out or interacted with any person.

On the contrary, the evidence as discussed above establishes that Tikla (PW-9) had a comfortable meeting with Sushil Arora culminating in an agreement whereby he was to receive staggered payments at the rate of Rs.2 lakhs each month.

98. If at all any deal, as suggested to DW-6, had been struck between the accused persons, then the opportunity to attack Tikla (PW-9) was best available at the Chintoo Car Point itself or thereabouts. The prosecution, on the contrary, has established that no attempt was made to attack Tikla who was the first to leave the

Chintoo Car Point, in a separate car of a totally different make. His car i.e. the Maruti Esteem preceded the black Santro in which his nephew Sunil Kumar and his associates including deceased Ankit left. No attempt was made by any of the accused person to chase or accost the Esteem or to take Tikla's life.

99. The prosecution has therefore, miserably failed to prove that there was any agreement or dealings between the accused persons to take the life of Tikla. No linkage of any kind has been established between Sushil Arora on the one hand, with Hemant Garg, Sonveer and Vishnu.

V. The prosecution evidence of unfolding of the events as per prosecution witnesses rendered it impossible for a bystander to effectively make an identification of the other occupants of the car

100. The most important piece of evidence relied upon by the prosecution in support of the guilt of the appellants is their identification by the prosecution witnesses. In fact, so far as Rajesh Pandey and Vishnu are concerned, there is no other evidence at all. A consideration of this evidence is therefore, not only central but critical as well. The credibility of this evidence lies firstly on whether the witnesses had opportunity to see the accused persons sufficiently enough to identify them? This has been strongly challenged by the appellants. It is an important matter and therefore, is discussed in some detail hereafter.

101. The evidence has to be exaimed bearing in mind that other than Tikla (PW-9), the accused persons were complete strangers to

all the prosecution witnesses on the 22nd of February 2009 when the incident took place. The main plank of the prosecution rests on dock identifications of the appellants by prosecution witnesses when their evidence was recorded on the following dates :

(i) Sunil (PW-1) on 8th March, 2010
(ii) Ranjeet (PW-4) on 19th April, 2010
(iii) Paramjeet (PW-5) on 20th April, 2010
(iv) Varun (PW-6) on 21st April, 2010
(v) Surrender (PW-8) on 12th August, 2010

It was therefore, necessary for the prosecution to establish that the witnesses had adequate opportunity to view the accused persons to significantly notice distinguishing features so as to be able to identify them.

102. Before considering this issue, I set down the broad sub-heading under which I am dividing my consideration :

(i) *Shooting episodes were in close proximity of time and place*

(ii) *Santro in which the deceased and eye-witnesses (PW-1, 5, 6 & 8) were travelling had tinted glasses and its windows were rolled up which would have substantially reduced visibility*

(iii) *Indica car was moving at a high speed*

(iv) *The Santro passengers escaped by scrambling out of windows*

(v) *Indiscriminate firing from the Indica towards the black Santro*

(vi) *No complaint made by the occupants of the Santro despite all having mobiles*

(vii) *No pointing out of any distinguishing feature of the Indica occupants which would have enabled any witness to identify them pointed out; no sketch prepared; no hue and cry notice and no effort to search for or arrest them*

103. Apart from motive, the prosecution has attempted to establish the involvement and assumed roles to the appellants in the commission of the offence through oral testimony of six witnesses. In this regard, it was the prosecution case that the four surviving occupants of the black Santro, namely, Sunil Kumar (PW-1), Paramjeet Singh (PW-5), Varun (PW-6) and Surender (PW-8) were eye-witnesses to the shootings from the Indica. Additionally, the prosecution has examined two public persons – Manveer Singh (PW-2) and Ranjeet Singh (PW-4) as fellow travellers at the same time on the road in front of the Buddha Garden, also travelling towards the Dhaula Kuan, just as the black Santro, who also witnessed the shootings. Through the testimony of these six witnesses, the prosecution has sought to identify the five appellants as occupants in the Indica and also assigned the role of driver of the Indica to Hemant Garg; the shooter from the rear left side window to Sonveer; exhortation by Sushil Arora seated behind the driver as well as by Rajesh Pandey seated in the middle of the rear seat.

104. The defence has challenged the ability of passengers in the black Santro as well as any bystander to sufficiently view the occupants of the Indica and identify them, given the unfolding of the events as set up by the prosecution witnesses. I examine in

seriatim the several circumstances established in evidence in this regard.

(i) *Shooting episodes were in close proximity of time and place*

105. Let me first and foremost examine the sequence and nature of the events, after leaving the Chintoo Car Point, the black Santro (0002) proceeded on the road in front of the Buddha Garden. Varun (PW-6) desired to have cold drink. It is in evidence that at around 1:30 pm, the Santro car stopped near a cold drink cart at the Buddha Garden to purchase some cold drinks and water. Seated in the car itself, Varun (PW-6) claims to have called out to the vendor.

106. As per Sunil (PW-1), at that time, a silver grey Indica passed by the Santro car at a "*very high speed overtaking our parked Santro car*" and a fire arm shot was fired from the Indica car which bullet pierced through the rear fixed glass window pane on the right side of the vehicle and hit Ankit near his right side armpit. The Indica came to a halt a little ahead of the Santro on the left side of the unmetalled shoulder ("*kachcha*") of the road when, once more, shots were fired from the Indica towards the Santro which did not hit the vehicle. Paramjeet Singh (PW-5) drove the black Santro at a speed towards the right side of the road. However, the traffic light at the Simon Bolivar road intersection turned red and the Santro was forced to a stop in which process it hit the rear of the vehicle in front. Because of the traffic, the black Santro was unable to move ahead.

107. At this point, all the passengers of the Santro scrambled out of the vehicle and, post haste, ran in different directions to escape. According to Sunil (PW-1), Paramjeet (PW-5) who was on the driver's seat got out and ran towards the right side while Varun (PW-6) who was seated besides the driver got down and ran towards the Buddha Garden side. From the rear side, Sunil (PW-1) and Surender (PW-8) got out from the left window. Surender (PW-8) is stated to have suffered fire arm injury on his hip while trying to escape while Ankit is stated to have opened the right side window of the car (**pg 22**) but was unable to escape and suffered one fire arm bullet injury on his head.

108. With regard to the incident, the driver of the Santro, Paramjeet Singh (PW-5) has stated that around 1:50 pm about 50-100 metres before the traffic light point on the Buddha Garden road, he stopped the Santro car and asked a drink cart vendor standing there to give cold drink and water bottle. One cold drink and a water bottle was delivered by the cart vendor. The Santro was ready to move at that point when one Indica car (silver coloured) (**pg 94-95**) passed by.

109. As per Paramjeet Singh (PW-5) (**pg 94**), Sonveer was in this car, "*with his almost upper half part of his body out of the Indica car the left side rear window and he fired a shot and that bullet after piercing through the small size fixed glass behind the right rear side window pane of our Santro vehicle and the bullet hit Ankit on his right side just below his armpit*". Thereupon, Paramjeet (PW-5) claims to have increased the speed of the Santro

while the Indica had moved to the left side unmetalled shoulder ("*kachcha"*).

Unfortunately, the traffic light had turned red and Paramjeet (PW-5) unsuccessfully tried to escape from the unmetalled left side of the road in which process their car hit a Maruti car standing in their path in the front. Compelled to stop the Santro, its inmates quickly scrambled out of the car. Paramjeet (PW-5) had stated that he was running behind Sunil (PW-1) while Surender (PW-8) ran towards the jungle side.

110. With regard to the same incident, Varun (PW-6), who also was a passenger of the Santro car, and was seated next to driver Paramjeet @ Monu (PW-5), corroborates stopping the Santro car near a cold drink cart to buy cold drink and water (**pg 113**). He further states that they had bought a Pepsi, one Frooti and one water bottle and that while they were in the process of receiving the cold drink and water bottle from the cart vendor, the Indica car bearing No.2192 passed them whose occupants fired fire arms towards the Santro car.

The witness refers to one bullet having pierced the fixed small glass behind the rear side window glass of the Santro and its having hit Ankit on the right side. The witness reiterates the unfolding of events as stated by the other witnesses. So far as identification of the accused persons is concerned, Varun (PW-6) stated that Sonveer and Vishnu had taken out "*upper half of their body out of the Indica from the rear side windows of the Indica car and firing from the fire arms*". The witness identified Hemant

Garg as the driver of the Indica car. Though categorical that there were two more persons in the Indica, he has stated that he was not able to see who they were.

111. Varun (PW-6) also stated that he did not know who uncle Tikla (PW-9) had gone to talk to at the Chintoo Car Point office or who was its owner. The witness denied having made any statement to the police to the effect that he knew that Sushil Arora was the owner. The witness was declared hostile and cross-examined by the prosecutor. In his cross-examination, the witness pointed out Sonveer, Vishnu, Hemant Garg and added Rajesh Pandey as the fourth person in the Indica. He was again categorical that Sushil Arora had not been named by him as the fifth person in the Indica in his statement under Section 161 of the Cr.P.C.

112. The prosecution has placed reliance on the testimony of Manveer Singh (PW-2) (**pg 48**), as an eye-witness to the incident. This witness has claimed that he was returning home (in Malviya Nagar) from Karol Bagh after getting his motorbike repaired on Sunday 22nd February, 2009 and at around 2:00 pm, he had stopped by some caged birds at the Buddha Garden main road. At that time he noticed a silver coloured grey Indica car proceeding towards Dhaula Kuan at a very high speed. It had proceeded to a distance of around 100-150 metres from the spot from where he was standing, when he heard a sound like that of a fire cracker, though the cause of sound was not visible to him. The witness claimed that he had proceeded in the direction in which the Indica had

gone. As he drew closer to it, he noticed that the car was moving slowly and that two or three persons were in the process of getting into the back side of the car from both sides. The witness claims that he followed the Indica car to concentrate on its number and noted it as DL3HAX 2192.

113. It is also in the testimony of Manveer Singh (PW-2) that since he did not have much time nor paper available, he had taken out his mobile (9971054074) which he was using and had given a call at 2:06 pm to the police control room on the telephone no.100, narrating what he had seen. The witness has claimed that at the same time as when he had seen people boarding the Indica, he had simultaneously seen two or three persons running towards the Buddha Garden side.

114. The witness claims that while chasing the Indica car to note down its number, he had gone about 100 metres beyond the black Santro car having registration no.DL2FFK 0002 and that after calling the police on no.100, he had parked his bike on the left side of the road and had come back towards the Santro on foot. The witness stated that he saw a young boy wearing an orange coloured jersey and sky blue jeans with white sport shoes lying close by the Santro on the right side back corner of the car who was bleeding profusely from his head.

115. The witness claims that he gave a second call at 2:08 pm from his mobile to the police in which he gave the number of the Santro car which was DL2FFK 0002. At this time, another white coloured Santro bearing No.DL4CAG 7179 (**pg 49)** arrived and

stopped there. The two persons in that car removed the injured boy to the hospital.

116. Interestingly, Manveer (PW-2) states that from the manner in which the white Santro car had arrived, and the occupants had stopped and lifted the boy, he had deduced that they were someone known to the boy.

117. Manveer Singh (PW-2) states that he had received a message from the police to stay there and that in response, he had stayed at the spot and that the police came and recorded his statement at the spot. The witness has also stated that he had seen the hole in the glass window which was on the right side rear door of the vehicle which appeared to be from a fire arm bullet.

118. The prosecution has produced yet another witness Ranjit Singh (PW-4) as an independent eye-witness (**pg 58**). Ld. counsels for the appellants have vehemently challenged his testimony as being completely unnatural and that he was a planted witness.

119. This witness has not claimed that he had seen shooting by any person. The witness claimed that while proceeding on his scooter from Pahari Dhiraj towards his sister's house in village Adhchini on the 22nd of February, 2009, at around 2:00 pm, when he reached a little ahead of the Buddha Garden gate, he noticed a silver grey coloured Indica car bearing No.DL 3C AX 2192 being driven at a "*very high speed*" as if it wanted to overtake and stop a black Santro vehicle which was proceeding towards the Dhaula Kuan side. The witness claims that after the Indica had overtaken him by around 10-15 metres, he heard a sound like that of a fire

cracker and then saw "*two persons who had taken out their heads up to shoulder from the left side both front and rear window of Indica car and both were each holding fire arms in his hand and the hand holding the firearm was also outside the car from the window*".

120. Ranjeet Singh (PW-4) is the only witness who states that the Indica vehicle stopped and its five occupants came out of the car. The witness states that the occupants of the Indica car "*hurriedly reoccupied*" it and the Indica chased the Santro. At the traffic light on the T-point where the road in front of the Buddha Garden going towards Dhaula Kuan intersected with the Simon Bolivar Marg, the traffic had stopped on account of the light turning red. Ranjit Singh (PW-4) claims that he saw that the black coloured Santro car had also stopped and he "*saw some boys came out of that Santro car from both front and rear left side window seats*"; one boy wearing an orange coloured kind of shirt came out of the rear right side of the Santro and walked with difficulty and rested his body against the Santro car towards its back side. The Indica also arrived and stopped just a little distance behind the Santro. The witness claims that he saw a boy with a well built physique getting down from the left front side of the Indica car i.e. the driver's left side (**pg 59**) holding the fire arm and aimed his fire arm on the head of the boy wearing the orange coloured shirt and shot a bullet which hit the head of the boy.

121. Ranjit Singh (PW-4) relocates the first incident of firing to the spot which was a little ahead of the main gate of the Buddha

Garden. The duration of this incident was claimed by him to be one and a half minutes only while the incident at the red light point was of two and a half to three minutes duration. The witness explained that he did not touch the victim nor assisted in lifting him due to fear. He submitted that there were other persons present besides the victim at the spot.

122. As per the prosecution, the moments between the place where Ankit suffered the armpit injury and the Santro coming to a halt at the traffic light where Sunil (PW-1) and the others scrambled out of the Santro car were so fleeting that Sunil (PW-1) did not even come to know that Ankit, who was sitting very next to him, had suffered a bullet injury.

123. The trial court has discussed the testimony of five of the witnesses – Sunil Kumar (PW-1); Paramjeet Singh (PW-5); Varun (PW-6) and Surender (PW-8) from paras 93 to 101 (**pg 665**) and concluded that the prosecution had established that two incidents of shooting took place, the first near cold drink cart vendor and the second at red light T-point. The trial court was also of the view of the witnesses have consistently identified Vishnu and Sonveer as being the two persons in the car who had shot at them. The trial court held that Hemant Garg has been identified by all the witnesses as the driver of the car.

124. Rajesh Pandey and Sushil Arora stood identified by Sunil Kumar (PW-1) and Paramjeet Singh (PW-5) as occupying the rear seat.

125. In para 106 (**pg 672**), the trial court has also held that the presence of Manveer (PW-2) stood established on the record.

126. I find that the witnesses (Ranjeet Singh PW-4) have timed the duration as between one minute to two minutes (**pg 67**). But when faced with a frightful situation, seconds seem to be minutes, minutes seem like hours while hours seem like days. So the estimation of time by witnesses to a shooting episode cannot be relied upon.

127. It stands established that the distance separating the points at which the two incidents of shooting happened was hardly between 100 – 200 metres and that the Indica was moving fast. Therefore, the two shooting incidents would have taken place within moments, certainly rendering it difficult to see strangers occupying the vehicle sufficiently to be able to identify the Indica occupants several months after the 22nd of February 2009, as as been done in the present case. It has to be borne in mind that the Indica occupants were completely unknown and had never been seen before by the prosecution witnesses.

(ii) *Santro in which the deceased and eye-witnesses (PW-1, 5, 6 & 8) were travelling had tinted glasses and its windows were rolled up which would have substantially reduced visibility*

128. It has come in the prosecution evidence that it being winter, the windows of the black Santro car were all rolled up. Sunil Kumar (PW-1) (**pg 37**) has stated that at the time of the incident, the back side window pane were in the up position i.e. closed and

not down. He further stated that when the cart vendor was called, only at that time the front left side window pane was rolled down. In cross-examination, Sunil has further testified that the window glasses of the Santro were 50% black tinted (**pg 34**).

129. In his cross-examination, (**pg 98**) Paramjeet (PW-5) has stated that the Santro car had "*tinted glasses with 60% visibility*". He also stated that the incident took place on 22nd of February 2009 when, being winter, the glasses would be rolled up. The witness was unable to recollect even the number of the white Verna which according to him belonged to his uncle Mahender Tikla (PW-9).

130. Varun (PW-6) has stated that the percentage of the tinted glasses would be 60% or 70% or 80% (**pg 119**). At the same time, Varun (PW-6) has tried to suggest (**pg 119**) that though the window glasses of the Santro were tinted, the extent of tint was such that the outside objects were comfortably visible.

131. It cannot be denied that the tint in the glasses would have reduced visibility of the outside to the Santro occupants. Admittedly the persons seated in the Indica were strangers to the Santro occupants. Even if their testimony was accepted at face value, two of the appellants – Sushil Arora and Rajesh Pandey – had never been even seen by the Santro occupants. Given the speed of the Indica; the quick turn of events and the reduced visibility, it is difficult to believe that the features of the Indica occupants could have registered with the Santro occupants.

(iii) *Indica car was moving at a high speed*

132. Our attention is drawn to the testimony of Sunil Kumar (PW-1), the complainant (**pg 21**) who refers to the Indica "***passed*** *through our Santro car in a* ***very high speed overtaking*** *our* ***parked Santro car****" ... "when fire arm shot was fired from that Indica car,* ***bullet piercing*** *through the* ***back right side fixed glass window pane***". At this time, the Santro occupants were engaged in buying cold drinks and their attention would have been on the drinks cart, that is, away from the road.

133. Manveer Singh (PW-2) while describing the manner in which the silver grey Indica car was proceeding towards Dhaula Kuan has stated that the car was in a "*very high speed*" (**pg 48)**.

134. Ranjit Singh (PW-4) corroborates the other witnesses and he also stated that the Indica car bearing no.DL3HX 2192 was being driven in a "*very high speed*" (**pg 58**). He further stated that after he heard the fire arm shot, the Indica vehicle had passed him at a "*fast speed*". **(pg 67).**

135. Varun (PW-6) has explained that "*Speed of Indica car, when it overtook our Santro vehicle at the Budha Garden gate, could be around 60/70 KMPH*" (**pg 127-128**). He has further stated that from the point of the cold drink cart to the incident at the traffic light, the Santro had covered the distance very fast.

136. The public eye-witness Manveer Singh (PW-2) has gone to the extent of stating (**pg 53)** that it being a Sunday and open road, it was the high speed of the Indica that attracted his attention towards

the vehicle and that he was unable to specify whether it was 60, 70, 80, 90 or 100 kmph.

137. In his examination-in-chief, Manveer Singh (PW-2) has clearly stated (**pg 51**) that since he had seen the occupants of the Indica car for a very small duration he could not identify the occupants of the Indica car in court. However, he stated that occupants of the car were young boys/persons.

138. The witnesses have thus categorically stated that while overtaking their black Santro, which was stationary at the drinks cart, the Indica was being driven at a very high speed. It is also in evidence that the Santro had tried to rush away from the spot and again the Indica had come from behind moving at a fast speed and stopped behind the Santro. Both the incidents were of very short duration. The speed of the vehicle as well as the suddenness of the attack and the brevity of the incidents would have rendered it difficult for any person, be it the passengers in the Santro or bystanders such as Manveer Singh (PW-2) and Ranjeet Singh (PW-4), to spot or identify the inmates of the speeding vehicle.

(iv) *The Santro passengers escaped by scrambling out of windows*

139. One more telling circumstance has completely escaped notice by the ld. trial judge as well as ld. counsels appearing in the matter. This is strong evidence which elucidates the haste with which the Santro occupants disembarked from the car and the fear in their minds which would have blocked out any effort to ascertain the identity of the assailants or the other occupants of the Indica.

Their focus at that time would have been to escape alone and at the earliest.

140. Varun appearing as PW-6, who was seated on the left side besides Paramjeet (the driver), has described his escape from the black Santro. PW-6 states that the left side door was stuck against the stem of a tree. He got out of the car with difficulty by scrambling out from the window.

141. Surender (PW-8) (**pg 150**) has stated that at the red light point, the front seat passengers i.e. Varun (PW-6) and Paramjeet (PW-5) were the first to come out of the car. Thereafter, Sunil (PW-1) who was sitting in the middle of the rear seat, went on to the front seat and escaped from the window. Surender (PW-8) has claimed that he escaped from rear left side door of the car and that he ran towards the other side of the road from the front of the black Santro.

142. Sunil (PW-1) who scrambled out of the front left side window, has also explained that Paramjeet (PW-5) was the first to run away from the Santro followed by Varun (PW-6). The witness has categorically stated that "*thereafter Surender got down from my left side window*" (**pg 42**).

143. The above testimony is supported by Ranjeet Singh (PW-4) who has also stated that from the black coloured Santro car which had arrived and stopped, he "*saw some boys come out of that Santro car from <u>both front and rear left side window seats</u>*".

144. Ranjeet Singh (PW-4) has also described Ankit's exit from the Santro in the following terms:

"I saw the boy wearing orange colour shirt who had got down from the rear ***right side window of the Santro car*** *and was able to walk with difficulty…"*

(Emphasis by us)

145. The above evidence illustrates that at the traffic light, the Santro was hemmed in by vehicles on the front and right side and by the tree on the left side. The same would also manifest the reasons why Ankit had no option but to go towards the rear of the Santro, when he had fallen between the two cars in his effort to escape and received the fatal injury.

146. The above evidence establishes beyond doubt that the Santro car inmates were least concerned about the identity of the occupants of the Indica car and looked at the shortest and fastest route of possible escape, even if it meant scrambling out of the windows of the black Santro. Sunil (PW-1) did not even wait for Surender (PW-8) to disembark from the rear seat of the car but instead jumped to the front seat, following Varun (PW-6) from the front left side window of the car, running after Paramjeet (PW-5).

147. The evidence on record also establishes that Metro work was going on and there was a traffic jam also because of this at the red light point (PW-6) (**pg 120**). Varun (PW-6) has stated that there were about 30-40 vehicles at the traffic light which mainly comprised of cars as well as some motorbikes and buses. He could not note down the number of any of the vehicles at that point.

148. It is quite clear that it was not possible to open the car doors to escape from the car which would have aggravated the panic in the mind of the Santro occupants.

(v) *Indiscriminate firing from the Indica towards the black Santro*

149. It is additionally in the evidence of the prosecution witnesses (PW-1 & PW- 6) that, Vishnu on the front left side seat and Sonveer on the rear left side seat of the Indica, had their head and hands out of the Indica, and were shooting towards the Santro with the fire arm in their hands.

150. On this, Ranjit Singh (PW-4) (**pg 58**) has said that these two persons had "*taken out their heads up to shoulders from the left side both front and rear window of the Indica car and both were holding each fire arm in his hand and the hand holding the fire arm was also outside the car from the window*".

151. Surender (PW-8) defines the position even more graphically and states that "*there were* ***two boys in the Indica car who were holding fire arms while firing upon our Santro vehicle***. *Those* ***two boys firing from Indica car, were in a position*** *that one was on the driver's side seat and his* ***upper half of his body*** *had been taken out of the window glass of the door and* ***similar was the position of the second boy*** *who was on the rear left side window of the Indica car*". PW-8 further stated that in all there were *"4 to 5 occupants in that Indica car*".

152. Paramjeet Singh (PW-5) (**pg 94**) has also declared that he had seen "*accused Sonveer with his almost upper half part of his body out of the Indica Car left rear side window….*"

153. Though there is isolated evidence on record of some of the witnesses referring to specific number of shots, there is also evidence of indiscriminate and continuous firing during the incident.

154. Sunil (PW-1) refers to one bullet piercing the back right side fixed glass window pane of the Santro. He also refers to one more fire arm shot which did not hit the vehicle at the first incident. However, so far as the traffic light point is concerned (**pg 22),** the witness has attributed "*firing*" by two of the accused persons towards the Santro vehicle and its passengers in which Ankit and Surender received injury.

155. Manveer Singh (PW-2) (**pg 48**) refers to hearing a sound that was like a fire cracker, which is a solitary incident of firing. Manveer (PW-2) has clearly stated that he did not see anyone shooting from the Indica car.

156. Ranjit Singh (PW-4) (**pg 67**) has stated that when "*fire arm shots were being fired*", he did not pay attention towards the traffic light.

157. Paramjeet (PW-5) (**pg 95**) refers to firing in the incident by the two of the accused persons who were seated on the left side of the Indica.

158. Surender (PW-8) **(pg 137**) mentions "*firing from the occupants of that Indica car on our Santro vehicle*" and that one of those fired bullets hit Ankit after piercing the small fixed glass.

159. Sunil Kumar (PW-1) (**pg 22)** had stated that he had not been able to see and note the Indica car number. This clearly shows that the witness was not in a position to pay attention to any detail of the Indica car.

160. If we were to reconstruct the scene of crime, as described by the prosecution witnesses, at the drink cart, the speeding Indica went passed the Santro in a matter of moments. The Santro's passengers were engaged in buying drinks with attention diverted towards this. Two persons with half their body sticking out of the left side windows of the Indica were shooting at the Santro with the fire arms in their hands. These shooters would have certainly blocked the view into the Indica. At the traffic light, it is in evidence that the Indica was forced to a stop behind the Santro.

161. It is also in the evidence of Sunil (PW-1) (**pg 39**) that headrests were fitted on both the front seats of the silver Indica. Even Sunil (PW-1) has admitted that if the headrest is affixed on the seat, then in that situation, it is a little bit difficult to see who is sitting on the rear seat. If this was so, in the small car like Indica, it would be impossible even for the passengers in the rear seat of the same car to make out the identity of the driver or the passengers sitting next to him if they were not known to them. These headrests would have considerably obstructed the view of any person seated in the Santro which was ahead of the Indica, not in

its direct parallel line, to see the passengers on the rear seat of the Indica, much less to be in a position to identify them.

162. How could the Santro occupants have seen any thing of a vehicle which sped past their Santro for the first time at the drinks cart and then stopped behind the Santro at the traffic light with shooters aiming at the Santro and its occupants? Faced with bullet fire, the normal reaction of every unarmed human being would be to duck down so as to avoid being in the path of the bullet fire as testified by Varun (PW-6).

163. In his cross-examination, (**pg 128**), Varun (PW-6) has stated that "***it is true that on that point of time we bowed our body a little inside the car as a reflex that none of us received any fire arm injury further and as well that our attention was towards Ankit***".

164. In this regard, Sunil Kumar (PW-1) has stated that "*the incident of firing I had seen only when I was sitting inside our car and I had not taken my upper head part out of the car to see it*" He further states that "*after getting down from the car, I ran straight in the direction I had got down*" (**pg 34**). Sunil Kumar (PW-1) was sitting in middle of the rear seat of black Santro sandwiched between Surender on his left and Ankit on his right.

165. The panic in the mind of the occupants of the Santro at being fired upon is evident from their deposition in court. When the first shot was fired, as per all the prosecution witnesses, the Santro was stationary as its occupants were purchasing drinks from the cart vendor while the Indica was going past it. Upon being fired at, the sensible thing which any reasonable person would have done was

to escape in a direction opposite to the one in which the Indica had sped away. That is to say, attempt to put the maximum distance between the assailants and themselves. Instead, blindly and without paying any attention to the consequences, Paramjeet Singh (PW-5) sped in the same direction in which the Indica had gone. It appears that the thought process of the passengers in the Santro were frozen and it did not even strike Paramjeet Singh (PW-5), the driver, or for that matter any of the other occupants, that they should drive away from the Indica instead of towards it. This clearly illustrates that the occupants of the Santro were completely panic stricken after being shot at.

166. Apart from the natural human instinct which would have discouraged any person from moving towards or looking towards the direction from which bullets were being fired at their vehicle, the desire to flee as far away and as quickly as possible, would have prevented any occupant of the black Santro from even looking towards the Indica, let alone, taking a clear view of the occupants of the Indica car.

167. Even if there were no shooters in the Indica, it would have been impossible to view either the driver or the persons occupying the rear seat of the Indica beyond the person sitting at the window let alone affirmatively identify the driver of the Indica or the occupants. Certainly it would be impossible to view the person sitting behind the driver in the extreme right hand corner of the Indica.

168. If at all they can be believed, the witnesses in the black Santro would at best have had a fleeting view of two persons hanging out of the windows on the left side of the Indica. It is therefore, obvious that it would have been difficult for the prosecution witnesses to even see the features of the occupants of the Indica car. Identifying them with certainty would be impossible.

169. The fact that no person is named (or described) in the elaborate police records from 1:58 pm to 7:30 pm leads to the only conclusion that it was impossible to identify the occupants of the Indica and in fact the witnesses were actually unable to do so.

170. In this regard, I find that the trial court has also accepted this position but selectively. The ld. trial judge has used this important circumstance to explain some of the prosecution witnesses' inability to identify the accused persons while at the same time believing the identification by others, despite this position. In para 142 (**pg 687**), the ld. trial judge has held that it was "*quite understandable*" that Manveer (PW-2) was unable to identify Sushil Arora as he was on his motorcycle and was only able to note the vehicle numbers. I find that again in para 155 (**pg 691**), the ld. trial judge rejects the argument on behalf of the accused that the two of the witnesses who were called for the TIP on 26th August, 2009 were unable to identify Hemant Garg and therefore, the identification on 28th August, 2009 of the two other witnesses (who had been present on 26th August, 2009) should be rejected. In this regard, the ld. trial judge has held that *"PW4 Ranjeet was the eye-*

witness who had seen the accused fleetingly on the date of incident. His inability to identify the accused after six months, is understandable." This very observation would apply to all other identifications as they had spotted the occupants of the Indica similarly, i.e. only fleetingly, and their testimony was recorded after six months or more after the incident.

171. In para 155 of the impugned judgment (**pg 692**), the ld. trial judge has further observed that Paramjeet Singh (PW-5) "*was driving Santro car and his attention would have been more on driving the car*". This finding *per se* is sufficient to disbelieve the identification by Paramjeet Singh (PW-5) of the occupants of the Indica car.

172. It is quite obvious from the above consideration that even if we were to overlook the evidence that the shooting at the drinks cart was transitory from a speeding Indica; that tinted glass windows of the Santro were all drawn up considerably reducing visibility; that the Indica was speeding; that two assailants with half their bodies out of the left side windows were shooting from the vehicle; that at the traffic light, the Indica had come to a halt behind the Santro; that the Santro occupants were in so much panic and hurry to escape for their lives that they had jumped out of windows of their Santro and run ahead i.e. away from the Indica amongst other evidence noted above, it is highly improbable that the occupants in the Santro would have looked at the shooters aiming at them or that they could have even seen the driver of the Indica or two persons seated in rear of the Indica next to the

shooters, so as to be able to identify the with certainty. For persons such as PW-2 and PW-4 on the roadside who were complete strangers, to be able to sufficiently view the occupants of the Indica, in the above circumstances, so as to make their identification in court several months later, is quite impossible.

173. The claimed reaction of Surender (PW-8) to the shooting episode is further illustrative of the panic in the minds of the occupants of the Santro car. Surender had stated that after the Santro car was forced to stop, the occupants got down and started running to save themselves. However, as soon as he came out of the Santro car, a fire arm bullet hit him on the left side below the waist near the hip. He thereafter moved from the front of the Santro towards the right side of the road. PW-8 had stated that he did not see what those other one or two boys who were in the Indica did as after being hit, he moved and did not see what was happening behind him (**pg 138**). Surender (PW-8) has claimed that he ran for around one and a half kms towards the right side from the red light of the spot; got into a DTC bus going towards Gurgaon and reached the Ring Road; from the Ring Road boarded another bus to reach AIIMS Hospital, and from where he boarded another bus to Mehrauli (**pg 138 and 146**). The witness has claimed that while he was running to get the bus, and even after boarding it, he was bleeding profusely. He claims that he had got down on the Ring Road near AIIMS for medical help but by the time he reached AIIMS, the bleeding had stopped. As he was perplexed, he did not go inside the hospital for medical treatment.

The witness has declared that he did not tell anybody about the manner in which he had sustained the injury; nor did he contact any guard. This is not normal conduct.

174. What to say of identification of the assailants, these four friends (PW-1, PW-5, PW-6 and PW-8) in the black Santro were so petrified that they did not even bother about each other's well being. They did not even care about injured Ankit's welfare and just ran from the spot without caring for him.

(vi) *No complaint made by the occupants of the Santro despite all having mobiles*

175. It is in evidence that the Santro occupants were carrying mobile phones. Yet not one of them called the police either for help or to nab the assailants. Sunil (PW-1) had met Sushil Arora on the 20th of February 2009 when he accompanied Tikla (PW-9) to Chintoo Car Point and had gone up to the office on the 22nd February, 2009. If he had actually spotted Sushil Arora in the Indica, he would have immediately informed the police.

176. The evidence on record shows that the prosecution witnesses Sunil Kumar (PW-1) and Paramjeet Singh (PW-5) had criminal cases against them and as such were aware of criminal processes – Yet these witnesses failed to inform police.

177. Sunil (PW-1) has disclosed that prior to the 22nd of February 2009, he had been implicated in criminal cases. One case which had been registered against him under Section 307 IPC was over. A second criminal case under Section 506 IPC was pending against

him even on the date of his testimony. This witness disclosed that even Paramjeet (PW-5) also had a case under Section 308 IPC against him.

178. I also find that Paramjeet Singh (PW-5) has also mentioned in his cross-examination that he has a criminal case against him under Sections 308 and 506 IPC pending in the Patiala House Courts. This case is stated to have been registered in connection with transport rivalry by one Sumender Singh and Sonu Maan, residents of Kishangarh which was pending trial and was listed on the 23rd of April 2010.

179. The conduct of these prosecution witnesses, running large transport business, some even having criminal cases against them, claiming to have run away from the spot without caring for the injured and not having made even a phone call to the police despite carrying mobiles, points towards either they were physically not present at the spot, or that their narration of the unfolding of events is not true.

(vii) *No pointing out of any distinguishing feature of the Indica occupants which would have enabled any witness to identify them pointed out; no sketch prepared; no hue and cry notice and no effort to search for or arrest them*

180. The prosecution has set up Sunil (PW-1); Manveer Singh (PW-2); Ranjeet Singh (PW-4): Paramjeet Singh (PW-5); Varun (PW-6) and Surender (PW-8) as eye-witnesses to the commission of the offence. It has been pointed out by Mr. M.N. Dudeja, ld. counsel for Vishnu that all these witnesses categorically state that

they did not know the accused persons prior to the incident. Ld. counsel would contend that in fact, the appellants are neither named nor their description mentioned in the first call made by Manveer (PW-2), recorded as DD no. 24B in the police control room record (Exh. PW26/D1) about the incident.

181. The next document with regard thereto is the '*rukka*' (Ex.PW1/A) which was prepared at the instance of Sunil Kumar (PW-1) which also does not contain any description or distinguishing features of the accused persons to enable identification.

182. Sunil Kumar (PW-1) has also not given any description of any of the assailants including Sonveer and Vishnu in his statement under Section 161 of the Cr.P.C.

183. Ranjeet Singh (PW-4) has neither given description nor names of the assailants in the statement attributed to him as having been recorded by the police on 22nd February, 2009 under Section 161 of the Cr.P.C. He has merely described the two shooters on the left windows of the Indica as two stocky persons of similar height aged approximately 30-32 years and three well built persons who were aged between 25-30 years. He has not described their features, height, complexion or their clothes. These general specifications would fit hundreds of persons. No special marks of identification are pointed out.

184. I find that the record is completely devoid of any effort made by the police to trace Hemant Garg, Sonveer and Vishnu for several months. On the 22nd of March 2009, an application was

filed by the police seeking issuance of non-bailable warrants only qua Rajesh Pandey and Hemant Garg. Raids are also claimed to have been made at the residences of Sonveer and Vishnu without disclosure of any dates or particulars.

185. It is important to note that the investigating agency claims that on 22nd February, 2009, it recorded statements under Section 161 Cr.P.C. of Sunil Kumar (PW-1); Manveer Singh (PW-2); Ranjeet Singh (PW-4); Paramjeet Singh (PW-5); Varun (PW-6); Mahender Tikla (PW-9). On 23rd February, 2009, the police claims to have recorded the statements of Surender (PW-8); Hemant (PW-10) and Gajender (PW-11). It is noteworthy that in all these statements, only two accused persons, Sushil Arora and Rajesh Pandey are named while reference is made to three other boys ("*teen aur ladke*") in the Indica.

186. In their statements under Section 161 of the Cr.P.C., Paramjeet Singh (PW-5), Varun (PW-6) recorded on 22nd February, 2009 and Surender (PW-8) recorded on 23rd February, 2009 have also not given any names or description of the occupants of the Indica.

187. The pronouncement reported at ***(1979) 3 SCC 319, Kanan & Ors. v. State of Kerala*** has been placed before us by Mr. K. Singhal, ld. counsel for Hemant Garg. This judgment was rendered by *Fazal Ali, J.* who, on the question of presence of PW-25 on the night of the occurrence and dock identification of the convicts by him, has commented thereon in the following terms :

"...Secondly, PW 25 says that he ***heard an explosion,*** *and if this was so, as he was ill,* ***his first impulse and natural conduct would be to remain confined in the room rather than to go out to look as to what was happening around and invite danger****. xxx xxx xxx*

... It is ***not understandable*** *as to* ***how the witness gave the names of the appellants*** *when he knew them only by face* ***which indicates that names of the accused must have been supplied by someone else*** *and* ***this introduces an element of doubt in his testimony. Both the trial court and the High Court have found that the mere fact that no T.I. parade*** *was held* ***would not destroy the evidence of PW 25****. With due respect, we feel that the* ***High Court erred in law in taking this view****. It is well settled that* ***where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I. parade to test his powers of observation****. The* ***idea of holding T.I. parade*** *under* ***Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held*** *then* ***it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court****. In these circumstances, therefore, we feel that it was incumbent on the prosecution in this case to have arranged T.I. parade and got the identification made before the witness was called upon to identify the appellant in the Court.* ***On this ground alone, the testimony of PW 25 becomes unworthy of credence*** *and* ***must be excluded from consideration****. In this view of the matter, even if the evidence of PWs 17 and 18 regarding the participation of the accused in conspiracy to raid the police station be accepted, the* ***evidence being of very vague nature, the appellant cannot be***

convicted because there is no evidence to show that the appellants were members of that conspiracy*…"*

(Emphasis by us)

188. Our attention also stands drawn by Mr. K. Singhal, Advocate to the pronouncement of the Supreme Court reported at ***(1999) 3 SCC 54, Vijayan v. State of Kerala.*** The court has considered the factual matrix with regard to the fact that the accused was a stranger to the witnesses and the value of the witnesses' substantive identification in court noting the facts thus :

"6. *....This conclusion on the face of it is unsustainable. Since the accused Vijayan was not known to PW 3 and the test identification parade having been discarded****, the substantive evidence of identification in the Court after so many years cannot be relied upon.*** *Though Mr Ramachandran, learned Senior Counsel appearing for the State initially had urged that the evidence of PW 3 so far as she identified accused Vijayan in the Court can be accepted even discarding the test identification parade but ultimately could not support the said contention with any authority.* ***As a matter of prudence, it is highly unsafe to accept the identification of the accused in court many years after the occurrence when the test identification parade made shortly after the occurrence has not been accepted****. There are also* ***several other reasons for discarding the evidence of PW 3*** *since according to PW 3, the person who rang the bell was not a tall man though the height of Vijayan is more than 6 feet.* ***For a person to just see his face while opening the door and then remember the same for the purpose of identification after five years of the occurrence****, in our considered opinion,* ***is just impossible****. The evidence of PW 3 and the circumstances sought to be proved through her evidence*

by the prosecution cannot be relied upon and the High Court committed gross error in relying upon the same.

7. *The next circumstance sought to be relied upon by the prosecution and accepted by the High Court is through the* ***evidence of PW 9 who on the date of the occurrence was returning after supplying milk*** *and then he* ***saw accused Vijayan running away*** *without any chappals and in a worried manner…*

… We have gone through the ***evidence of PW-9****. It is indeed* ***difficult for us to rely upon his evidence*** *and it is* ***highly improbable for a man to remember any person running on the street without chappals.*** *That apart, his so-called identification in the test identification parade was rightly disbelieved by the Sessions Judge inasmuch as* ***by the date the test identification parade*** *was conducted,* ***not only the photograph of the accused had been shown to PW 3*** *and* ***in all probability must have been shown to PW 9 but also in all the local_newspapers the photograph had already been printed.*** *In such circumstances, the Sessions Judge in our view, rightly came to the conclusion that the test identification parade is nothing but a farce and cannot be relied upon....”*

(Emphasis by us)

189. The Supreme Court also considered the evidence and identification by PW-4 in para 8 and observed thus :

“8. *…We also really fail to understand how a* ***witness seeing an unknown man running away could be able to identify him at a later point of time****. No special feature was also indicated by the witness. In our view, the evidence of PW 4 is totally unworthy of credit and, as such, cannot be relied upon for bringing home the charge.”*

(Emphasis by us)

190. Mr. M.N. Dudeja, ld. counsel has drawn our attention to the pronouncement reported at ***1993 (Crimes) 466 SC, State of Mahrashtra v. Subhaiya Kanak Moniah & Ors.*** wherein the prosecution had alleged that the appellants who were the workers in a factory, set a car on fire and three eye-witnesses present in the car received injuries. The incident occurred in a flash of time. The injured witnesses made statements to the police but names and description of the culprits were not given. The court held that the subsequent identification of the culprits by these witnesses either in the Test Identification Parade or in the court did not inspire confidence. In this regard, in para 5 of the pronouncement, the court observed thus :

> ***"5.*** *Learned counsel for the appellant submitted that these witnesses who received burns are the most natural witnesses and the respondents who were identified by them as having participated in the occurrence ought to have been convicted. We have gone through the entire bulky record. As noted by the High Court, the* ***case mainly rests on the evidence of these three eyewitnesses. The identification of the alleged culprits by these witnesses assumes lot of importance in the case****. Admittedly these* ***injured witnesses did give some statements to the police*** *but further recording was stopped. The explanation given is that they were in serious condition and therefore further recording could not have been proceeded with.* ***It is only again at a subsequent stage that their statements were recorded in which they gave some particulars of the assailants. Throughout the contention of the defence had been that these witnesses did not give any descriptive particulars of the accused and therefore they had not***

seen the persons concerned. It is only at a later stage after being tutored that they gave some particulars and proceeded to identify some of the assailants in the identification parade. *The plea taken by the defence that some of them only had minor burns and that at least the evidence of Dr Nuriyani, PW 41 shows that they were in a position to make the statements and that the Medical Officer of the Sion Hospital had no objection to their statements being taken at that time and in fact some part of the statements was recorded. PW 74, the Sub-Inspector who recorded the first statement of Barve, further stated that the Doctor asked him not to talk to Barve as he was under severe shock. PW 74 came out with another story in the deposition that the same night he visited Bhatia Hospital where he could record the statements of PWs 28, 34, 38 and 39 who received burns. According to him, he had not completed their statements earlier. It therefore emerges that the statements of these witnesses recorded on November 3, 1973 were not complete and by then descriptive particulars were not given.* ***As a matter of fact, the statements of each of the witnesses recorded by the police at that stage ran into two or three foolscap sheets but in spite of such lengthy statements, the names and the descriptions of the culprits did not find place. Only PW 38, the driver mentioned Balan as the main culprit. Except his name, no other names were mentioned. The High Court examined*** *this position and observed that except the name of Balan,* ***the names or descriptive particulars of no other accused were mentioned and that leads to an inference that these witnesses have not actually seen the culprits and their subsequent identification either in the parade or in the court does not inspire confidence.*** *Admittedly A-7 had deformity in his hand and Kadam, PW 39 knew accused 6, 7, 8 and 9 by face and A-5 by both name and face for a long time before the incident but still no descriptive particulars were mentioned. In spite of his claim that he*

had known accused 6, 7, 8 and 9, surprisingly he did not identify A-7 in the parade. The circumstance that the statements of these witnesses were recorded on November 5, 1973 and November 8, 1973 support the plea of the defence that these witnesses have not seen actually who the culprits were and for that reason ***they could not give descriptive particulars earlier****. In this context it is also important to note that the* ***prosecution failed to examine*** *the two female employees Miss Leela Ramaswamy and Miss Leela Chandane, who had escaped with negligible or no burns and who would have been in* ***a better position to give the particulars****. The High Court has also given good reasons for coming to the conclusion that a deliberate attempt to implicate A-6 was made by Suvarna, PW 34. It is rather strange that* ***these witnesses gave some of the descriptive particulars only in their later statements****. Further the circumstances show that the* ***incident*** ***must have occurred within seconds rather in a flash of time and it is highly doubtful whether these witnesses would have been in a position to identify any of the culprits****. We cannot say that the reasons given by the High Court for not relying on the evidence of these witnesses are unsound and if the evidence of these main witnesses becomes doubtful and not acceptable, then the other circumstances relied upon by the prosecution do not advance the prosecution case.* ***We do see that the culprits have acted high-handedly without any concern for law and order. But there is paucity of evidence and the prosecution could not establish the guilt of the respondents beyond all reasonable doubt. Accordingly all the appeals are dismissed****."*

(Emphasis by us)

The Supreme Court disbelieved the prosecution case and identifications by injured eye-witnesses in a factual scenario very similar to the present case.

191. On the 22nd/23rd May, 2009, the first chargesheet came to be filed against Sushil Arora (**pg 214-721**). This chargesheet states that other accused persons namely, Vishnu and Sonveer were involved.

The prosecution does not disclose where and how these particulars were obtained.

192. No description of any distinguishing features of the appellants by any witness is found anywhere in the record. No sketches of the appellants were drawn up nor any hue and cry notices published or circulated. This casts substantial doubt on the implication of the appellants as well as their identification of the accused persons months after the occurrence by the witnesses during trial.

VI. To connect Sushil Arora and Rajesh Pandey to persons standing outside Chintoo Car Point, allegation that Rajesh Pandey was interacting with them – whether credible evidence

193. To connect Rajesh Pandey with the commission of the offence, the prosecution has tried to establish the following three circumstances :

(i) that Rajesh Pandey was inside the Chintoo Car Point on the 22nd of February 2009 when negotiations between Sushil Arora and Tikla took place.

(ii) that he was connected with the three persons outside the Chintoo Car Point who were involved in the tiff over the parking which fact was established by the fact that Rajesh Pandey was moving between Chintoo Car Point and these three boys.

(iii) that Rajesh Pandey was sitting in the middle of the rear seat of the Indica and had exhorted the assailants to kill.

194. According to the prosecution, the first statement of the manner in which the events had unfolded is to be found in the statement (Ex.PW1/A) purportedly made by Sunil (PW-1) (**pg 748**) and recorded by Inspector S.S. Rana (PW-26). In this statement, Sunil Kumar (PW-1) has stated that Tikla (PW-9) was talking to Sushil Arora and Rajesh Pandey inside the office of the Chintoo Car Point. He also further stated that three – four boys who were standing outside the office, were coming in and going out of the office.

195. I have elaborately noted above the fact that the negotiation proceedings inside the Chintoo Car Point office were cordial. In fact Hemant (PW-10) has stated that (**pg 193**) inside the Chintoo Car Point, there was no occasion of any dispute and the issues were settled before Tikla (PW-9) and his friends came out.

196. I find that the prosecution has not lead any evidence that the other accused persons (alleged to be standing outside), had any knowledge at all of the transaction between Tikla (PW-9) and Sushil Arora or of the negotiations between them.

197. The negotiations inside the Chintoo Car Point were so congenial that there is no evidence of any kind of dispute or abuse

or any raised voice even. The only suggested point of difference between Sushil Arora and Tikla, is over payment of interest. But that is so in every case involving payment of money. Therefore, even the suggestion by the prosecution that Rajesh Pandey had told Tikla that his money was stuck, is not in the nature of a threat but a valid and genuine concern which weighs with every creditor who is trying to get payment of his amounts from a debtor.

198. It appears that realizing that there was no connection at all between Sushil Arora and Rajesh Pandey on the one hand, with the persons with whom there was an altercation outside the Chintoo Car Point; in a desperate attempt to establish a linkage between the boys standing outside the Chintoo Car Point with the negotiations between Tikla and Sushil Arora, the prosecution led evidence of Sunil (PW-1) (**pg 20)**, Paramjeet (PW-5) (**pg 93**), Varun (PW-6) (**pg 114**) and Hemant (PW-10) (**pg 185**) to the effect that Rajesh Pandey was moving between the office and these people who were outside the office. But the prosecution overlooks that this could have been only if any differences remained between Tikla (PW-9) and Sushil Arora when the black Santro arrived at the Chintoo Car Point. The testimony of Sunil (PW-1), Tikla (PW-9), Hemant (PW-10) and Gajender (PW-11) establishes that the matter stood resolved.

199. It is the case of the prosecution that when Sunil (PW-1) reached the Chintoo Car Point and had tried to enter the office, he had been told by Tikla (PW-9) that the matter has already been settled and he could wait outside. This would further illustrate that

by the time Sunil (PW-1) and the others in the Santro reached Chintoo Car Point, the negotiations, inside were already over. Then where was the occasion or need for Rajesh Pandey to be repeatedly coming out and going in, confabulating with the persons outside?

200. It is further important to note that Tikla (PW-9) and Gajender (PW-11), the persons who were in fact negotiating inside with Sushil Arora, do not even remotely suggest, let alone state, that Rajesh Pandey was going in and out of the Chintoo Car Point. Even Surender (PW-8) who was standing outside with Sunil Kumar (PW-1) and the others does not say that Rajesh Pandey came outside.

This fact is also completely corroborated by the defence evidence of Shri Pushkar Raj who appeared as DW-6.

201. It is important to note that in the *rukka* (Ex.PW1/A), Sunil (PW-1) has not stated that Rajesh Pandey was going in and coming out of the Chintoo Car Point and talking to the persons standing outside. Clearly, his testimony in court on 8th March, 2010 that Rajesh Pandey was going in an out, is a concoction only to rope in Rajesh Pandey and to connect the persons outside with Sushil Arora.

It is therefore, amply established on record that the allegation that Rajesh Pandey was moving between Chintoo Car Point and the boys standing outside is not established.

202. As per the record, Rajesh Pandey was arrested only on 11th November, 2009 and refused the TIP offered to him. He was

identified by prosecution witnesses more than a year thereafter in the witness box after March, 2010. In the given circumstances, no reliance can be placed on this evidence.

VII. Presence of Hemant Garg outside the Chintoo Car Point on the 22nd of February 2009 – whether established?

203. Let me examine the prosecution evidence to explain identification by the prosecution witnesses suggesting the presence and involvement of Hemant Garg in the parking lot incident outside the Chintoo Car Point. It is the prosecution case that two persons standing outside the office got into a scuffle with Varun and/or Ankit over removal of a vehicle to enable the Santro to pass. And that Tikla (PW-9) who was leaving the spot with Hemant (PW-10), Gajender (PW-11) and Sudhir Kumar in his Esteem intervened to separate the two sides.

204. As noted above, Sunil (PW-1), Paramjeet (PW-5), Varun (PW-6), Surender (PW-8) and Ankit (deceased) were the associates of Tikla (PW-9) who were standing outside the Chintoo Car Point (**pg 22-23)**. Sunil (PW-1) does not at all mention that Hemant Garg was present either inside or outside the Chintoo Car Point on the fateful day.

205. However, in his court testimony, Varun (PW-6) (**pg 113**) has stated that "*I remain standing outside the Chintoo Car Point*". He further stated that "*Myself and Anit one side and four accused persons today present in the court whose name I am not confirm (witness has pointed towards accused Rajesh Pandey, Vishnu,*

Sonveer and Hemant Garg) happened to be a brawl over the issue of taking out of vehicle."

It is noteworthy that Varun (PW-6) did not participate in the TIP of Hemant Garg held on both 26th and 28th August, 2009. The value which could be attached to this dock identification will be dicussed a little later.

206. It now becomes necessary to refer to the testimony of Paramjeet Singh (PW-5). On 20th April, 2010, Paramjeet Singh (PW-5) in his court testimony, has given a completely different story as to what transpired outside Chintoo Car Point. He is the only witness who states that when Sunil Kumar (PW-1), Varun (PW-6), Surender (PW-8), Ankit (deceased) and he were waiting outside the Chintoo Car Point, "*one Indica car arrived. That was silver coloured Indica car and it stopped in front of the office. Its number was 2192 and three persons got down from that car. ... Those three boys who had got down from Indica car and were standing outside the office where accused Sonveer, Vishnu and Hemant Garg today present in court in custody in this case (witness has correctly identified these three boys) I had come to know their names later on*".

207. While asked to identify Hemant Garg in the Test Identification Parade on the 26th of August, 2009, Paramjeet Singh (PW-5) was completely unable to identify Hemant Garg. Yet he makes the above correct identification on 20th of April 2010 in his court testimony which is completely unacceptable.

208. Tikla (PW-9) (**pg 170**); Hemant (PW-10) (**pg 184**) and Gajender Singh (PW-11) (**pg 202**) do not mention the presence of any Indica and also do not name Hemant Garg as present outside the Chintoo Car Point.

209. Given the above narration of the episode, Tikla (PW-9) who separated the fighting persons, was best placed to identify them. However, Tikla (PW-9) (**pg 172**) referring to the quarrel between Ankit and four boys, states that since the quarrel was of a short duration, he could not identify the accused persons.

210. Hemant (PW-10) (**pg 185**) also testifies separating the boys who were quarrelling with Sunil (PW-1) and the others. Furthermore, though he has identified Vishnu and Sonveer in court as being *"amongst those 4/5 boys present outside the office of chintoo car point..."*, he did not identify Hemant Garg as one of those present outside the Chintoo Car Point.

211. Similarly, Gajender Singh (PW-11) (**pg 204**), as noted above, has referred to the tiff/quarrel of Ankit and Varun with the four/five boys outside the office and identified Sonveer and Vishnu present in court as being amongst those 4-5 boys. He also does not identify Hemant Garg as present outside the Chintoo Car Point.

212. We therefore, have only the dock identification on 20th April, 2010 by Varun (PW-6) without his participating in the TIP. We also have the completely contradictory unfolding of events testified by Paramjeet Singh (PW-5) who failed to identify Hemant Garg in the TIP on 26th of August 2009 but unerringly pointing him out in court on the 20th of April 2010.

213. There is positive evidence of the defence witness Pushkar Raj (DW-6) with regard to the quarrel being only over shifting of the motorcycle with the two persons seated on it to enable the black Santro to move out of the parking area. This witness has not been cross-examined on this evidence.

214. Surender (PW-8) has also referred to shifting of bike.

215. It is in the evidence of Sunil Kumar (PW-1) that the altercation outside the Chintoo Car Point was over the shifting of a motorcycle to make way for the Santro to leave its place of parking. It is only someone who, if not the owner, has some proprietory rights over the vehicle which was to be moved, could have been asked to move the same. We have evidence of two persons seated on the bike. However, no evidence regarding ownership of the bike and its identification is available.

216. I have also noted the evidence of the prosecution regarding the presence of the motorcycle and the persons present in the parking.

217. None of the witnesses other than Paramjeet (PW-5) even remotely suggest the presence of an Indica. Given the testimony of the several other witnesses on this point, Paramjeet (PW-5) has to be disbelieved on this aspect.

218. Therefore, the prosecution evidence with regard to the presence of the silver grey Indica bearing No.DL3C AX 2192 or Hemant Garg outside the Chintoo Car Point on the 22nd of February 2009 is unreliable and unworthy of belief.

VIII. No relationship of any kind, business or otherwise as well as no evidence of enmity between the appellants on the one hand and Sunil, Surender, Paramjeet, Varun or Ankit on the other (i.e. occupants of the Santro car) – no evidence of "common intention" to invoke Section 34 of the IPC

219. It has been further contended by Mr. Vivek Sood, learned Senior Counsel for the appellant Rajesh Pandey that in order to bring home the charge under Section 34 of the Indian Penal Code, the prosecution had to establish not only common intention on the part of the persons charged, but also overt acts pursuant to the same. In other words, active participation in the commission of the offence. The submission is that even if the prosecution case that the appellants were present in the Indica car is accepted, there is no evidence of any overt act on the part of Rajesh Pandey and therefore, he cannot be held culpable for murder by invocation of Section 34 of the IPC.

220. In support of this submission, Mr. Vivek Sood, ld. Senior Counsel has placed reliance upon the pronouncements in ***AIR 1925 PC 1, Barendra Kumar Ghosh v. The Emperor; AIR 1956 SC 731, Chikkarange Gowda v. State of Mysore; AIR 1994 SC 1133, Balkar Singh v. State of Punjab; (1999) 9 SCC 24, Sumitra Banik v. State of West Bengal; AIR 1999 SC 1557, Chandra Kant Murgyappa v. State of Madhya Pradesh; JT (2012) 10 (SC) 424, Sukadev Giri v. State of Orissa and (2008) 17 SCC 277, Nagraja v. State of Karnataka.***

221. I note that so far as the shooting is concerned, the prosecution has attributed identical roles to Sushil Arora as it has to

Rajesh Pandey. This submission can be examined in regard to his culpability as well.

222. I first consider the judgments placed before us before analysing the evidence and facts established in evidence to set down the legal position. I shall examine the evidence on record thereafter in the light thereof.

223. The prosecution has set up the case that financial dealings between Sushil Arora and Tikla led to the murder. Thus the case sought to be established was that the violence took place with the object of avoiding financial liability. I find that the prosecution has hopelessly overlooked the important principle that the requisite "*intention*" to support invocation of Section 34 of the IPC is not synonymous with the "*object*" of a particular act or omission. This distinction is brought out in several binding precedents discussing "*object*" referred to in Section 149 IPC juxtaposed against "*intention*" referred to in Section 34 of the IPC.

224. In ***AIR 1925 PC 1, Barendra Kumar Ghosh v. The Emperor,*** which is considered *locus classicus* on this issue, it was held thus :

> *"35. There is a* ***difference between object and intention****, for, though their* ***object is common, the intentions of the several members may differ*** *and indeed may be* ***similar only in respect that they are all unlawful****, while* ***the element of participation in action, which is the leading feature of section 34, is replaced in section 149*** *by membership of the assembly at the time of the committing of the offence. Both sections deal with* ***combinations of persons****, who* ***become punishable as sharers in an offence****. Thus they have a certain*

resemblance and may to some extent overlap, but section 149 cannot at any rate relegate section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all."

(Emphasis by us)

225. The principle laid down above was reiterated in ***AIR 1956 SC 731, Chikkarange Gowda v. State of Mysore*** and it was further observed thus :

"12. *.... It is true that* ***Section 34 embodies a principle of joint liability in the doing of a criminal act, and the essence of that liability is the existence of a common intention****. ...."*

(Emphasis by us)

226. Ld. Senior Counsel would submit that it is the prosecution case that Rajesh Pandey was only a co-passenger in the Indica car from which the assailants shot at the victims. The prosecution has levied the same allegations against Sushil Arora. Is this mere presence in the vehicle on the part of Sushil Arora and Rajesh Pandey, if established, sufficient to participation in the acts to return the finding of guilt for commission of the offence of murder with the assistance of Section 34 of the IPC?

227. In ***AIR 1994 SC 1133, Balkar Singh v. State of Punjab,*** the Supreme Court considered the case of an accused who was held guilty because of mere presence by invoking Section 34 of the IPC

even though no overt act was attributed to him. The court held thus :

> *"**2.** The next question is whether all the three appellants namely Balkar Singh, Jagir Singh and Ram Singh have participated in the crime. So far as Balkar Singh and Jagir Singh are concerned the evidence is clear. PW-1 has deposed that the appellant Balkar Singh caused injury on the left hand of Satnam Singh who was one of the witnesses. Likewise Jagir Singh also caused injury to Darshan Singh and so far as appellant Ram Singh is concerned, PW-1 Bachan Singh, principal witness, stated in his deposition that Ram Singh and Avtar Singh, the acquitted accused, have caused injuries to Darshan Singh. No other particulars are mentioned. Even the weapon in Ram Singh's hand is not mentioned. What kind of injuries and on what part of the body, nothing is mentioned.* ***Therefore it is omnibus allegation****. Free fight appears to have taken place during which some of the PWs and some of the appellants received injuries.* ***That being so, it is necessary to examine the overt acts, if any, attributed so that the participation can be inferred****. If we apply this type of test, it is difficult to hold that Ram Singh also caused any injury. Some persons in quite good numbers gathered at the place and the said occurrence took place and under the circumstances mentioned above, it is presumed that Ram Singh was also present there. Therefore, the case of Ram Singh can be distinguished.* ***His mere presence cannot constructively make him liable*** *and both the Courts* ***below have simply applied Section 34 without taking into consideration whether any specific overt act is proved against the appellant Ram Singh.*** *Therefore this is ground on which the case of appellant Ram Singh can be distinguished."*
>
> *(Emphasis by us)*

Therefore, mere presence at the spot without establishing participation is not sufficient for invocation of Section 34 of the IPC to hold a person criminally liable for commission of an offence.

228. In ***AIR 1999 SC 1557, Chandrakant Murgyappa Umrani & Ors. v. State of Madhya Pradesh,*** the Supreme Court has reiterated the principle that participation in the crime is an essential concomittant to invoke Section 34 of the IPC. It was held thus :

> ***"2.*** *In distinguishing the case of the seven appellants from that of the other four convicts regarding the common charge framed against them under Sections 302/34 IPC for the murder of Sankonda Birajdar, the trial court observed that <u>though the appellants did not participate in the murder and were only present at the spot, still it could be presumed that they had knowledge that due to their acts some of them could cause the death</u>. It further observed that they (<u>appellants) had knowledge that they were likely to cause injuries which could cause death</u>. Accordingly, the trial court convicted the appellants under Sections 304(II)/34 IPC and the four others, who actually caused the murder under Sections 302/34 IPC. In recording the above finding against the appellants the trial court relied upon the judgment of this Court in Mer Dhana Sida v. State of Gujarat [(1985) 1 SCC 200 : 1985 SCC (Cri) 54] . In upholding the conviction of the appellants under Sections 304(II)/34 IPC the High Court however did not advert to this aspect of the matter.*
>
> ***3.*** *In* ***our considered view the above reasoning of the trial court to convict the appellants under Sections 304(II)/34 IPC is patently wrong***. ***<u>Before a person can be convicted with the aid of Section 34 IPC the ingredients that are required to be satisfied are that he along with others committed a criminal act and that</u>***

such act was done in furtherance of the common intention of them all. On the own showing of the trial court the appellants were merely standing when the act of murder was committed by the other four. Indeed no evidence was laid by the prosecution to prove that any of the appellants committed any criminal act which resulted in the death of the victim*. The reliance of the trial court on Mer Dhana Sida [(1985) 1 SCC 200 : 1985 SCC (Cri) 54] was wholly misplaced for in that case the persons who were convicted under Sections 304(II)/34 IPC committed a criminal act, in that, they assaulted the deceased. While on this point, it is pertinent to mention that consequent upon their acquittal of the offence of rioting the question whether the appellants can be convicted with the aid of Section 149 IPC for the above death does not arise."*

(Emphasis by us)

229. In ***(2008) 17 SCC 277, Nagraja v. State of Karnataka,*** it was held that for invoking Section 34 of the IPC, existence of common intention as well as participation in the crime are essential. Presence *simplicitor*, at the scene of the crime is not enough to do so. I extract the words of the Supreme Court on this important aspect when it was stated thus :

"17. We are not concerned herein as to whether the said iron rod was the weapon *of assault. Having* ***regard to the quality of evidence*** *that the* ***prosecution had led, in our opinion, it is difficult to come to the conclusion that all the accused persons had a common intention to commit the murder of the deceased****.*

18. For invoking the provisions of Section 34 IPC*, at least* ***two factors must be established; (1) common intention, and (2) participation of the accused in the commission of an offence****. For the aforementioned purpose although* ***no***

overt act *is required to be attributed to the individual accused but then before a person is convicted by applying the* ***doctrine of vicarious liability not only his participation in the crime must be proved but presence of common intention must be established****.* ***It is true that for proving formation of common intention, direct evidence may not be available but then there cannot be any doubt whatsoever that to attract the said provision, prosecution is under a bounden duty to prove that the participants had shared a common intention. It is also well settled that only the presence of the accused by itself would not attract the provisions of Section 34 IPC. Other factors should also be taken into consideration for arriving at the said conclusion. The accused persons were not related to each other; they did not have any family connection; they have different vocations. It has not been established that they held any common animosity towards the deceased****.*"

xxx xxx xxx

22. *Yet again in* ***Mohan Singh v. State of Punjab [AIR 1963 SC 174]*** *this Court held: (AIR pp. 180-81, para 13)*

"13. That inevitably takes us to the question as to whether the appellants can be convicted under Sections 302/34. Like Section 149, ***Section 34*** *also* ***deals with cases of constructive criminal liability.*** *It provides that* ***where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that*** *act in the same manner as if it were done by him alone.* ***The essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them****. xxx xxx xxx* ***Common intention denotes action in concert and necessarily postulates the existence of a pre-arranged***

plan and that must mean a prior meeting of minds. *It would be noticed that cases to which Section 34 can be applied disclose an* ***element of participation in action on the part of all the accused persons***. *The acts may be different; may vary in their character, but they are all actuated by the same common intention. It is now well settled that the common intention required by Section 34 is different from the same intention or similar intention."*

xxx xxx xxx

24. *We may, however, hasten to add that the question as to* ***whether common intention was formed for commission of an offence or not would depend upon the facts of each case****. (See* ***Nishan Singh v. State of Punjab [(2008) 17 SCC 505*** *: (2008) 3 Scale 416] .)"*

xxx xxx xxx

26. *For the aforementioned reasons, we are of the opinion that the appellant cannot be held guilty for commission of offence punishable under Section 302 read with Section 34 IPC.* ***The very fact that the appellant was unarmed and must be presumed to have been performing his duties at his place of employment, it cannot be said that he had formed any kind of common intention at the spot to murder the deceased.*** *Some incident might have taken place and he might have formed a common intention to teach a lesson to the deceased. He might be guilty for commission of offence punishable under Section 323 IPC and not for commission of offence punishable under Section 302 read with Section 34 IPC. He is sentenced to the period already undergone."*

(Emphasis by us)

230. On the same aspect, reference may be made to a recent pronouncement of the Supreme Court reported at ***AIR 2016 SC 310, Sudip Kr. Sen alias Biltu v. State of West Bengal & Ors.*** wherein the court held as follows :

"14. <u>Section 34 IPC</u> embodies the principle of joint liability in the doing of a criminal act and essence of that liability is the <u>existence of common intention</u>. Common intention implies acting in concert and existence of a pre-arranged plan which is to be proved/inferred either from the conduct of the accused persons or from attendant circumstances. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. <u>It must, therefore, be proved that</u>:

(i) there was common intention on the part of several persons to commit a particular crime, and

(ii) the crime was actually committed by them in furtherance of that common intention.

Common intention implies pre-arranged plan. Under Section 34 IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The essence of liability under Section 34 IPC is <u>conscious mind</u> of persons participating in the <u>criminal action to bring about a particular result</u>. The question whether there was any common intention or not depends upon inference to be drawn from the proved facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted."

(Emphasis by us)

231. I may also note the fact situation in ***Sudip Kr. Sen alias Biltu*** which illustrates that the act of exhortation could be treated as an act of commission in furtherance of common intention sufficient for inviting the applicability of Section 34 of the IPC. In this regard, para 15 of the pronouncement deserves to be considered and reads thus :

> ***"15.*** *Considering the facts and circumstances of the case in hand, it is evident that there was prior concert and that the appellants have acted in furtherance of common intention. As seen from the evidence of PW 6, all the appellants and another co-accused Sk Kochi were doing illegal business of extorting money from the flat owners. On the date of occurrence, all the appellants and another co-accused Sk Kochi came together and* ***Sudip Kumar Sen alias Biltu (A-3) started abusing the deceased and Apu Chatterjee (A-6) exhorted others that if the men of Khoka were not killed, there would be no peace. On such exhortation, Tapas Das and Sankar Das (A-2 and A-4) caught hold of the deceased, and Goutam Ghosh and Sk Kochi (A-1 and A-5) fired at the deceased. The facts and circumstances clearly establish meeting of minds and common intention of the appellants in committing the murder of Saikat Saha and the appellants were rightly convicted under Section 302 read with Section 34 IPC. No ground for interference under Article 136 of the Constitution of India is made out.*** *"*
>
> *(Emphasis by us)*

232. On the aspect of culpability because of mere presence at the spot, in ***JT (2012) 10 (SC) 424, Sukadev Giri v. State of Orissa,*** it was held thus :

> *"8. The* ***presence*** *of all the four appellants is* ***not in dispute****. It is* ***also established that two of the appellants*** *Rushinath and Atul also* ***received injuries****.* ***It is established that the scuffle took place*** *on the entering of the bullocks in the field of Rushinath as detailed hereinbefore. It also stands* ***established that there was a sudden quarrel*** *on account of the incident in question. We have examined the evidence. We find considerable* ***force*** *in the contention of learned counsel for the appellant that there was* ***no pre-concert or***

premeditation or meeting of mind *between the 4 accused for committing the murder of Jugal Kishore. It is no doubt true that the three appellants came on Rushinath asking for help. It is, however,* ***not proved that except appellant Atul others were carrying any weapon****.* ***The High Court has also not found that they inflicted any injury, the only finding by the High Court is that they were present at the spot. The mere presence will not make them liable for the offence under Section 34 of the Indian Penal Code. It is no doubt true that intention can be formed at the spot itself but that is not the case in the facts and circumstances of the incident in question. It has come in evidence that the appellant Atul was carrying with*** *him* ***a gupti*** *but at the same time, according to the* ***testimony of PW 1****,* ***he took out that gupti from inner side of the garments and pushed it in the left back of Jugal who started bleeding profusely, as a result of injury inflicted by Atul. <u>There is no evidence to show that the other appellants knew that Atul was carrying gupti under his garments</u>.*** *Regarding Sukadev who is said to have over-powered deceased Jugal too, the position is no different. There is no evidence that prior to over-powering, Sukadev had any knowledge about Atul carrying knife under his garments. There is thus* ***no evidence to establish meeting of minds between the accused to commit murder*** *of deceased Jugal.* ***The High Court has also not found so except simply stating that they were present at the spot and were liable for conviction under Section 302 read with Section 34*** *of the Indian Penal Code. In this state of affair the* ***conviction*** *of appellants Rushinath, Basanta and Sukadev* ***under Section 302 read with Section 34 of the Indian Penal Code cannot be maintained****. The same would be position in respect of conviction under Section 323/34 IPC. In any case approximately 61/2 years imprisonment insofar as Rushinath and Sukadev are concerned and as far as Basanta is concerned*

approximately 4 years imprisonment has already been undergone as per the submission made by learned counsel for the appellants."

(Emphasis by us)

233. The position that mere presence at the scene of the crime is insufficient to invoke Section 34 of the IPC stands reiterated by the Supreme Court in ***(1999) 9 SCC 24, Sumitra Banik v. State of West Bengal*** wherein it was held thus :

"5. *Mr K.G. Shah, learned Senior Counsel for the appellant Sumitra submitted that the* ***three letters****, Exhibits 8, 8/1, 8/2* ***do not disclose that Sumitra was also a party to the torturing and ill-treatment given to Debjani****. We find that only in one letter Debjani has specifically referred to appellant Sumitra, and the only complaint against her was that she had also stopped talking to her. This evidence should not have been considered as sufficient for coming to the conclusion that Sumitra was also ill-treating Debjani. Moreover,* ***we do not find any evidence to prove that she had participated in the beating which led to the death of Debjani****. It was the definite case of the prosecution that Debjani died as a result of beating. Neither Jagdish (PW 19) nor Shanti (PW 20) have deposed that Sumitra had taken any part in beating Debjani. What they have stated is that about 4 o'clock when Debjani was being beaten by her husband and father-in-law* ***Sumitra was also seen standing outside that room along with the other family members****. What they have further stated is that after about 45 minutes when some noise of "thakthakani" was heard, they had rushed to that place to see what was happening* ***and they had seen Sumitra standing near the door of that room along with other family members****. This was the only evidence led by the prosecution to prove the involvement of Sumitra. The learned counsel for the State submitted that Sumitra, Ashim and Jayanti being the family members, it*

was their duty to intervene and prevent the other two accused from beating Debjani and as they did not do so, this Court should infer, that by remaining present there they had encouraged or facilitated the murder of Debjani and had thus shared the common intention with the other two accused. We cannot accept this submission because ***mere presence of these persons near the place of the incident cannot lead to an inference that they shared the common intention with the other two accused as they were also residing in that house****. They had not entered the room of Debjani at 4 o'clock when the beating took place or thereafter. They had remained standing outside that room. As something was happening in the room of Debjani, it was quite natural for the other family members to go near that place and see what had happened.* ***Merely because they did not try to prevent the other two accused from beating Debjani no inference of sharing the intention of beating her to death can be inferred in view of their relationship with them and their indifferent attitude towards Debjani. The only positive act alleged against Sumitra*** *is that she had told Jagdish and Shanti to go away from that place. On the basis of this circumstance* ***it would not be reasonable to jump to the conclusion that she also intended*** *that Debjani be killed on that day. It was a family quarrel and it is quite natural that Sumitra did not like the domestic servants to witness the same.*

6. *In our opinion,* ***the evidence against Sumitra was not sufficient to sustain her conviction under Section 302 read with Section 34 IPC****. The High Court, thus, committed an error in confirming her conviction under those sections. We, therefore, allow Appeal No. 527 of 1989 filed by Sumitra and dismiss Appeals Nos. 461 and 462 of 1989 filed by the State against Ashim and Jayanti. Conviction of Sumitra under Section 302 read with Section 34 IPC and the sentence imposed upon her for that offence are set aside."*

(Emphasis by us)

234. In ***AIR 1965 SC 257, Gurdatta Mal v. State of U.P.*** in the context of Sections 34 and 149 IPC, in para 9, the court noted that Section 34 IPC did not create a separate offence :

> *"9. ... It is well settled that* ***Section 34 of the Penal Code does not create a distinct offence: it only lays down the principle of joint criminal liability.*** *The necessary conditions for the application of Section 34 of the Code are* ***common intention*** *to commit an offence* ***and participation by all the accused*** *in doing act or acts in furtherance of that common intention.* ***If these two ingredients are established, all the accused would be liable for the said offence….*** *In that situation Section 96 of the Code says that nothing is an offence which is done in the exercise of the right of private defence. Though all the accused were liable for committing the murder of a person by doing an act or acts in furtherance of the common intention, they would not be liable for the said act or acts done in furtherance of common intention, if they had the right of private defence to voluntarily cause death of that person. Common intention, therefore, has relevance only to the offence and not to the right of private defence. What would be an offence by reason of constructive liability would cease to be one if the act constituting the offence was done in exercise of the right of private defence….' "*
>
> *(Emphasis by us)*

235. The principle in ***Gurdatta Mal*** was reiterated in ***(2008) 16 SCC 657, Bhanwar Singh v. State of Madhya Pradesh.***

236. Thus it is well settled that mere presence at the spot at the time of commission of offience would not *ipso facto* establish intention to commit the crime to invoke Section 34 IPC. The prosecution has to establish existence of the intention as well as

participation in the crime (by overt or covert acts or omissions) by credible evidence for invocation of Section 34 of the IPC.

237. Varun (PW-6) (**pg 126)** has stated that prior to the occurrence none of the prosecution party i.e. Sunil (PW-1), Paramjeet (PW-5), Varun (PW-6), Surender (PW-8), Tikla (PW-9), Hemant (PW-10), Gajender Singh (PW-11) and deceased Ankit or he had any concern, quarrel or grudge with the accused persons.

238. Sunil Kumar (PW-1) has categorically stated in his cross-examination that none of the five occupants of the Santro had even seen Sushil Arora prior to that day or knew who he was. He also categorically stated that he did not know any of the accused prior to the incident and confirmed that the accused persons had no personal grudge or enmity with the occupants of the Santro car. Paramjeet Singh (PW-5) and Surender (PW-8) have testified to the same effect.

239. Surender (PW-8) completely denies that he had gone into Chintoo Car Point or had conversed with Sushil Arora, Rajesh Pandey, Vishnu and Sonveer.

240. The prosecution has led no evidence at all that Sushil Arora, Rajesh Pandey or Hemant Garg have any kind of association with the deceased Ankit.

241. Even with regard to the altercation in the parking, while Paramjeet (PW-5) have mentioned a dispute between Varun and the boys who were standing there, Tikla (PW-9) has mentioned a dispute with Ankit.

242. The prosecution has also led evidence to the effect that the appellants had no business dealings or animosity with the prosecution witnesses. It is noteworthy that Inspector S.S. Rana (PW-26) **(pg 298**) has categorically stated that "*only Mahender Tikla was having money transaction with accused Sushil Arora and none of the other witnesses namely, Sunil, Surender, Paramjeet, Varun and deceased Ankit were having any kind of business relation or enmity with accused Sushil Arora*".

243. The Investigating Officer PW-26 has also further specifically confirmed the fact that Rajesh Pandey was not known and was having no connection with any of the other prosecution witnesses or the deceased Ankit.

244. I may also note that the prosecution had to make out a clear case as to what was the act for which the accused persons had a common intention?

245. In ***(2008) 17 SCC 277, Nagraja v. State of Karnataka,*** the Supreme Court has held that the genesis of the crime must be established so far as common intention to invoke Section 34 of the IPC is concerned. In this regard, I may usefully extract paras 19 and 23 of this judgment which read as follows :

> "***19.*** *A* ***general and vague statement made by one of the prosecution witnesses would not prove motive. It may be true that the common intention may develop suddenly at the spot but for the said purpose, the genesis of the occurrence should have been proved. The prosecution has failed to establish why and how a quarrel had started. The prosecution*** *even has* ***not proved as to why Accused 1 was carrying the iron rod*** *even before the quarrel with the*

deceased started ***or as to whether the appellant was aware of this****. It has also* ***not been shown that he along with other accused persons came to assault the deceased****. The appellant ordinarily was expected to be at his workplace only. His presence at the spot, therefore, has sufficiently been explained.*

xxx *xxx* *xxx*

23. Even a <u>past enmity</u> by itself, in our opinion, may not be a ground to hold for drawing any inference of formation of <u>common intention</u> amongst the parties."

(Emphasis by us)

246. Unfortunately, these well settled legal principles have completely escaped consideration in the impugned judgment. Material evidence has been overlooked. I find that in the impugned judgment dated 2nd July, 2015, the learned Trial Judge has noted that Tikla (PW-9) has disclosed the financial transaction with Sushil Arora as the genesis of the entire episode. In para 81, the learned Trial Judge notes that the matter between Tikla (PW-9) and Sushil Arora "*amicably resolved*" in that Sushil Arora having agreed to pay a principal loan amount in monthly instalments of ₹2,00,000/- each (**para 89 pg 663**). However, in para 91, the learned trial judge has rejected the defence case that therefore, there was no motive to kill Tikla or his associates holding that in view of the eye-witness accounts, the existence of motive was irrelevant. In para 91, the trial court has at the same time held that the amicable settlement did not establish inclination on the part of Sushil Arora to return the money and that he "*may have merely*

agreed to pay only to make Mahender and his associates leave the place".

This, in our view, is pure conjecture. There is no evidence to support this finding of the trial court.

247. The prosecution had to establish the motive sufficient enough to incite the accused persons into killing Mahender Tikla and his associates and if it was so, the defence can safely argue that the best place to do so would have been the Chintoo Car Point itself and not a public spot.

248. I also find that though in para 147 (**pg 689)** of the impugned judgment, the trial court notes the submission on behalf of the appellants that if enmity with Mahender Tikla was the motive for the offence, there was no reason for the occupants of the Indica to target the Santro car and shoot at its occupants instead of chasing Mahender Tikla in the Esteem car. However, no considered view was taken on this aspect. The ld. Trial Judge has gravely erred in completely overlooking the fact that the assailants did not chase Tikla (PW-9) or his Esteem car. The witnesses have testified only about chasing the Santro and shooting only at Ankit and not even at other occupants of the car.

249. In paras 172 (**pg 698)** and 186 (**pg 702**) of the impugned judgment, the ld. trial judge has concluded that the five accused persons as occupants of the Indica car had carried out the shoot out in furtherance of "*common intention*" which stood proved *"beyond reasonable doubt"*.

250. Sushil Arora had the financial dealings only with Tikla (PW-9). The persons standing outside knew that he had left in an Esteem which had departed before the Santro left the parking.

251. Inspector S.S. Rana (PW-26) has further confirmed in his cross-examination by ld. counsel for Rajesh Pandey (**pg 300**) that the deceased Ankit *"had not business dealings or enmity with any of the accused persons*".

252. A close scrutiny of the prosecution evidence in its entirety establishes that the prosecution witnesses had no connection with Sushil Arora or the other appellants. There was no financial or business dealings with them. No evidence is pointed out that they were ever even introduced to each other. The prosecution evidence establishes that there was no enmity of the witnesses and the deceased with the appellants.

253. I have carefully scrutinized the entire evidence on record and found that there is not an iota of evidence to establish common intention of the five accused persons. Not a single circumstance has been pointed out which would enable the court to conclude that the five accused persons even knew each other or had any common intention to undertake any of the acts which have been attributed to them.

254. There is, therefore, not even an iota of evidence which could support the finding that Sushil Arora or Rajesh Pandey or Hemant Garg had any intention to hurt any of the person in the Santro, especially Ankit who was targeted by the shooters, let alone common intention with anyone else to murder him. Even qua the

other two, the reference is only to the parking lot dispute which had no linkage with Tikla's financial dealings.

255. The prosecution has in fact led affirmative evidence to the effect that out of all the occupants in the Santro car, only Ankit was targeted by the assailant(s), both at the first point i.e. at the drink cart at the gate of the Buddha Garden as well as at the second instance when the Santro was forced to stop at the traffic light at the T-point connecting Simon Boliver Marg to the main road towards Dhaula Kuan.

The prosecution had attempted to establish that Sonveer and Vishnu were shooting at Ankit without leading any evidence of shooting at any other person in the Santro.

256. The prosecution has therefore, failed to establish its case that the appellants had any intention to kill Tikla (PW-9) or any of his associates on account of financial dealings between Sushil Arora and Tikla (PW-9).

257. In fact, the prosecution has led no evidence to establish any inter-relationship or association *inter se* the five persons accused of commission of offfence. The details of call records would have enabled the prosecution to establish commonality of evidence, meeting of minds etc. to execute the criminal offence. Hemant Garg had to file an application for production of his call detail records of the phone which he was using. These were then produced by the investigating officer. Sushil Arora examined defence witnesses to prove the call details of the mobile phone which he was using. This evidence amply establishes that there was

no linkage or meeting of minds of the appellants at all of the appellants. These also militate against their having the common intention to either eliminate Tikla (PW-9) or Ankit or any other associate of Tikla (PW-9).

258. No evidence has been led which could establish the reasons for which they were shooting at the Santro or meeting of mind or any association even between Sonveer and Vishnu to kill Ankit or any of the other occupants of the Santro. Other than the oral testimony of interested prosecution witnesses, there is not an iota of evidence to establish that the convicts were together in mind or physically either prior or subsequent to the incident. There is not the remotest suggestion of common intention between the appellants.

259. I may also note that the prosecution witnesses have also made conflicting statements with regard to the vehicle which was so parked that it blocked the exit of the Santro outside the Chintoo Car Point.

260. In the present case, the genesis of the crime, as per the prosecution, was the financial dealings between Sushil Arora and Tikla (PW-9) turning sour. This could not be established in the evidence. There is no evidence at all of a common intention being shared between Sushil Arora on the one hand and any of the accused persons or the convicts to liquidate either Tikla (PW-9) or any of his associates. The prosecution also miserably fails to establish by reliable evidence any connection between Sushil Arora, Hemant Garg, Sonveer and Vishnu. There is not a whit of

evidence to establish that any of the appellants had any intention to murder Ankit, the only person who was injured and expired.

261. There is no evidence at all on record of common intention or that the appellants had entered into a criminal conspiracy to do so.

The case of the prosecution is thus completely contrary to the evidence brought on record.

262. I find that even if the only allegation of exhortation against Sushil Arora and Rajesh Pandey could be believed, no firing resulted. The prosecution has miserably failed to establish any act by Sushil Arora and Rajesh Pandey to justify invocation of Section 34 of IPC to hold them guilty of murder. As such the evidence led by the prosecution is hopelessly insufficient to invoke Section 34 of the IPC to implicate the appellant Sushil Arora and Rajesh Pandey for commission of offence under Sections 302 or 307 IPC with which they were charged. Section 34 IPC is completely inapplicable and cannot be invoked inasmuch as the prosecution failed to establish the first essential condition of any common intention between all the appellants for invocation of Section 34 of the IPC. The prosecution has also not established the second essential requirement of a participatory act, overt or covert on the part of these two appellants.

IX. <u>Charge under Section 34 IPC</u>

263. There is another key facet of the impugned judgment and the trial in general that deserves to be dealt with and commented upon in the present appeal. All appellants were charged, *inter alia*, with

commission of offence under Section 120B as well as Section 34 of the IPC. The learned trial judge has held them to be guilty for commission of offence under Section 34 IPC, however has sentenced them for commission of offence under Section 120B!

264. The charges, framed as vague as they could have been, against Sushil Arora on 22nd August, 2009 is that he *'entered into a criminal conspiracy with co-accused persons namely Rajesh Pandey and three others unknown to commit offence of murder and attempt to murder and in execution of that criminal conspiracy… … and pursuant to that criminal conspiracy and in furtherance of common intention of you all five accused persons…someone of you five accused persons fired fire arm bullet shot aiming at occupants of Santro car and that bullet hit victim Ankit…'*

265. The charge framed on 29th January, 2010 against the other four appellants is that they *'entered in to a criminal conspiracy with co-accused Sushil Arora to commit offence of murder and attempt to murder and in execution of that criminal conspiracy… … and pursuant to that criminal conspiracy and in furtherance of common intention of you all five accused persons…you accused Vishnu & Sonvirfired fire arm bullet shot aiming at occupants of Santro car and that bullet hit victim Ankit…'*

266. The learned trial judge has not held them guilty for commission of offence under Section 120B of the IPC. It is trite that the offence under Section 120B of the IPC is a distinct offence and for successful prosecution under that section, positive evidence has to be led in contradistinction to Section 34 IPC which is a rule

of evidence, the invocation of which is by inferences drawn on the evidence. ***[Ref: (2011) 6 SCC 1 Satyavir Singh Rathi v. State]***

267. In the pronouncement of the Supreme Court reported at ***(2004) 3 SCC 793 Girija Shankar v. State of U.P***., it was observed that Section 34 has been enacted to elucidate the principle of joint liability of a criminal act, in which regard it was held thus:

> *" Section 34 has been enacted on the principle of joint liability in the doing of a criminal act.* ***The section is only a rule of evidence and does not create a substantive offence.*** *The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime.* ***Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances****."*
>
> *(Emphasis supplied)*

268. On the meaning of *"common intention"* and the intendment and purpose of Section 34 IPC, in the pronouncement reported at ***(2010) 10 SCC 259 Abdul Sayeed v. State of Madhya Pradesh***, it was held thus:

> *"52.* ***Section 34 intends to meet a case in which it is not possible to distinguish between the criminal acts of the individual members of a party, who Act in furtherance of the common intention of all the members of the party or it is not possible to prove exactly what part was played by each of them.*** *In the absence of common intention, the criminal liability of a*

member of the group might differ according to the mode of the individual's participation in the Act. ***Common intention means that each member of the group is aware of the Act to be committed****."*

(Emphasis supplied)

269. I may sum up the principles guiding my consideration on the aspect of awarding conviction with the aid of Section 34 of the IPC as settled by binding judicial precedents as follows:

(i) The leading feature of Section 34 is the element of participation in action
(Ref: Chikkarange Gowda v. State of Mysore AIR 1956 SC 731
Barendra Kumar Ghosh v. The Emperor AIR 1925 PC 1)

(ii) Section 34 is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action.
(Ref: Girija Shankar v. State of U.P (2004) 3 SCC 793)

(iii) Section 34 does not constitute an offence and is only a rule of evidence and inferences on the evidence can be drawn.
(Ref: Satyavir Singh Rathi v. State (2011) 6 SCC 1 ; Lachhman Singh & Ors. vs. The State AIR 1952 SC 167)

(iv) Section 34 of the Penal Code does not create a distinct offence : it only lays down the principle of joint criminal liability.
(Ref. : Gurdatta Mal v. State of U.P., AIR 1965 SC 257)

(v) Section 34 intends to meet a case in which it is not possible to distinguish between the criminal acts of the individual members of a party, who act in furtherance of the common intention of all the members of the party or it is not possible to prove exactly what part was played by

each of them.
(Ref: Abdul Safeed v. State of MP (2010) 10 SCC 259)

(vi) Mere presence cannot constructively make a person liable with the aid of Section 34.
(ref: Balkar Singh v. State of Punjab AIR 1994 SC 1133)

(vii) Mere presence of persons near the place of the incident cannot lead to an inference that they shared the common intention with the other two accused.
(ref: Sumitra Banik v. State of West Bengal (1999) 9 SCC 24)

(viii) Before a person can be convicted with the aid of Section 34 IPC the ingredients that are required to be satisfied are that the accused along with others committed a criminal act and that such act was done in furtherance of the common intention of them all.
(ref: Chandrakant Murgyappa Umrani and ors. v. State of Maharashtra AIR 1999 SC 1557)

(ix) The mere presence will not make them liable for the offence under Section 34 of the Indian Penal Code.
(Ref: JT (2012) 10 (SC) 424, Sukadev Giri v. State of Orissa)

(x) A past enmity by itself, in our opinion, may not be a ground to hold for drawing any inference of formation of common intention amongst the parties
(Ref: Nagraja v. State of Karnataka (2008) 17 SCC 277)

(xi) The essence of liability under Section 34 IPC is conscious mind of persons participating in the criminal action to bring about a particular result.
(Ref: Sudip Kr. Sen alias Biltu v. State of West Bengal & Ors. AIR 2016 SC 310)

270. The offences under Section 302 & Section 307 IPC, have been pinned on Sushil Arora, Rajesh Pandey & Hemant Garg, with the aid of Section 34 of the IPC who were, as per the case of the prosecution, present there and/or were exhorting to Sonveer and Vishnu to fire at the Santro Car.

271. In ***Sudip Kr Sen*** stands declared that *"the essence of liability under Section 34 IPC is conscious mind of persons participating in the criminal action to bring about a particular result."* In the present case, neither "*conscious mind*" not a "*particular result*" has been proved. If motive is considered, then this limb falls as soon as the testimonies are considered, as then Mahender Tikla (PW-9), an occupant of the Esteem Car would have been the target. The prosecution does not even suggest, let alone prove that Mahender Tikla (PW-9) was chased or attacked.

272. When the charge against the other appellants was framed, the court had clearly ascribed the role of shooting only to Sonveer and Vishnu. This is clear from the operative part of the charge reproduced hereinabove. Therefore, since the trial court was aware about the identity of the purported shooters namely Vishnu & Sonveer, and no specific role was ascribed to Sushil Arora, Rajesh Pandey & Hemant Garg in the incident of shooting which led to the death of Ankit, Section 34 of the IPC could neither have been invoked against them, nor could they have been convicted for the allied offences with its aid, unless *common intention* to commit the offence could be established by the prosecution.

273. Given the categorical case of shooting *"in furtherance of common intention"*, the prosecution had to place some evidence of common intention on record. The prosecution fails to establish the remotest connections between all five accused or even between Sonveer and Vishnu, the alleged shooters. The prosecution completely fails to prove common intention between the appellants to kill occupants of the black Santro car.

X. Attribution of exhortation by Sushil Arora and Rajesh Pandey – whether established and acceptable?

274. While propounding the story of the manner in which the events unfolded, the prosecution witnesses have stated that the five appellants executed the conspiracy from the silver grey Indica alleging that Vishnu and Sonveer were seated in the front and rear left side respectively and shooting from the windows. Hemant Garg was driving the vehicle while Sushil Arora and Rajesh Pandey were seated on the rear seat of the Indica car, behind the driver and in the middle respectively.

275. Appearing for Rajesh Pandey, the appellant in Crl.A.No.53/2016, Mr. Vivek Sood, ld. Senior Counsel has pointed out that given the evidence led by the prosecution, the prosecution was unable to establish even the presence of Rajesh Pandey in the car. Even if, it could be held that Rajesh Pandey was present, he was at best, a mere spectator to the entire episode.

276. Learned Senior Counsel would contend that the effort has been made by the prosecution to attribute an overt act to Rajesh

Pandey in the commission of the offence through the testimony of two witnesses Ranjeet Singh (PW-4) and Paramjeet Singh (PW-5) who attribute omnibus exhortation by Sushil Arora and Rajesh Pandey to the shooters. The submission is that the allegation of exhortation is an extremely weak piece of evidence which is levelled only to implicate a wider number of people, as has been done in the present case to implicate Rajesh Pandey.

277. Mr. Vivek Sood, learned Senior Counsel would contend that even the allegation of exhortation has not been established by the prosecution by any cogent and reliable evidence.

278. In any case, it is submitted that even if it could be held that Rajesh Pandey had actually exhorted Sonveer and Vishnu, in any manner, the prosecution still has to establish that it was Rajesh Pandey's act of exhortation which had actually led to firing. Mr. Sood, ld. Senior Counsel would point out that in the instant case it is not so.

279. Our attention in this regard is drawn to the evidence of Ranjeet Singh (PW-4) who having ascribed roles of the shooting to Vishnu and Sonveer, Ranjeet Singh (PW-4) has brought the appellants out of the Indica and added yet another dimension to the case when he states that at the Simon Bolivar Marg traffic light, *"rest three accused were giving exhortation to Vishnu and Somveer uttering 'Maro Salo Ko Maro Salo Ko"*. Therefore, he has attributed the exhortation not only to the two passengers in the rear seat but also to Hemant Garg as the driver of the Indica.

280. Ranjeet Singh (PW-4) has further clearly stated that immediately after the exhortation, the traffic light turned green and the passengers of the Indica hurriedly re-boarded the vehicle which moved towards the Dhaula Kuan side.

281. On this very aspect, the testimony of Paramjeet (PW-5) is relevant who has identified Vishnu and Sonveer as the persons who were firing from the left side windows of the Indica. PW-5 is the only occupant of the black Santro who states that Sushil Arora and Rajesh Pandey were not only sitting on the rear seat of the Indica car but also shouting "*maaron saalon ko maaron saalon ko*" as well as using abusive language. He does not attribute exhortation to Hemant Garg.

282. Mr. Vivek Sood, ld. Senior Counsel appearing for Rajesh Pandey (Crl.A.No.53/2016) has contended that the prosecution evidence of exhortation in the present case is completely unreliable and deserves to be rejected. In support of these pleas, Mr. Vivek Sood, ld. Senior Counsel has placed before us the judgments reported at ***AIR 1974 SC 45, Jainul Haque v. State of Bihar*** and ***(2012) 7 SCC 225, Anand Mohan v. State of Bihar***.

283. I may extract hereunder the relevant portion of the judgment reported at ***AIR 1974 SC 45, Jainul Haque v. State of Bihar*** :

> *"9. It would appear from the above that there is a clear discrepancy between the evidence of the witnesses given at the trial and the version given in the first information report regarding the part played by the appellant. The part attributed to the appellant according to the first information report is that he had exhorted the other accused to assault Leyaquat, while according to the*

evidence adduced at the trial the appellant actually joined in the assault on Leyaquat. The High Court did not accept the prosecution evidence on the point that the appellant had joined in the assault on Leyaquat. All the same, the High Court convicted the appellant because it was of the view that the appellant had exhorted the other accused to assault Leyaquat. In the absence of any substantive and cogent evidence adduced at the trial that the appellant had exhorted the other accused to assault Leyaquat, the High Court, in our opinion, should not have convicted the appellant for the offence under Section 323 read with Section 114 of the Indian Penal Code. The High Court has found the evidence of the eyewitnesses to be unsatisfactory. It has also found that the eyewitness were prone to exaggerate things and to involve as many accused as possible. In the circumstances it was, in our opinion, not safe to base the conviction of the appellant on the aforesaid evidence. ***The evidence of exhortation is, in the very nature of things, a weak piece of evidence. There is quite often a tendency to implicate some person, in addition to the actual assailant, by attributing to that person an exhortation to the assailant to assault the victim. Unless the evidence in this respect be clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant.*** *The evidence adduced at the trial in respect of the part alleged to have been played by the appellant is contradictory and far from convincing. We would, therefore, accept the appeal, set aside the conviction of the appellant and acquit him."*

(Emphasis by us)

284. Placing reliance on the above pronouncement in ***Jainul Haque***, in the judgment reported at ***(2012) 7 SCC 225, Anand Mohan v. State of Bihar,*** the Supreme Court was considering the evidence led by the prosecution against A-1 and A-2 that they had

exhorted one Bhutkan Shukla to shoot at the deceased. It was noted that out of the 14 witnesses, only four witnesses said so whereas the remaining eight did not say so. Out of the 14 witnesses, the majority of the witnesses made no reference of exhortation to Bhutkan Shukla to shoot at the deceased. On this evidence, the court in paras 69 and 70, the court observed thus :

> ***"69.*** *This Court has held in Jainul Haque v. State of Bihar [(1974) 3 SCC 543 : 1974 SCC (Cri) 1 : AIR 1974 SC 45] that evidence of exhortation is in the very nature of things a weak piece of evidence and* ***there is often quite a tendency to implicate some person in addition*** *to the* ***actual assailant by attributing to that person an exhortation to the assailant to assault the victim and unless the evidence in this respect is clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant****.*
>
> ***70.*** *Since the majority out of the fourteen prosecution witnesses comprising both civilian and police personnel accompanying the procession do not support the prosecution version that A-2, A-3 and A-4 also exhorted Bhutkun Shukla to shoot at the deceased, it will not be safe to convict A-2, A-3 and A-4 for the offence of abetment of the murder of the deceased. In our view, therefore, the High Court was right in acquitting A-2, A-3 and A-4 of the charge under Sections 302/109 IPC."*
>
> *(Emphasis by us)*

285. The evidence in the present case is also similar. Out of the four car occupants of the black Santro (PWs-1, 5, 6 & 8) and two public witnesses (PWs-2 & 4) examined as eye-witnesses to the occurrence, only one public witness (Ranjeet Singh – PW-4) and

one occupant of the car (Paramjeet Singh – PW-5) attribute exhortation to Sushil Arora and Rajesh Pandey. The others do not say so.

286. The wording of the exhortation itself renders it doubtful inasmuch as Ranjeet Singh (PW-4) has alleged that occupants of the Indica used identical words of exhortation. This is certainly unbelievable.

287. Ranjeet Singh (PW-4) and Paramjeet Singh (PW-5) differ with regard to the number of persons involved in the exhortation.

288. It is in evidence that there was heavy traffic at the traffic light and more than 30-40 vehicles had stopped at the light when the shooting had taken place (Varun – PW-6). I also note that Paramjeet Singh (PW-5) (**pg 106**) has stated that he heard the appellants giving this exhortation for the first time after he had run away from the spot for 25-30 steps in between vehicles while escaping from the firing as he had turned back and seen them doing so. He further claims that he had crossed the traffic light signal when he saw them giving the exhortation; that as the light had turned green, there was continuous moving traffic. The witness refers to sound of these vehicles and the fact that Sunil (PW-1) was ahead of him.

289. Is it believable that in this scenario, anybody could have heard utterances of persons seated furthest away in the Indica? It is not.

290. Admittedly, there was no exhortation before the firing or at the time of the firing. In fact, the two witnesses attribute the

exhortation to Sushil Arora and Rajesh Pandey after the shooting. It is also in evidence that at that time, the traffic light turned green and the vehicle moved away.

291. On this aspect, Sunil (PW-1) has stated that PW-1 further states (**pg 18**), he had seen Rajesh Pandey and Sushil Arora only sitting in the rear seat of the Indica car at the time of the incident and that he did not see or observe any other act on their part. He further stated (**pg 22**) that "*accused Sushil Arora was behind the driver's seat on the rear seat in the Indica and accused Rajesh Pandey was on the left side of the accused Sushil Arora*.

292. I find that Varun (PW-6), has also not made any allegation of exhortation by either Sushil Arora or Rajesh Pandey.

293. It is in the evidence of Surender (PW-8) (**pg 137**) that in the firing incident, he had seen two boys holding fire arms and that there were <u>one or two more boys</u> firing from the Indica. In all they were "*around <u>four to five occupants</u> in that <u>Indica</u> car*".

294. He further states that (**pg 138**) *"I did not see what role those other one or two boys did who were in Indica car as after being hit by the bullet, I moved and did not see what was happening behind."*

This witness does not allege any exhortation by the other one or two boys.

295. I may note that Surender (PW-8) was declared hostile and in cross-examination by the prosecutor (**pg 139**), he reiterated that he did not himself hear or see *"if other <u>one or two boys</u> in Indica car had given exhortation by utterance 'maroo salo ko'* ". The witness

denied that he had told the police that the accused Sushil Arora and Rajesh Pandey had exhorted the other accused or they had shouted exhortation "*goli maro salo ko koi bach na paye*" (**pg 139**). The prosecution tried to suggest that he had been won over by the accused persons which he denied.

296. Thus, in the witness box, Sunil Kumar (PW-1), Varun (PW-6) as well as Surender (PW-8) who were also occupants in the Santro do not attribute any exhortation to the shooters or any role in the shooting by the other occupants.

297. One distressing matter is found in the present case. I have noted above the prosecution evidence that the statement of Sunil (PW1) was recorded for almost two hours between 4.30 to 6.15 p.m. which was treated as a *rukka* and formed the basis of registration of FIR No. 35/09 by the Police Station Chanakyapuri. Barely, one and a half hour thereafter, Inspector S.S. Rana (PW26) recorded a supplementary statement of this very witness (**TCR pg 2281)** with gross improvements in material particulars. In this second statement, Sunil (PW1) has allegedly told the investigating officer that at the drink cart, Sushil Arora, Rajesh Pandey and their other three men in the Indica car had fired at their car and had got down from their Indica car and yelled *"goli maro salon ko, goli maro salon ko"*. It is further recorded that at the second shooting site also, the same five persons had got down from their car and fired bullets at them in which Sushil Arora and Rajesh Pandey were loudly screaming *"goli maro salon ko, koi bach na paye etc……."*. This second statement has been attributed to Sunil

(PW1) has been placed on record **(TCR pg 2281).** Sunil (PW-1) makes no such statement in his testimony. This is a very important factor which by itself establishes that the allegation of exhortations has been concocted by the prosecution in consultation after the *rukka* had been sent, to build a false case against Sushil Arora and Rajesh Pandey.

298. It is in the testimony of Inspector Jagat Singh (PW-47) (**pg 386**) that a statement of Sunil (PW-1), a prime witness of the prosecution was recorded under Section 164 of the Cr.P.C. on the 21st of May 2009 (Ex.PW1/B)/(Ex.PW48/A). What was the reason? There is not a whit of an explanation as to what was the necessity of recording this statement of the witness. The suggestion is that perhaps the prosecution was not sure of his evidence as he was an unreliable witness.

299. Let me briefly examine this statement. I find that even in this statement, Sunil Kumar (PW-1) has named only Sushil Arora and Rajesh Pandey while referring to 3-4 boys standing outside the office of Sushil Arora. In this statement, he alleges that these boys were coming in and out of the office whereas this was not his statement in court. He has also contradictorily stated that these boys were even present on the 20th of February 2009 when Sushil Arora made the prior visit to the Chintoo Car Point.

300. In Ex.PW1/B, Sunil Kumar (PW-1) refers to Sushil Arora and Rajesh Pandey discussing the matter with his *chacha* Sushil Arora and his two friends. At that time, he with his conductor Surender (PW-8), cousin Paramjeet @ Monu (PW-5), friends

Varun and Ankit, stood outside the office. He is categorical in his statement that outside the office, 3-4 boys were standing and that he further states that Rajesh Pandey was repeatedly coming out of the office to talk to those 3 or 4 boys. PW-1 has also referred to an altercation and scuffle (*'kahasuni'* and *'hathapai')* between Varun and Ankit and that his *chacha* had separated them. So far as the shooting incident is concerned, Sunil Kumar has stated that when they had stopped to have cold drinks near the cold drink cart on the Buddha Garden Road, a silver coloured Indica came there and one boy seated therein fired at their car in which, Ankit got hit by the bullet. On 21st May, 2009, Sunil Kumar (PW-1) has stated that Sushil Arora and Rajesh Pandey were merely sitting in the Indica car. The boy who shot at the black Santro was seated in the front seat next to the driver. With regard to the second incident of firing on 21st of May 2009, Sunil Kumar (PW-1) has stated that thereafter they escaped from the spot but because of the red light where the traffic had stopped, they were unable to escape. They somehow got out of the car and ran; that the indica was coming from behind and from behind, they fired 8-10 bullets. One bullet hit Ankit and one bullet hit Surender.

301. In this statement (Ex.PW1/B) (Ex.PW48/A), Sunil Kumar (PW-1) has stated that apart from Rajesh Pandey and Sushil Arora in the Indica car there where three other boys who had committed murder. He has categorically stated that he did not know the names of the three other boys but they were the three persons who were outside Sushil Arora's office with whom Varun and Ankit

had had the altercation. He had claimed that he could recognize these boys.

Thus even in his statement under Section 164 of the Cr.P.C. (Ex.PW1/B or Ex.PW48/A), Sunil Kumar (PW-1) did not attribute exhortation to Sushil Arora or Rajesh Pandey.

302. The prosecution completely failed to establish the allegation of exhortation against these two appellants by any reliable evidence. On the contrary, the evidence and material on record establishes the concerted effort to concoct such evidence and build a false case of exhortation by Sushil Arora and Rajesh Pandey on record.

303. I find that even if it could be held that the prosecution had established exhortation to Sonveer and Vishnu by Sushil Arora and Rajesh Pandey, the prosecution still had to prove that the exhortation led to the firing. In the present case, it is not so. In any case, even if we accept the allegation of exhortation, Paramjeet (PW-5) and Ranjeet Singh (PW-4) have also established that the exhortation did not result in any firing.

304. In the present case, as discussed above, there would have been a lot of noise of the traffic at the spot and the incident was not only transitory but also there was quick movement of the Indica as well as of the prosecution witnesses. It would thus have been impossible that the occupants of the Santro could be able to look deep into the rear of Indica where Sushil Arora and Rajesh Pandey were seated, let alone hear sounds from inside it.

305. Given our above discussion, the attribution of exhortation to Sushil Arora and Rajesh Pandey by Ranjeet Singh (PW-4) and Paramjeet Singh (PW-5) is completely unreliable and unbelievable.

306. It is the case of the prosecution that at the time of the exhortation, the traffic light turned green and the Indica sped off. Even if it could be believed that Sushil Arora and Rajesh Pandey had actually exhorted the others, no firing resulted as a consequence of the exhortation. In view of the law laid down by the Supreme Court, even if the general and omnibus exhortation attributed to the accused is to be believed, the same would be of no consequence so far as the culpability is concerned.

307. I are therefore, of the view that the finding of the ld. trial judge in para 146 of the impugned judgment that the testimony of Ranjeet Singh (PW-4) to the effect that Sushil Arora along with Rajesh Pandey and Hemant Garg were exhorting the other two accused Sonveer and Vishnu "*maaron saalon ko maaron saalon ko*" establishes the active involvement of these accused in the commission of the offence is completely unsustainable.

308. In view of the above discussion, the conclusion in para 186 (**pg 703**) of the impugned judgment by the ld. trial judge that the accused Sushil Arora and Rajesh Pandey occupants of the rear seat and exhorting the other two accused to kill the occupants of the Santro car is also unacceptable and not sustainable.

XI. No complaint by occupants of black Santro nor particulars or details of assailants reported or disclosed till 4:30 pm - the appellants were named for the first time, after ample confabulation between Sunil (PW-1), Paramjeet (PW-5), Varun (PW-6), Surender (PW-8), Tikla (PW-9), Hemant (PW-10) and Gajender (PW-11)

309. I examine the aspect of the failure to promptly disclose the incidents by the prosecution witnesses under the following headings :

(i) Witnesses had adequate opportunity to confabulate

(ii) Evidence manifesting concert and intent to falsely implicate

(iii) Witnesses were either related or close associates and acting in concert – they had the financial motive to implicate the appellants especially Sushil Arora

310. Information with regard to the incident on the road in front of the Buddha Garden is contained in DPCR records which had been recorded at 01:58 pm as No.1310456 (Exh.PW29/A) (**TCR pg 3841**). At 1:59 pm, Head Constable Brij Veer (PW-21) (**pg 251**) has also noted the message regarding a grey coloured Indica car inflicting a fire arm injury shot on a person.

311. At 2:08 pm, a further message concerning this incident was received, followed by three more messages in quick succession up to 3:09 pm, as detailed above. The information received was conveyed to P.S. Rajender Nagar which recorded DD No.24B (**pg 795**) and P. S. Chanakya Puri which recorded DD No.15A (Ex.PW34/A) (**pg 781**). Thus, the only information conveyed to the police was to the effect that the occupants of an Indica car

No.2192 had shot one person and thereafter escaped towards the Dhaula Kuan side. Thereafter, further information was received to the effect that the injured person had been brought to the Safdarjung Hospital by a person in Santro car No.DL4CAG 7179. Neither the number of the persons involved in the incident nor names of the persons involved were disclosed in the first record by the police.

312. It stands established that on the 22nd of February 2009, all the prosecution witnesses other than Surender (PW-8) admittedly were carrying mobile phones, some of them even multiple phones. For instance, the evidence of Sunil Kumar (PW-1) discloses that he was carrying more than one phone on the fateful day. Yet not one of them called the police control room at 100.

313. The first act which anyone who has faced gunmen and shooting at the best of identified persons would do is to reach out for police help and protection. Instead the Santro occupants telephoned either each other or their leader, Tikla (PW-9) who directs them either to the spot or to the hospital. Even at the Trauma Centre, these witnesses neither call 100 nor approach the police posted there. No explanation at all has been given by the witnesses for not doing so.

314. This is coupled with yet another most unnatural conduct. The witnesses also admitted that they were having close relations with the then injured Ankit. Yet none of them made any effort to inform his family about the incident. This in our view is a serious

aspect of the matter and by itself points towards grave doubts about the acceptability of the prosecution version.

315. The only possible explanation is that Tikla (PW-9) and company were engaged in evolving a story to implicate Sushil Arora in the commission of the offence who they considered they could easily frame, perhaps intending to force payments from him. The fact that the witnesses were confabulating before making any official statement establishes the reason that not one of them called the police control room at 100.

316. The witnesses have been categorically cross-examined in this regard. The statements of Sunil (PW-1) (**pg 43**); Paramjeet (PW-5) (**pg 110**); Varun (PW-6) (**pg 116**) and Surender (PW-8) (**pg 138 and 146**) in this regard establish the fact that the witnesses have propounded a calculated and considered depiction of events.

317. The first discussion between Tikla (PW-9) and his associates regarding the incident is to be found in the telephone call to Tikla (PW-9) claimed to have been made by Sunil (PW-1) after fleeing from the spot. In his testimony, Sunil (PW-1) has merely stated that he had called the mobile telephone of his uncle and narrated the incident when he was told by his uncle to go and see how Ankit was.

318. Tikla (PW-9) also states that when he was near the Hyatt Hotel, he had received a telephone call from Sunil (PW-1) and "*Sunil in that telephone call conveyed me the only fact an incident of firing upon their vehicle had taken place and no further names of assailants were disclosed*". This witness (PW-9) was not

present at the shootings. In his statement in examination-in-chief, he has therefore, incorrectly claimed that Sushil Arora and Rajesh Pandey were occupants of the Indica from which the firing had taken place (**pg 179 and 173**).

319. Light is thrown on what was disclosed by Sunil (PW-1) in this phone call to Tikla (PW-9). In the testimony of Hemant (PW-10) (**pg 184)** and Gajender Singh (PW-11) (**pg 202**) who were present in the Esteem car with Tikla (PW-9) when the phone call was received, Hemant Kumar (PW-10) (**pg 185**) has clearly stated that in the phone call from Sunil (PW-1), Tikla (PW-9) was informed that "***someone*** *has fired a bullet on them and Ankit had received a bullet injury. Gajender Singh (PW-11) was the driver of the Esteem who has stated that in the phone call from Sunil received when they had reached Hotel Hyatt, Sunil had told Tikla that* ***occupants of Indica car*** *had fired bullets upon them*".

320. This phone call by Sunil (PW-1) to his uncle Tikla (PW-9) has been put forth as his first revelation about the crime. Sunil (PW-1) and Paramjeet Singh (PW-5) had escaped the bullets of assailants, barely minute before the call. The normal instinct for a person so traumatized would have been to blurt out the names of the assailants, if he knew them, especially if the person was one such as Sushil Arora with whom Tikla (PW-9) trying to resolve disputes regarding financial transactions Sunil (PW-1) has not named anybody in this call.

321. It is noteworthy that Sunil (PW-1) had gone to the Chintoo Car Point with Tikla (PW-9) on the 20th February, 2009 as well and

had met Sushil Arora on that date. If Sushil Arora had been in the Indica, Sunil would have lost no opportunity to disclose it to Tikla (PW-9) or call the police.

322. It is quite obvious that till such time, none of the appellants had been identified or named as having been involved in the incident of shooting by any of the witnesses who would be having knowledge thereof.

Clearly the occupants of the Santro were not in a position to and did not know the identity of the persons seated inside the Indica. They had certainly not identified the appellants as involved in the shooting.

(i) *Witnesses had adequate opportunity to confabulate*

323. The prosecution has led evidence that after Sunil's (PW-1) telephonic call and the direction by Tikla (PW-9) to ascertain Ankit's well being, Tikla (PW-9), Hemant (PW-10) and Gajender (PW-11) converged to the spot at the traffic light where the shooting had taken place.

324. In the witness box, Sunil Kumar (PW-1) has said that Paramjeet (PW-5) and he had hired an auto and returned to the place of occurrence i.e. the red light point where they learnt from the public at the spot that Ankit had been removed to the AIIMS Trauma Centre. He states that he gave information thereof to Tikla (PW-9) who directed them to reach the Trauma Centre. These two then consequently proceeded to the Trauma Centre.

325. Contradictorily, Paramjeet Singh (PW-5) (**pg 111**) has stated that when Sunil (PW-1) had telephoned Tikla (PW-9), he was informed by Tikla that Ankit stood taken to the Safdarjung Trauma Centre. As per PW-5, therefore, Sunil (PW-1) and he proceeded directly to the Trauma Centre without stopping anywhere and reached the Trauma Centre around 2:00 pm.

326. Paramjeet Singh (PW-5) (**pg 107**) has further stated that when he reached the Trauma Centre, his uncle Tikla (PW-9) was already there and that after some time, some family members of the deceased Ankit also reached there. He states that initially there was no discussion with regard to the incident as everybody was concerned about Ankit's life. However later, Paramjeet (PW-5) did have a talk with Tikla (PW-9) in the presence of Sunil (PW-1), Varun (PW-6) and Surender (PW-8) with regard to the incident, before the police had arrived - a clear admission of confabulation.

327. Tikla (PW-9) **(pg 181**) also states that Sunil (PW-1), Paramjeet (PW-5) and Varun (PW-6) met him when he reached the hospital at around 3 o'clock. He also stated that the police had already arrived in the hospital by then and that Surender (PW-8) had arrived at the hospital after about 15-20 minutes of his having reached the hospital.

328. Varun (PW-6) (**pg 116**) in his cross-examination has stated that from the site of the occurrence, he reached his village Kishangarh. The witness refers to having received a phone call from Paramjeet (PW-5) at around 2:45 pm asking him to reach the Trauma Centre and that he therefore reached the Trauma Centre by

around 3:30 or 4:00 pm. The witness is categorical that when he reached the Trauma Centre, he met Paramjeet @ Monu (PW-5), Sunil (PW-1), Tikla (PW-9) as well as the family members of Ankit. This witness however says that by the time he reached, the police officials had already arrived there (**pg 107**).

329. I also get some sense of the time which Tikla (PW-9) and his associates had got in the hospital to confabulate from the evidence of the police witnesses on record.

330. Inspector S.S. Rana (PW-26) has stated that information was received on the phone at 3:50 pm about the injured having been taken to the AIIMS Trauma Centre. In the police record, DD No.17A (Ex.PW34/B) was logged only at 03:50 pm with regard to Ankit's admission at the Trauma Centre, AIIMS.

331. Insp. S.S. Rana (PW-26) and Jagat Singh (PW-47) are categorical that they were at the spot at the Simon Bolivar Marg traffic light where the shooting had occurred, till such time when they received a copy of DD No.17A. As per Inspector Rana (PW-26), the SHO conveyed this information to him. It is also in his evidence that till the period up to 3:50 pm, they had got the crime scene investigated by the crime team and made inquiries with public persons present, at the spot.

332. Given the fact that the copy of this entry had to be delivered from P.S. Chanakya Puri, it can reasonably be expected that it would have taken about 10 minutes for it to reach. Even if PW-26 left the spot immediately on receipt, it would have taken some time to reach the Trauma Centre at AIIMS. It can reasonably be

expected that the police would have reached the hospital for the first time only around 4:15 pm to 4:30 pm, which was long after all the witnesses had gathered at the Trauma Centre. Insp. S.S. Rana (PW-26) had confirmed that all these persons, the other public witnesses at the hospital as also the father of the deceased were present at the Trauma Centre when they reached there.

333. Gajender (PW-11) has stated that they met the police officer of the rank of DCP with two – three police officers only at around 3:30 pm for the first time and that in between no police official met him. The first statement of any witness which was recorded by the police is that of Sunil (PW-1) by Insp. S.S. Rana (PW-26) only at about 4:30 pm.

334. None of these witnesses made any complaint to the police or contacted even the police (duty constable) at the hospital. The witnesses had ample time to deliberate and consciously frame a narration of events so as to implicate the appellants.

(ii) Evidence manifesting concert and intent to falsely implicate

335. In this regard, I may also refer to the information recorded on the DPCR Form at 15:57:35 hrs on 22nd February, 2009. The police had noted that Surender has informed that "*Mahender Tikla who is a resident of Mehrauli, working at Mehrauli had given loan of Rs.10 lakhs to Chintoo Car Point in Karol Bagh and he* ***had gone to take that money over which there was a jhagra (quarrel) and thereafter, the shooting incident has occurred***".

336. There is no evidence at all on record that the persons standing outside who had gone to the Chintoo Car Point with Sunil (PW-1) had any knowledge of the purpose for which Mahender Tikla had proceeded to Chintoo Car Point or of his financial dealings or transactions with Chintoo Car Point or of any quarrels.

337. All these witnesses have categorically stated that they did not know any of the accused persons prior to the incident on the 22nd of February 2009. I also find that each of these witnesses had stated that the accused persons had no personal grudge or enmity with any of the occupants in the Santro car (Sunil - PW-1 (**pg 44),** Varun – PW-6 **(pg 126),** Surender – PW-8 **(pg 159).** The witnesses also confirm that there was no enmity with Ankit.

338. It is in evidence that Tikla (PW-9) had business and financial dealings with Sushil Arora. On the 22nd February, 2009, Tikla (PW-9) and the others had gone in connection therewith to the Chintoo Car Point. The shooting episodes happened while returning therefrom. It appears that the prosecution thus simply linked the shooting to the financial dealings and woven case around the same.

339. On the aspect of false implication and reasons therefor, I find useful the observations of this court in ***1995 SCC OnLine Del 418, Ten Singh v. State (Delhi Admn.)***, I extract hereunder the relevant portion of the judgment :

> ***"21.*** *It has been contended on behalf of the State that Makar Dhwaj had no animus against the appellant and no sound reason has been given by the appellant as to why*

Makar Dhwaj would have named the appellant as the culprit in court. ***It is difficult for the appellant to know the reasons for his false implication. Mere fact that appellant has not been able to give any sound reason for his false implication does not mean that the court is to believe the prosecution case against him even if there has occurred serious doubt about the identity of the appellant being the culprit.***

22. *The Supreme Court in* ***Shankarlal Gyarasilal Dixit v. State of Maharashtra, AIR 1981 SC 765****, while dealing with such a point observed as follows:*

> *"Our judgment will raise a* ***legitimate query****:* ***If the appellant was not present in his house at the material time, why then did so many people conspire to involve him falsely****? The answer to such questions is not always easy to give in criminal cases. Different motives operate on the minds of different per-sons in the making of unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions. In the instant case, the dead body of a tender girl, raped and throttled, was found in the appellant's house and, instinctively, everyone drew the inference that the appellant must have committed the crime. No one would pause to consider why the appellant would throw the dead body in his own house, why would he continue to sleep a few feet away from it and whether his house was not easily accessible to all and sundry, as shown by the resourceful Shrinarayan Sharma. No one would even care to consider why the appellant's name was not mentioned to the police until quite late. These are questions for the Court to consider."*
>
> *(Emphasis by us)*

340. It is in evidence that by the time Surender (PW-8) reached the hospital, Mahender Tikla and the other occupants of the Santro had already gathered at the Trauma Centre. Clearly, the above

statement recorded in the DPCR records at 15:57:35 hrs on 22nd February, 2009 regarding quarrel inside Chintoo Car Point over loan of Rs.10 lakhs attributed to Surender (PW-8) was at the behest of Mahender Tikla (PW-9) and manifests the intent of Tikla (PW-9) and his party to implicate Sushil Arora on account of their financial dealings.

(iii) *Witnesses were either related or close associates and acting in concert – they had the financial motive to implicate the appellants especially Sushil Arora*

341. There is one extremely strange co-incidence in this case that while some of the witnesses have admitted that they knew each other, several other private witnesses also appear to be known to the Tikla (PW-9) and his associates. I therefore, now consider the evidence on record which reinforces the defence submission that all the witnesses knew each other and that the delay in registration of the FIR was only because the witnesses were confabulating and concocting the story to implicate the accused persons.

342. It is in evidence of Tikla (PW-9) and Sunil (PW-1) that they were related to each other. In fact, Sunil (PW-1) refers to Tikla (PW-9) as his uncle. Sunil (PW-1) has stated that he resides in Kishangarh and was running a transport business of blueline buses on DTC route and property dealing business. He was having a manpower of 20-22 persons in his blueline business (**pg 26**). His uncle Mahender Tikla (PW-9) was also residing in Kishangarh and also in transport business.

343. Sunil Kumar (PW-1) has further stated that (**pg 26**) Paramjeet Singh (PW-5) and Surender (PW-8) were related to him. It is in evidence that Surender (PW-8) was also working as a conductor of the bus bearing No.DL1P5 1840 owned by Sunil Kumar (PW-1) which was plying on DTC Route No.502.

344. So far as Ankit is concerned, Sunil Kumar (PW-1) has stated that father of Ankit knew Tikla (PW-9) very well. He also stated that he was himself acquainted with Ankit for about 10 years prior to the occurrence and that Ankit was carrying on property dealing business and that Sunil Kumar (PW-1) used to have commercial deals with him.

345. Paramjeet Singh (PW-5), another resident of Mehrauli, stated that he too was carrying on a transport business and known to Sunil Kumar (PW-1) and Tikla (PW-9) to whom he was related. Paramjeet Singh (PW-5) was using mobile No.9953333363 (**pg 96**). He has disclosed that the transport office of his uncle Tikla (PW-9) was situated just in front of his office and that the buses of the two business houses operated on the same route and that they were on co-ordial visiting term. (**pg 96**).

346. Varun (PW-6) had stated in his evidence that Sunil Kumar (PW-1); Paramjeet Sïngh (PW-5) and Surender (PW-8) were old friends and they used to meet prior to the incident which friendship was continuing even on the date of his deposition (**pg 125**).

347. Varun (PW-6) has stated that he knew Ankit (deceased) for about 2-3 years while Paramjeet Singh (PW-5) has stated the

Ankit's family were residing only 4-5 houses away from him and that he knew him for several years.

348. It is in evidence that Varun (PW-6) was also a resident of Mehrauli and was known to Mahender Tikla (PW-9). Varun was using mobile phone No.9910234952 (**pg 115**) and was sitting with Paramjeet Singh (PW-5) in Sunil's office on the 22nd of February 2009 when Tikla (PW-9) had called them to the Chintoo Car Point.

349. I have noted the details recorded by wireless log and diary maintained by the Police Vehicle VTR-69, manned in the control of Head Constable Jai Bhagwan, which has made an entry at 2:40 pm. (**pg 841**). I find that in Ex.PW43/B, it is noted by the Police Control Room that information was received from Manveer (PW-2) to the effect that Ankit was removed to the hospital by his companions who were in another vehicle ("*uske sathi dusri car mein*"). The receipt of this information at the Police Control Room is established in the testimony of S.I. Jeet Singh (PW-43) (**pg 372**).

350. This police record is corroborated by the testimony of Narender Singh (PW-12) (**pg 214**), who is also a resident of Kishangarh, Mehrauli and has stated that he had, recognized the black Santro as belonging to Monu (Paramjeet) who was from Mehrauli and concerned with transport business and that he had removed the victim to the Trauma Centre, AIIMS.

351. In his cross-examination, on behalf of Rajesh Pandey, Narender Singh (PW-12) also admits that he knew Tikla (PW-9) as he was a known person from Village Kishangarh; Paramjeet Singh @ Monu (PW-5) as he was also a resident of that area; Sunil (PW-

1), a nephew of Tikla (PW-9) as also a resident of Mehrauli; as well as the others.

352. Deceased Ankit and the witness Narender Singh (PW-12) were thus residents of the same locality and probably were known to each other (**pg 412**). The entire conduct of this witness is suspicious and he is certainly concealing something material.

353. It also appears that Manveer Singh (PW-2) was known to Narender Singh (PW-12) as he was also a resident of Mehrauli. The DPCR form contains the reference to the caller as Manveer; contains Manveer's phone number but discloses the informant as Narender Singh. Thus Narender Singh (PW-12) appears to have used Manveer Singh's (PW-2) phone to call the police control room.

354. The witness states that he was using mobile No.9811318832 while his friend Jagmohan who was with him in the white Santro was using mobile No.9811943033 (**pg 217**).

355. So what is the impact of the relationship of the witnesses to Tikla, or their close association to each other. Can this fact *ipso facto* render their testimony unbelievable? It is not an absolute rule that the testimony of a related or an associate witness would be disbelieved for this reason alone. The principles in this behalf have been laid down in the pronouncement of the Supreme Court reported at ***(2008) 16 SCC 73 State of Uttar Pradesh v. Kishanpal & Ors.*** wherein it was held thus:

> ***"17.*** *The plea of "**interested witness**", "**related witness**" have been succinctly explained by this Court*

in State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593] . The following conclusion in para 7 is relevant: (SCC p. 754)

> *"7. As mentioned above the High Court has declined to rely on the evidence of PW 1 on two grounds: (1) she was a 'highly interested' witness because she 'is the wife of the deceased', and (2) there were discrepancies in her evidence. With respect, in our opinion, both the grounds are invalid. For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True, it is, she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. '**Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished**. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be 'interested'."*

From the above it is clear that "related" is not equivalent to "interested". The witness may be called "interested" only when he or she has derived some benefit from the result of a litigation, in the decree in a civil case, or in seeing an accused person punished. A witness, who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested"."

(Emphasis supplied)

356. In ***Kishanpal,*** it was expounded that plea of defence to the effect that it would not be safe to accept the evidence of related or

interested witnesses was rejected by the Supreme Court and it was further held thus:

> ***"19. It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness, if otherwise the same is found credible****. The witness could be a relative but that does not mean his statement should be rejected.* ***In such a case, it is the duty of the court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness****. Caution is to be applied by the court while scrutinising the evidence of the interested witness.*
>
> ***20.*** *It is well settled that it is the* ***quality of the evidence and not the quantity of the evidence which is required to be judged*** *by the court to place credence on the statement. The ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person.* ***Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible.*** *(Vide* ***State of A.P. v. Veddula Veera Reddy[(1998) 4 SCC 145 : 1998 SCC (Cri) 817] , Ram Anup Singh v. State of Bihar[(2002) 6 SCC 686 : 2002 SCC (Cri) 1466], Harijana Narayana v. State of A.P.[(2003) 11 SCC 681 : 2004 SCC (Cri) 65] , Anil Sharma v. State of Jharkhand[(2004) 5 SCC 679 : 2004 SCC (Cri) 1706], Seeman v. State [(2005) 11 SCC 142 : 2005 SCC (Cri) 1893] , Salim Sahab v. State of M.P. [(2007) 1 SCC 699 : (2007) 1 SCC (Cri)***

425], Kapildeo Mandal v. State of Bihar [(2008) 16 SCC 99 : AIR 2008 SC 533] and D. Sailu v. State of A.P. [(2007) 14 SCC 397 : (2009) 1 SCC (Cri) 898 : AIR 2008 SC 505*])*

21. *In* ***Kulesh Mondal v. State of W.B. [(2007) 8 SCC 578 : (2007) 3 SCC (Cri) 741****] this Court considered the reliability of interested/related witnesses and has reiterated the earlier rulings and it is worthwhile to refer the same which reads as under: (SCC pp. 580-81, para 11)*

> *"11. '10. We may also observe that the ground that the [witnesses being close relatives and consequently being partisan witnesses,] should not be relied upon, has no substance. This theory was repelled by this Court as early as in* ***Dalip Singh v. State of Punjab [AIR 1953 SC 364****] in which surprise was expressed over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: (AIR p. 366, para 25)*
>
> > *"25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court*

> *endeavoured to dispel in* ***Rameshwar v. State of Rajasthan [AIR 1952 SC 54]*** *(AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."*
>
> *11. Again in* ***Masalti v. State of U.P. [AIR 1965 SC 202]*** *this Court observed: (AIR pp. 209-10, para 14)*
>
> *"14. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. ... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."*
>
> *(Emphasis supplied)*

Therefore, apart from knowing each other, the defence would have to show that because of the alleged motive, relationship and association, they were interested in the implication and conviction of the appellants.

357. I have discussed above as to how the prosecution witnesses have alleged the financial transaction between Tikla (PW-9) and

Sushil Arora as having motivated the commission of the offence. They claim that they had all in fact gone to the Chintoo Car Point only to assist Tikla (PW-9) in recovery of this money. The evidence on record has to be scrutinized keeping in view this important aspect of the matter. The evidence that none of the prosecution witnesses informed the police about the incident and that they all converged at the hospital with ample time to discuss the matter so as to implicate Sushil Arora and the others for the commission of the offence coupled with even thereafter, the delay in giving their statements, delay in naming the appellants, failure to describe the occupants of the Indica to the police and dock identification of complete strangers, who they either had a fleeting glimpse previously or never seen at all, more than a year after the incident, creates grave doubts about the veracity of their evidence. Their relationship and association therefore, assumes considerable significance in the present case.

358. Despite the police record including the Delhi Police Control Room entries and the wireless message containing full particulars of the incident, details including registration numbers of the vehicles involved, presence of eye-witnesses; two public witnesses claiming that they were present at the spot for hours after witnessing the incident, no FIR is registered till 7:00 pm, more than five hours after the incident. The testimony of these witnesses suggests pre-concert discussion and confabulation. The same is undeniably unreliable and untrustworthy.

359. In view of the above discussion, the finding of the ld. Trial Judge in para 160 (**pg 694**), is contrary to the record as the prosecution has also not been able to establish by credible evidence that Vishnu was shooting from the front of the left side while Sonveer was shooting from the rear left side window of the Indica car. For the same reason, the reliance on the identification by the witnesses including Ranjeet Singh (PW-4) is also not sustainable.

360. The finding by the ld. trial judge that the presence of Sonveer and Vishnu in the Indica was more noticeable as they were hanging out of the windows during the shoot out and were observed by the witnesses other than Ranjeet Singh (PW-4) is not supported by clear and credible evidence. Furthermore, the ld. trial court has completely fallen into error in accepting the solitary testimony of Ranjeet Singh (PW-4) that he had seen the accused persons coming out of the car at both the spots of shoot out then getting back into the Indica. None of the other occupants of the Santro car support him in his testimony.

XII. Unnatural conduct of witnesses renders their testimony questionable

361. Mr. M.N. Dudeja, ld. counsel appearing for Vishnu has challenged the veracity of the claimed witnesses in view of their conduct in not making a report to the police control room; in fleeing from the spot without caring for their injured friend, if they were present when the crime was committed in the Santro; in not reporting the crime at all to the police; in fleeing from the spot

without bothering about the fate of their associate and friend Ankit; in not informing his family despite all of them having mobile phones.

362. Placing reliance on the judgments reported at ***2003 (2) Crimes 459 (SC), Joseph @ Jose v. State of Kerala*** and ***1992 (3) CRIMES 5, State of Maharashtra v. Sukhdeo Singh & Anr.***, it is urged that these prosecution witnesses are completely untrustworthy and their testimony cannot be utilized as a basis for the appellant's conviction. Their unnatural conduct especially in failing to seek police assistance and not informing the police about the shootings, renders their testimony suspicious.

363. In ***2003 (2) Crimes 459 (SC), Joseph @ Jose v. State of Kerala,*** the appellant was convicted on the basis of the sole testimony of eye-witness PW-3. The deceased had been assaulted with a knife at 3:30 pm on 25th of March 1993 in the house of the accused. PW-3 was a resident of the nearby house. PW-2 who was accompanying the deceased and according to the prosecution case was a eye-witness had turned hostile. The court noted that there was no electricity in the area at the time of the incident. A candle and kerosene oil lamp in the house of PW-3 could hardly provide enough light for one to identify the role of assailant. The testimony of PW-3 was largely disbelieved on the ground of his conduct in not informing anyone. Even PW-2 on whose information PW-1 lodged the FIR, that he had seen the incident was, unnatural. His statement was claimed to have been recorded on the next date at 4:00 pm. This was held to have lent more suspicion to the

statement. I extract hereunder paras 16 and 18 of the judgment where the court has dealt with such conduct.

> *"16. Coming to the evidence of **PW-3**, he did not claim that while in his house he had seen the occurrence which took place just outside the house of the accused, who lived across the narrow path way. According to this witness he had closed his shop and had come by bus. After alighting from the bus he was proceeding toward his house when he saw the deceased and PW-2 walking ahead of him at a distance of about 20 feet. It is thereafter that he **claims to have witnessed the occurrence** in front of the house of the accused. After the assault the deceased ran towards his house and fell down on the eastern side of the house. **The conduct of PW-3 appears to us to be rather unnatural. He did not disclose what he had seen to anyone that night, and for the first time on the next day** at about 4.00 p.m. he **disclosed the fact of his being an eye witness** to the investigating officer. According to him he went to see the deceased who had fallen down near his house. When he was there, PW-2 also came and pulled out the knife from the body of the deceased and kept it there. Thereafter PW-2 rushed to inform the brother of the deceased. From his deposition it does not appear that he talked to PW-2 at all about the occurrence. Moreover, PW- 2 has not stated that he met PW-3 when he had gone to the place where the deceased had fallen. He does not even state that he had pulled out the knife from the body of the deceased and kept it near the body of the deceased. **What however appears to be rather unnatural is the fact that thereafter when lying, he did not disclose to them about his having seen the several persons came to the place where the injured was occurrence.** It is not disputed that after sometime PW-2 along with the brother of the deceased PW-1 and some others had come to the place where the deceased was lying injured which was just near the house of PW-3. No*

doubt, PW-3 stated that when the brothers of the deceased had come he had told one of the brothers, namely Baby, that he had seen the occurrence and he further asserted that when he told this fact to Baby, PW-1 was also present and he had said this in presence and within the hearing of PW-1. PW-1 does not say that PW-3 had disclosed the name of the assailant to him or to any other person. ***What is of considerable significance is the fact that in the F.I.R. lodged by PW-1, the name of PW-3 is not mentioned as an eye witness, nor is it stated that he had disclosed that he had seen the occurrence****. It therefore appears that* ***this witness did not talk about the occurrence to anyone after the occurrence,*** *and for the first time on the next day at about 4.00 p.m. he discloses the fact of his being an eye witness to the investigating officer. His keeping silent for such a long period and not disclosing the fact that he was an eye witness to the brothers of the deceased and others, who had come to the place where the deceased was lying injured just next to his house,* ***creates a serious doubt in our mind about this witness being an eye witness.*** *In normal course he, being an eye witness, would have disclosed this fact at the earliest opportunity. He could have said so to PW-2 who was the first to come or at least to the others who came to the place where the injured was lying which included PW-1. Rather than disclosing to them that he was an eye witness, the witness remained inside his house and did not communicate with anyone. There is, therefore, force in the submission of the counsel for the respondent that on the next day, finding no clue for the murder, PW-3 was got up as an eye witness.*

xxx xxx xxx

18. For the reasons discussed above, we have serious doubt about PW-3 having actually witnessed the occurrence. There was hardly sufficient light to identify the assailant at the time of occurrence. ***The conduct of the sole eye witness PW-3 in remaining silent for a***

long time, and his failure to disclose the facts to the persons who had gathered near the place where the deceased lay injured, creates a serious doubt about the truthfulness of this witness.

(Emphasis by us)

364. In this regard, ld. counsel has placed reliance on the pronouncements of the Supreme Court reported at ***2010 (3) SCC (Cri.) 150 : (2010) 6 SCC 407, Gopal Singh & Ors. v. State of Madhya Pradesh; AIR 2013 SC 2144, Shivasharanappa & Ors. v. State of Karnataka; 2013 (1) Crimes 386 (SC), Lahu Kamlakar Patil & Anr. v. State of Maharashtra.***

365. In the pronouncement of the Supreme Court reported at ***2010 (3) SCC (Cri.) 150 : (2010) 6 SCC 407, Gopal Singh & Ors. v. State of Madhya Pradesh,*** in para 25, the court has doubted the statement of Feran Singh, PW-5 as an eye-witness of the incident for the reason that his behaviour was unnatural as he claimed to have rushed to the village but has still not conveyed the information about the incident to his parents and others present there and had chosen to disappear for couple of hours on the suspicious and unacceptable plea that he feared for his own safety. In the present case, after escaping from the spot, the witnesses who converged to the same spot, have expressed no apprehension of fear for their life at all. None of the witnesses offered a whit of an explanation as to why they did not inform the police or the family of Ankit or why they did not care about the welfare of injured.

366. So far as the pronouncement reported at ***AIR 2013 SC 2144, Shivasharanappa & Ors. v. State of Karnataka*** is concerned, the

court noted the unnatural conduct of the daughter and grandmother of the deceased in a murder case who claimed to be eye-witnesses to the occurrence. The daughter (witness) stated that she had informed her maternal grandmother that the accused had forcibly taken away her mother. Despite this information, the grandmother did not disclose the incident to her relatives, villagers or the police for two days. She also gave no explanation as to why she thought it apt to search for the deceased without informing anyone else. Such conduct of both the daughter and the grandmother was considered unnatural and the court refused to base a conviction on such evidence. The view taken by the High Court acquitting the accused was held to be plausible in view of the circumstances in the judgment. Valuable light is thrown in paras 22 to 23 of the pronouncement on the issue under consideration by us herein on the appraisal of the witness counts which reads thus :

> ***"22.*** *Thus, the behaviour of the witnesses or their reactions would differ from situation to situation and individual to individual. Expectation of uniformity in the reaction of witnesses would be unrealistic but the court cannot be oblivious of the fact that even taking into account the unpredictability of human conduct and lack of uniformity in human reaction, whether in the circumstances of the case, the behaviour is acceptably natural allowing the variations.* ***If the behaviour is absolutely unnatural, the testimony of the witness may not deserve credence and acceptance.***
>
> ***23.*** *In the case at hand, PW 9 was given a threat when her mother was forcibly taken away but she had the courage to walk in the night to her grandmother who was in her mid-fifties. After coming to know about the*

incident, it defies commonsense that the mother would not tell her other daughter and the son-in-law about the kidnapping of the deceased by her mother-in-law. It is interesting to note that the High Court has ascribed the reason that PW 7 possibly wanted to save the reputation of the deceased daughter and that is why she did not inform the other daughter and son-in-law. That apart, the fear factor has also been taken into consideration. Definitely, there would have been fear because, as alleged, the mother-in-law had forcibly taken away the deceased, ***but it is totally contrary to normal behaviour that she would have maintained a sphinx-like silence and not informed others. It is also worthy to note that she did not tell it to anyone for almost two days and it has not been explained why she had thought it apt to search for her daughter without even informing anyone else in the family or in the village or without going to the police station. In view of the obtaining fact situation, in our considered opinion, the learned trial Judge was absolutely justified in treating the conduct of the said witnesses unnatural and, therefore, felt that it was unsafe to convict the accused persons on the basis of their testimony.*** *It was a plausible view and there were no compelling circumstances requiring a reversal of the judgment of acquittal. True it is, the powers of the appellate court in an appeal against acquittal are extensive and plenary in nature to review and reconsider the evidence and interfere with the acquittal,* ***but then the court should find an absolute assurance of the guilt on the basis of the evidence on record and not that it can take one more possible or a different view****."*

(Emphasis by us)

367. In the judgment reported at ***(2013) 6 SCC 417 : 2013 (1) Crimes 386 (SC), Lahu Kamlakar Patil & Anr. v. State of***

Maharashtra, the court observed that if the conduct of the witness is so unnatural and is not in accord with acceptable human behaviour even allowing for variations, then his testimony becomes questionable and is likely to be discarded. I find that in the following para 21 of the judgment, the effect of the witnesses' conduct in not informing the police has been considered sufficient to doubt the veracity of his testimony :

> ***"21.*** *The attack is based on the grounds, namely, that the said witness (PW 2) ran away from the spot; that he did not intimate the police about the incident but, on the contrary, hid himself behind the pipes near a canal till early morning of the next day; that though he claimed to be an* ***eyewitness, yet he did not come to the spot when the police*** *arrived and was there for more than three hours; that* ***contrary to normal human behaviour*** *he went to Pune* ***without informing about the incident*** *to his wife and stayed there for one day;* ***that though the police station was hardly one furlong away yet he did not approach the police; that he chose not even to inform the police on the telephone*** *though he arrived at home; that after he came from Pune and learnt from his wife that the police had come on 21-2-1988, he went to the police station; and that in the backdrop of such conduct, his version does not inspire confidence and deserves to be ignored in toto."*
>
> *(Emphasis by us)*

XIII. ***Implication, arrest and identification of the appellants in the present case***

It is necessary to examine the prosecution case and evidence regarding implication, arrest and identification of the accused

persons in the order in which they came to be arrested. The same is in the following sequence :

(i) *Implication, arrest and identification of Sushil Arora*

(ii) *Implication, arrest and identification of Hemant Garg*

(iii) *Arrest and identification of Sonveer*

(iv) *Implication, arrest and identification of Vishnu*

(v) *Arrest and identification of Rajesh Pandey*

I propose to discuss the above sub-headings in *seriatim* :

(i) *Implication, arrest and identification of Sushil Arora*

368. The evidence on record establishes that on the 22nd of February 2009, while discussing the matter with Sushil Arora, Tikla (PW-9) was accompanied by Hemant (PW-10) (**pg 184**), Gajender Singh (PW-11) (**pg 202**) and a third companion Sudhir Kumar who has not been examined by the prosecution.

369. Gajender (PW-11) corroborates Sunil (PW-1) and Tikla (PW-9) when he also states that at the very moment of his entry, Sunil (PW-1) was asked by Tikla to go outside and to stay there. He confirms that none of the other occupants of the Santro car had come inside.

370. Deposing as PW-1, Sunil (**Pg 40**) has stated that at Chintoo Car Point, his four associates had remained outside and did not have an opportunity to see or look at Sushil Arora. He has

categorically stated that it was a fact that none of them had ever seen Sushil Arora or knew who was Sushil Arora prior thereto.

371. Sunil (PW-1) had barely come to the entrance of the Chintoo Car Point office when Tikla had told him that the matter had been resolved and asked him to go and wait outside. The witness states that he was neither introduced to Sushil Arora nor had any exchange of talks with him.

372. This witness was also unable to remember what clothes were worn by Sushil Arora that day, thereby establishing the brevity of his visit to the Chintoo Car Point office.

373. Sunil Kumar (PW-1) had stated that he came to know Sushil Arora's name after the incident through his uncle Tikla.

374. Paramjeet (PW-5), Varun (PW-6) and Surender (PW-8) did not get any chance to even see Sushil Arora and did not know him at all. Certainly these persons could not have identified Sushil Arora.

375. Sushil Arora was arrested barely two days after the incident on the 24th of February 2009. Yet no TIP was conducted.

376. The evidence therefore, establishes that only Tikla and three of his associates i.e. Hemant (PW-10), Gajender (PW-11) and Sudhir Kumar could have recognized or identified Sushil Arora. These three witnesses do not give any evidence regarding the occupants of the Indica involved in the shootings.

377. Surender (PW-8) testified that he had seen the two boys holding firearms firing at the Santro vehicle and a third one whom he had identified as Hemant Garg as the person driving the Indica

car and states that "*One or two more boys were there in the Indica car and since I had not been able to see those others one or two boys I cannot identify them with confirmation*" **(pg 137)**. At this stage, this witness was declared hostile and in his cross-examination, he names four persons in Indica including Rajesh Pandey as being present.

378. In his cross-examination by prosecutor, Surender (PW-8) also stated that he "*cannot identify accused Sushil Arora and Rajesh Pandey to be those one or two boys who were in the Indica car as I had not been able to see them*". (**pg 139**) He however, maintained that he had not seen the fifth accused (Sushil Arora), who was present in court, in the Indica car. He also denied that he had named him in his statement under Section 161 Cr.P.C.

379. Mr. Vivek Sood, learned senior counsel would contend that therefore, Surender's (PW-8) testimony was natural because he could not have seen inside the Indica as, according to the prosecution two of the accused wielding fire arms were allegedly hanging out of the cars up to half of their bodies. This witness (PW-8) was sitting at the rear extreme left side window. It is impossible that he could have seen the driver of the Indica car which had come to a halt behind the right of Santro. There is substance in this submission.

380. It has been pointed out that Varun (PW-6) (**pg 114**) corroborates Surender (PW-8) in his initial statement.

While being cross-examined by counsel for Hemant Garg (**pg 128**), Varun (PW-6) has stated that he could not identify the

other two persons in the Indica car for the fact that one person had taken half of his upper body outside the window of the Indica car when the Indica overtook the Santro.

381. In para 135-141 (**pgs 685-687**), the trial court has summed up the prosecution case and evidence with regard to the identification of Sushil Arora and very cursorily dealt with it. The trial court has completely overlooked the material evidence of Paramjeet Singh (PW-5), Varun (PW-6) and Surender (PW-8) of their not having identified Sushil Arora, as one of the occupants in the Indica, treating the same as "*each individual has its own perceptive faculty*" (**para 141 pg 687**).

382. In para 142 (**pg 687**), the trial court has observed that even Manveer (PW-2) was unable to identify Sushil Arora. The failure of Manveer (PW-2); Paramjeet Singh (PW-5); Varun (PW-6) and Surender (PW-8) to identify Sushil Arora as present in the Indica is a material circumstance weighing in favour of his innocence and supporting his plea of false implication. The evidence is that Sushil Arora was arrested on 24th February, 2009 when he went to P.S. Chanakya Puri. No test identification parade was held at all qua him. Despite the above evidence of his being a complete stranger to the Santro occupants and public witnesses PWs-2 and 4, dock identifications were effected as noted above by some of them which have no credibility and cannot be relied upon.

(ii) *Implication, arrest and identification of Hemant Garg*

383. It has been vehemently contended by Mr. K. Singhal, learned counsel appearing for Hemant Garg that he was not named by Sunil Kumar (PW-1) in the *rukka* (Ex.PW1/A). He submits that none of the witnesses have identified him as present on the 22nd of February 2009 outside the Chintoo Car Point except Paramjeet Singh (PW-5) who has tried to unbelievably bring in a story of the Indica as having come outside the Chintoo Car Point. Learned counsel would contend that the prosecution has failed to draw any connection between Hemant Garg and the other accused so much so that there is no evidence even to show that Hemant Garg even knew them. It is submitted that merely because an Indica car bearing no. DL3C AX 2192 was registered in his name and stated to have been used by the assailants in the episodes of shooting, the investigating agency has ascertained his name as its registered owner and has implicated him for commission of the offence.

384. There is not a whisper of an explanation as to how the police obtained the identities of Hemant Garg or Sonveer or Vishnu on the court record.

385. So far as the implication of Hemant Garg is concerned, it is in evidence (the DPCR records) that a silver grey coloured Indica bearing No.DL3C AX 2192 was used by the assailants in the commission of the crime.

386. Interestingly, the I.O. Inspector Jagat Singh (PW-47) has stated that the black Santro belonged to one Mahavir Tokas resident of Munirka.

387. The prosecution has examined Mahavir Tokas as PW-22 (**pg 256**) who claimed to be the registered owner of black coloured Santro car bearing no.0002 and stated that after purchase of the vehicle in 2005, he had given the car to his sister Bhawna (also a resident of Mehrauli). From his sister, he learnt that the black Santro has been taken from her by her brother-in-law namely, Paramjeet @ Monu (husband's brother).

388. I notice that an application dated 20th of March 2009 (**pg 284**) was filed by Inspector R.N. Choudhary of the P.S. Chanakya Puri seeking non-bailable warrants to be issued for the arrest of Rajesh Pandey and Hemant Garg. In this application, the prosecution has stated as follows (**TCR pg 2725)**:

> *"... The **assailants** were **bound in another Indica Car No.DL3CAX-2192, which is owned by accused Hemant Garg**. ... It has come to notice that accused Rajesh Pandey has moved to his native place Bihar and accused Hemant Garg is somewhere in Rurkee or Haridwar."*
>
> *(Emphasis by us)*

389. By an order dated 24th March, 2009, the court directed issuance of non-bailable warrants for 19th April, 2009 for Hemant Garg's arrest.

390. Our attention is drawn to an application of anticipatory bail which was moved by Hemant Garg on 17th of April 2009. A

handwritten reply dated 18th April, 2009 thereto was filed by Inspector Jagat Singh, the then SHO of P.S. Chanakya Puri. Inasmuch as the investigating agency has crystallized therein the case against the accused persons, it is necessary to extract this reply which reads as follows :

> *"Most respectfully it is submitted that on 22.2.2009 there was an altercation and scuffle between 1st party Sushil Arora and his associates and 2nd party Mahender Tikla and* ***his associates*** *in Karol Bagh on the issue of money matters. Thereafter the 2nd party left the place in their own vehicles and proceeded towards Mehrauli through Ridge Road. In the scuffle it could be known that the 1st party sustained injuries by the 2nd party. 2nd party consisting of Sushil Arora, Rajesh Pandey and* ***their other 3 associates*** *followed the 2nd party in car no. DL 3C x 2192 Indica and intercepted car no. DL 2FFK 0002 Santro black near Gate of Budha Garden and started spraying bullet on the occupants of the car. in that one occupant of the car namely Ankit Minocha sustained bullet injury on his armpit. again the 1st party sped up their Santro Car and tried to escape from .....(not legible) but after about 250 meters there was red light and the Santro Car got stuck up into .....(not legible). The offending Indica car followed and intercepted the Santro car again at red light. the four occupants of Santro Car came out and tried to escape but they were again sprayed with bullets. In that one of the bullet was hit on the head of Ankit Minocha and one bullet was hit on the right hip of one person namely. Surender. Meanwhile the red light became green and the offending Indica car escaped* ***with the assailants****. later the injureds were taken to trauma centre AIIMS when Ankit Minocha succumbed to the injury.*
>
> *Meanwhile when the incidents was occuring at*

*red light ridge road a call was received at PS that **occupants** **of Indica Car 2192** has shot down one person near Budha Garden and fled from the spot.*

*On 24/2/09 accused Sushil Arora surrendered and he was arrest. A hunt for accused **Rajesh Pandey and his associates** was made but all are absconding. the **details taken from traffic computer** revealed that the owner of **Indica car DL 3c x 2192 is Hemant Garg** S/o Brij Mohan Garg.*

***NBW** against accused Rajesh Pandey and **Hemant Garg S/o Brij Mohan Garg** has been taken and search for them is being made. All are absconding.*

On 9.4.09 the aforesaid Indica car was found abandoned in the area of Vikaspuri and it has been seized.

Accused/applicant Hemant Garg along with Rajesh Pandey, Sushil Arora and others conspired and killed Ankit Minocha brutally and inflicted bullet injury to Surender and all are absconding (except Sushil Arora). Hence in the wake of above facts his bail is strongly opposed."

(Emphasis by us)

391. The above reply refers to Sushil Arora and his "*assailants*"; "*occupants*" of Indica Car No.2192; Rajesh Pandey and his "*associates*". So far as Hemant Garg is concerned, the only reference in the factual narration is to details taken from "*traffic computer*" regarding his ownership of the Indica car. It is thus confirmed herein that the police obtained the details of ownership of the Indica from the traffic computer which revealed that Hemant Garg was the owner.

392. A verification report dated 18th April, 2009, also filed by Inspector Jagat Singh (PW-47) shows that the police had no clue

about the identity of the appellants. Certainly they were not looking for Sonveer or Vishnu on that date.

393. The application was rejected by an order passed on 20th of April 2009 noting submissions of counsel for Hemant Garg and observing as follows (**pg 2263**):

> "*Counsel Sh. Juneja has filed supplement in the form of* ***written submission*** *but submitted that let this written submission be treated as further facts pleaded for anticipatory bail.*
>
> ***Anticipatory bail is pleaded for applicant Hemant Garg on a plea that Indica Car DL-3C-X-2191 involved in this murder case is the registered ownership of applicant Hemant Garg but then Hemant Garg had given this case to one Sh. Yogender Yadav @ Vikas R/o 3/90, Veena Enclve, Nagloi, Delhi, for the purpose of its sale.*** *Counsel was however unable to point out as to since when this case was alleged to have given to Yogender Yadav.*
>
> *It is further pleaded that applicant is innocent and has no connection or concerns with this murder. It is argued that Ld. Counsel that applicant was not at all involved in the money transaction which as per prosecution case had been the issue of quarrel and fight between two groups and deceased/victim a boy Amkit Minocha belongs to one group.*
>
> ***According to prosecution case, five persons occupants of above said Indica Car chased*** *the xxx xxx xxx* ***Two of the culprits forming assailants party have already been identified and named in the FIR....Sushil Arora and Rajesh Pandey. Three, further culprits*** *as party of that group* ***since not known*** *to the victim are sought to be identified by victim/eye witnesses. IO submits that* ***Sushil Arora was taken on 4 days police remand and primarily efforts by the police*** *were to* ***trace out accused culprits*** *but IO admits that* ***no***

<u>further investigation/clue could be worked out during that 4 days police remand of Sushil Arora</u>.

IO submits that <u>since Indica Car belongs to applicant/accused Hemant Garg was involved, he could be one of those unnamed assailants who are yet to be identified</u>. *He, further submits that custodial interrogation of Hemant Garg is necessary for a fair and effective investigation in this case.*

*Keeping in view the **<u>plea of applicant/accused</u>** merely that **<u>he had handed over his car to one Yogender Yadav</u>** but no such plea had yet been conveyed to police, despite police having already obtained arrest warrant against applicant/accused and that he has so far evaded the arrest, his anticipatory bail application does not deserve a favourable order. His application is dismissed."*

(Emphasis supplied)

394. It is evident from the above that the police obtained the particulars of the registration of the Indica used in the crime from the traffic computer of the vehicle registering authority. From this information, they were able to identify Hemang Garg as the owner of the vehicle. In fact, the submission of the investigating officer to the court was that the <u>applicant was being investigated only for the reason that the Indica car stood registered in his name and not because he had been named by any of the co-convicts</u>.

395. Mr. K. Singhal, ld. counsel for Hemant Garg has vehemently urged that in the above application, filed on 20th of March 2009, as well as reply dated 18th April, 2009, <u>the police does not refer to any disclosure statement by Sushil Arora</u>. In fact, before the ld. Additional Sessions Judge, the investigating officer has submitted on 20th April, 2009 that even in Sushil Arora's four days police

remand, the primary efforts by the police to trace out the culprits could not be worked out. This is clearly noted in the order dated 20th April, 2009 rejecting the anticipatory bail.

396. The only allegation against Hemant Garg was that he owned the Indica which was used by the assailants for committing the crime. The police also does not impute any overt act on the part of Hemant Garg in the commission of the crime. It is nowhere stated that Hemant Garg was driving the vehicle on the 22nd of February 2009 at the time of the offence.

397. The order dated 20th April, 2009 further notes the plea of the appellant Hemant Garg that the car stood handed over to one Yogender Yadav. The above order would show that till the 20th of April 2009, Hemant Garg, Sonveer and Vishnu had not been disclosed as participants in the crime and that the investigating agency had been looking for "***unnamed assailants***" who are "***yet to be identified***".

398. As per the evidence of Shri Hari Shah (PW-31), Record Keeper, Transport Authority, Sheikh Sarai, a formal request was also made by Inspector Jagat Singh (PW-47), SHO, P.S. Chanakya Puri vide Ex.PW31/DA only on the 23rd of May 2009 (Ex.PW31/DA) (**TCR pg 3851**) to the Motor Licencing Office, State Transport Authority, Sheikh Sarai seeking ownership and registration details of the Indica car No.DL 3C AX 2192. In response, the Transport Authority informed the police that the vehicle was registered on 20th June, 2007 in the name of Hemant

Garg s/o Shri Brij Mohan r/o 10/2444 Bedan Pura, Karol Bagh, New Delhi (Ex.PW31/A).

399. In this regard, our attention is also drawn to the testimony of Inspector Arun Kumar (PW48A/49) (**pg 447**) who was entrusted with the investigation of the case on 9th of July 2009. This witness has unequivocally stated that he "*came to know about the involvement of accused Hemant Garg in this case on his moving application on 07.08.2009*". Even Inspector Jagat Singh (PW-47) (**pg 386**) has stated that he had collected verification report of the vehicle No.DL3C AX 2192 from the transport authority regarding registered owner and that as per the registration certificate of the above said car, Hemant Garg was the registered owner of this vehicle. It would appear that Hemant Garg has been implicated only as a result of the registration of the Indica bearing No.DL3C AX 2192 standing in his name.

(a) Arrest of Hemant Garg

400. The record does not disclose the steps taken to actually arrest Hemant Garg. It appears that only after the appointment of Inspector Arun Kumar (PW-48A) as the third investigating officer on 9th of July 2009, he started making inquiries with regard to whereabouts of the Hemant Garg.

401. Hemant Garg appeared to have been in custody in FIR No.535/02 registered by the police station Timarpur (**pg 431**). Learning about the fact that the police was looking for him in the present case, on 6th August, 2009, Hemant Garg through his

counsel moved an application before the court of Shri Pritam Singh, Metropolitan Magistrate *inter alia* requesting TIP to be conducted in the present case.

A copy of this application was served upon Inspector Arun Kumar (PW-48A). The investigating officer thereafter filed an application dated 10th August, 2009 (Ex.PW49/A) (**pg 3351**) for formal arrest of the accused Hemant Garg.

402. Hemant Garg's prayer for TIP was rejected by the Magistrate holding that it was for the investigating agency to see whether TIP by the accused is required or not and that the court could not interfere in the investigation.

403. On the 10th August, 2009 itself, Inspector Arun Kumar (PW-48A) also moved a handwritten application dated 10th of August 2009 (Ex.PW49/B) (**pg 982**) requesting the Magistrate to conduct a TIP of Hemant Garg. These applications were decided by the Metropolitan Magistrate by the order dated 10th August, 2009 (**TCR pg 2937**) whereby permission was granted to the Investigating Officer to arrest Hemant Garg in the present case. I find that the order dated 10th August, 2009 on the application (Ex.PW49/B) notes that the accused was in muffled face. It was directed that the application to be put before the Link Magistrate on the same day.

404. In these circumstances, Hemant Garg was arrested on the 10th of August 2009 from outside the court of Shri Pritam Singh, Metropolitan Magistrate (Ex.PW40/C).

However, no TIP was conducted for more than two weeks thereafter.

(b) *Test identification parade of Hemant Garg*

405. On the 12th of August 2009, an application was filed by the investigating officer seeking a TIP of Hemant Garg (**TCR pg 3371**). This application was to be placed before the Link Magistrate that day itself. The Link Magistrate noted that the court was doing TIP in another case (FIR No.72/2009) and directed for it to be fixed for the 13th of August 2009. On the 13th of August, 2009, the matter was deferred till the 17th August, 2009. On this date, the Link Magistrate directed that the application be put up with the case file and production on 24th of August 2009, even though Hemant Garg was produced in muffled face.

406. On the 24th of August 2009, the Link Magistrate did not pass any order on this application.

407. The application was directed to be put up on the 26th of August 2009.

408. The investigating agency proposed to get Hemant Garg's TIP done through four witnesses. Inspector Arun Kumar (PW48A/49) has stated that all the four witnesses were directed to come for the TIP on the 26th of August 2009. (**pg 448**).

409. On the 26th of August 2009, as per Sunil (PW-1), he, (**pg 45**), Paramjeet Singh (PW-5) and Surender (PW-8) reached Jail No.3 at the Tihar Jail together in a private Honda Civic vehicle.

410. Surender (PW-8) states that the fourth witness Ranjeet Singh (PW-4) also reached Tihar Jail and as such four witnesses were present for the TIP (**pg 154 & 155**).

411. The witness has further stated that in the first instance Paramjeet and Ranjeet Singh went inside to conduct the TIP proceedings (Ex.PW4/D2) which was held by Shri Jitender Mishra, MM (PW-35).

412. Ranjeet Singh (PW-4) was the first witness (**pg 990)** and thereafter Paramjeet Singh (PW-5) was asked to identify Hemant Garg from amongst the persons who were of his age and similar stature. Both Ranjeet Singh and Paramjeet Singh failed to identify the accused (**pg 992**).

413. The investigating officer thereafter did not get the TIP conducted from Sunil Kumar (PW-1) and Surender (PW-8) even though they were present. No explanation is given for the same.

414. Inspector Ajab Singh, Special Staff (NDD) filed an application dated 27th August, 2009 (Ex.PW49/C) (**pg 983)** in the court of Shri Pritam Singh, Metropolitan Magistrate, Patiala House Courts, New Delhi seeking a TIP of Hemant Garg through the remaining eye-witnesses. The ld. Metropolitan Magistrate passed an order on this application itself noting that the accused was produced in muffled face and directed that the application be put before the Link court that day. It was noted that the presiding officer had gone for evidence. The TIP was consequently fixed for 28th August, 2009.

415. It is on record that Hemant Garg was produced on the 27th of August 2009 for judicial remand. The appellant contends that he was exposed to the public on this day.

416. In this background, the TIP of Hemant Garg was again held on the 28th of August 2009 by Ms. Surya Malik Grover (PW-44) Metropolitan Magistrate (South-East) (**pg 821**). Both Sunil (PW-1) and Surender (PW-8) correctly identified Hemant Garg on this date.

417. Mr. K. Singhal, learned counsel for Hemant Garg would point out that these proceedings were not properly conducted. The position of Hemant Garg was not changed after his identification by the first witness nor was he made to change his clothes for the purpose of the TIP by the second witness.

418. The appellant has strongly contested the TIP proceedings and his identification by Surender (PW-8) and Sunil Kumar (PW-1). It has been urged that the police had his photographs as he was the convict in the said case arising out of FIR No.535/02. It is submitted that between the 26th of August 2009 and the TIP on 28th of August 2009, the police had shown the photographs of Hemant Garg to the other two witnesses.

419. It is noteworthy that the investigating agency got no TIP conducted by Varun (PW-6) or Manveer Singh (PW-2).

420. It is submitted that the investigating officer did not complete the TIP proceedings on the 26th of August 2009 even though two more witnesses Sunil Kumar (PW-1) and Surender (PW-8) were present as he had intended to show the photographs of the accused

person to these witnesses before they participated in the TIP. Their appears to be substance in this plea inasmuch as no explanation is forthcoming on behalf of the prosecution as to why the TIP was not got conducted by all the four witnesses even though they were all present on the 26th of August 2009 itself. The record does not contain any justification for the same either.

421. Principles stand laid down by the Supreme Court in the judgment reported at ***(2010) 3 SCC 508 : AIR 2010 SC 942, Mulla & Anr. v. State of Uttar Pradesh*** on the necessity for holding the test identification parade in para 44 wherein the court held as follows :

> *"**44.** The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime."*

422. This adds strength to the defence submission that it was because the investigating agency failed to get the desired outcome from two of the witnesses and needed the opportunity to influence the other two witnesses. Given the fact that the entire prosecution case rests on this identification, it would be unsafe to base the

conviction on such obviously dubious result of the TIP held on 28th August, 2009.

423. Mr. Singhal, learned counsel for Hemant Garg would submit that the action of Hemant Garg in filing an application seeking the surrender in the present case on learning about the same and the application filed by him on 10th August, 2009 seeking the TIP supports his innocence. It is submitted that the investigating agency was in the process of concocting a false case and consequently took no action to have the TIP conducted immediately. Learned counsel would submit that after active steps had been undertaken to enable the prosecution witnesses to identify Hemant Garg, the investigating officer filed an application for conducting his TIP. Two of the witnesses Ranjit Singh (PW-4) and Paramjeet Singh (PW-5) completely failed to correctly identify Hemant Garg. For this reason, the investigating agency did not conduct his TIP on the 26th August, 2009 with Sunil Kumar and Surender even though they were present in the Tihar Jail for the purpose, in order to tutor them. Only thereafter, the TIP was got conducted on the 28th of August 2009 with Sunil Kumar and Surender who have correctly identified him. Such identification is certainly not above suspicion, especially, given the complete non-explanation for failing to conduct the TIP on the 26th of August 2009 even though these witnesses were present in the jail.

(iii) Arrest and identification of Sonveer

424. I now examine the implication arrest and identification of Sonveer. The prosecution has examined Inspector Arun Kumar (PW-48A) (**pg 432**) who has stated that on 27th August, 2009 he had received information at about 5:00 pm that Sonveer would be visiting the Coffee Home at Hanuman Road, Connaught Place on a motorbike of Bajaj XCD make bearing registration no.DL-4CB-8976. Consequently, along with S.I. Ajab Singh, Head Constable Vijay and Head Constable Subhash, he proceeded to the spot. At about 6:15 pm, they had overpowered the said motorcycle which was approaching the Coffee Home from the Baba Kharak Singh Marg and upon inquiries, the motorcyclist revealed that his name is Sonveer @ Pinku. Sonveer was consequently, arrested vide memo Ex.PW17/A. His personal search was effected vide Ex.PW17/B.

425. Mr. Rajeev Mohan, ld. counsel for Sonveer would submit that so far as identification of the client is concerned, the witnesses who have been examined by the prosecution, can be examined into three categories. Firstly, the witnesses inside the Chintoo Car Point which included Tikla (PW-9), Hemant (PW-10) and Gajender Singh (PW-11); then the witnesses, namely, Sunil Kumar (PW-1), Paramjeet Singh (PW-5), Varun (PW-6), Surender (PW-8), who have claimed to be the co-passengers with deceased Ankit in black Santro bearing No.DL2FFK 0002, and lastly, two public witnesses namely, Manveer Singh (PW-2) and Ranjeet Singh (PW-4).

426. Mr. Rajiv Mohan, ld. counsel for Sonveer has submitted that the witnesses were clearly connected to each other and were close associates. It is submitted that Manveer (PW-2) who was the only independent eye-witness to the incident has not identified the appellant in his court testimony. Ld. counsel would contest the veracity of the testimony of the witnesses on the same grounds as have been discussed above.

It is submitted that in fact, the murder was committed by some unknown persons and consequently, the other prosecution witnesses have connived to implicate the appellants with some dishonest motive.

427. On 4th September, 2009, Sonveer refused to participate in the TIP on the ground that while in police custody, he had been shown to the witnesses.

428. Mr. Mohan, ld. counsel submit that during this period, he was not kept in a muffled face. Ex.PW17/D and Ex.PW49/C do not state so. I note that the investigating officer also does not state that even at the time of production of Sonveer after his arrest before the ld. Metropolitan Magistrate, his face was kept muffled to prevent his identification by the witnesses.

429. Ld. counsel would submit that it is only in the application for the TIP (Ex.PW49/D) (**pg 984**), it is stated that the appellant was produced in muffled face before the ld. Metropolitan Magistrate at 3:30 pm on 28th August, 2009. There is therefore, no record to show that between the time that he was arrested on 27th August, 2009 till Sonveer's production for the TIP, he was actually kept in

a muffled face to conceal his identity. This would be adequate ground for the appellant to have refused to participate in the TIP.

430. It has been pointed out that the prosecution witnesses have stated that they were called to the police station as and when the accused were arrested. I find that the record of the trial court also contains statement dated 7th September, 2009 (**TCR pg 3545**) of Ranjeet Singh (PW-4) that he had gone to the office of Special Staff NDD at Parliament Street where he identified Sonveer @ Pinku. It is in the evidence of Ranjeet Singh (PW-4) (**pg 90**) that he had identified Sonveer on 7th September, 2009 and Vishnu on 10th October, 2009 in the police station in the presence of Inspector Arun Kumar.

In court on 8th March, 2010, Sunil (PW-1) has identified Sonveer and Vishnu as the persons who were firing from the Indica (**pg 22**). In his cross-examination also, Sunil Kumar (PW-1) refers to three or four boys standing outside the office and a motorcycle found parked behind a car as stated by him in the *rukka*.

431. Manveer (PW-2), a bystander, has not identified any of the appellants as assailants in his court testimony. He stated that he was not able to identify the occupants of the Indica car though the occupants were young boys (**pg 51)**.

432. Ranjeet Singh (PW-4) refers to "*boys*" in the Indica car. The witness states that he identified Sonveer on 7th September, 2009 and Vishnu on the 10th of October 2009 in the police station in the presence of investigating officer Inspector Arun Kumar (PW-47) **(pg 90**). In his court testimony, on 19th April, 2010, PW-4 had

stated that **(pg 59-60**) he can identify them and that subsequent to the TIP proceedings, came to know their names. In court, PW-4 identified Vishnu and Sonveer present among the five accused persons in court as the shooters. PW-4 stated that Vishnu was sitting in the front side of the Indica while Sonveer on the rear left side. He has also attributed the fatal bullet on the head of Ankit as having been fired by Vishnu **(pg 60**).

433. Surender (PW-8) was equally unsure about the number of occupants in the Indica. In his court testimony recorded on 12th of August 2010 (**pg 137**), he states that there were "*around 4 to 5 occupants in that Indica Car*". In the court, he pointed out to Sonveer and Vishnu, as holding firearms while firing at the Santro vehicle with Vishnu being on the front driver's side seat and Sonveer behind him. He identifies Hemant Garg in court as the driver of the Indica and says that he had not been able to see other one or two boys in the Indica and that he could not identify them with confirmation.

(iv) *Implication, arrest and identification of Vishnu*

434. The prosecution examined Amresh Kumar, Assistant Superintendent, Jail No.3, Tihar as PW-38 (**pg 355**) who produced the admission register dated 3rd August, 2000 and the details of Vishnu (Ex.PW38/A). The prosecution led evidence that Vishnu was admitted in Jail No.3 in FIR No.289/2000 under Section 302/34 IPC registered by the police station Prasad Nagar and was

released on bail on 8th January, 2003 by the orders of the learned Additional Sessions Judge.

435. It appears that Vishnu was also implicated in FIR No.47/07 in which he stood incarcerated.

436. Seven months after the incident, without a single step on record to ascertain the whereabouts of the fifth accused or any meaningful efforts to arrest him; without any hue and cry notice on record or publication of citation regarding Vishnu being wanted; in the case, without any sketch with regard to Vishnu, it is in the evidence of Inspector Arun Kumar (PW-48A) (**pg 437**) that, on 26th September, 2009, he received an application from the court of Shri Prem Singh, Metropolitan Magistrate that Vishnu stood rearrested in FIR no.47/07 registered by P.S. Adarsh Nagar.

437. In this case, Inspector Arun Kumar (PW48/A) filed an application for issuing production warrant of Vishnu (Ex.PW49/K) (**pg 980**) which was listed for Vishnu's production on 29th of September 2009.

438. On the 29th of September, 2009, Inspector Arun Kumar (PW48/A) moved an application before the ld. Metropolitan Magistrate for grant of permission for interrogation/arrest of Vishnu in the present case (Ex.PW49/L) and another application for police remand (Ex.PW49/Q). Upon securing permission from the court, the investigating officer arrested Vishnu in the present case vide arrest memo Ex.PW49/M who was interrogated and thereafter sent to judicial custody in the present case.

439. It is the contention of Mr. M.N. Dudeja, ld. counsel that Vishnu was not produced on the 29th of September 2009 in muffled face. On the 29th of September 2009 itself, investigating officer Inspector Arun Kumar moved an application (Ex.PW49/N) (**pg 985**) for getting conducted a TIP of Vishnu wherein it is stated that Vishnu had been produced in muffled face. By an order of the same date i.e. 29th of September 2009, the TIP of Vishnu was fixed one week later for the 5th of October 2009. The order notes that the accused was in muffled face.

440. Vishnu had refused to join the TIP proceedings (the record of these proceedings had been proved on record before the Trial Court as Ex.PW49/P).

441. It is claimed by Inspector Arun Kumar (PW48/A) that on 8th of October 2009, he had also obtained police custody and he recorded Vishnu's disclosure statement (Ex.PW49/R). The witness has stated that Sunil Kumar (PW-1), Ranjeet Singh (PW-4), Paramjeet Singh (PW-5) and Surender (PW-8) had identified accused Vishnu in the police station (**pg 438**).

Vishnu was sent to judicial custody only on 15th of October 2009.

442. I find that the ld. trial judge has rejected Vishnu's plea that he refused to participate in the TIP proceedings (Ex.PW49/P) for the reason that he was produced in unmuffled face and there was possibility of his being seen by the witnesses. This plea has been rejected in para 158 (**pg 693**) by the trial court observing that there was no evidence that any of the witnesses were available.

However, other than an oral statement of Inspector Arun Kumar (PW-48A) that he had muffled the face of the accused during interrogation, there is no documentary evidence of the same. In fact, other than the disclosure statement attributed to Sushil Arora (which is denied by Inspector Jagat Singh (PW-47)) that Vishnu was a stranger to all the prosecution witnesses, the record is completely silent as to wherefrom the prosecution got complete name and identification of Vishnu to connect him with the commission of the offence.

443. So far as his refusal to participate in the Test Identification Parade is concerned, Vishnu has led defence evidence. He has examined his wife Pooja as DW-3 (**pg 620**) who has proved that on 17th September, 2009, at about 2:00 pm, police officials from P.S. Chanakya Puri which included Inspector Arun Kumar (PW48/A) had come to their house and inquired about her husband Vishnu. The police had demanded a photograph of her husband from her. They searched her house and took one photo album which contained photographs of her husband.

444. DW-3 has disclosed that she sent a telegram in this regard to the higher authorities including the Commissioner of Police and proved the receipt of the telegram as Ex.DW-3/A (**pg 878**).

445. I find that Inspector Arun Kumar (PW48/A) (**pg 455**) has admitted that he had received a telegram sent by Vishnu's wife to the effect that the police had taken the photographs of Vishnu and other documents from his house prior to his arrest. This telegram was thus in the power and possession of the investigating officer

who ought to have produced the same. It is trite that irrespective of burden and onus of proof, the party in possession of the best evidence is bound to produce the same. The police also did not deny the contents of the telegram.

446. On this aspect, reliance has been placed on the pronouncement by the Single Judge of this court reported at ***2009 SCC OnLine Del 3960, Ghanshyam @ Bablu v. State,*** relevant paras whereof are thus :

> *"12. It would be appropriate to take note of deposition of PW1 and PW7 in this regard. Regarding Avdhesh, Raghuvansh Arora PW1 states as under:*
>
> > *"I was informed by the police after 2 - 2.5 months that I should go to identify the accused. Police have informed the name of the accused which I do not remember. Police have come to me during day time to inform the name of the accused."*
>
> *I was shown some photographs of the suspects by the crime team when they came on the second day of the incident. Apart from this another photograph bundle was also shown to me.*
>
> *xxx xxx xxx*
>
> *15. As far as identification of accused Ghanshyam is concerned, it has come on record that his TIP was to be held on 13.04.2004. He was arrested on 28.03.2004 and was* ***produced in the Court*** *on 01.04.2004 with an* ***unmuffled face****.* ***His photographs has been taken*** *and shown to some persons. In any case from 01.04.2004 to 13.04.2004 the* ***possibility of photographs of the appellants being shown to the witnesses cannot be ruled out.*** *It is also not the case of the prosecution that he was brought in a muffled case when he was called for TIP. In these circumstances,* ***no adverse inference can be drawn for the said appellant for having refused to***

***participate in the TIP**. Similarly, in the case of Raju @ Katuwa **TIP took place** on 07.04.2004 i.e. **7 days after the formal date of arrest**. It has been submitted on behalf of the appellant that the appellant had been arrested on 28.03.2004 and was kept in illegal custody. The purpose of the said detention was to ensure that their identification by the witnesses is obtained prior to their appearance in the Court. It has been submitted **that delay of 4 days in conducting the TIP is fatal to the case of the prosecution**. Reference has been made to the judgment delivered by the Supreme Court in the case of **Bali Ahir v. State of Bihar, 1983 CriLJ 434 (SC)**. Moreover, reference has been placed on 3-Bench judgment, **Muthuswami v. State of Madras, AIR 1954 SC 4**. It has been stated that PW-1 has admitted that he has also shown the photographs of suspects by the crime team on the second day of the incidence. In this regard PW-1 also deposed 8-10 days prior to the identification of the appellant Raju @ Katuwa, the investigation officer also informed the complainant about the arrest of the appellant. Thus, carrying out proceedings of identification on the part of the prosecution. It has also been submitted, that nothing has been brought on record to show, the appellants were in possession of any deadly weapon a prerequisite invoking under Section 397 IPC no such weapon has been recovered.*

xxx xxx xxx

*20. Much emphasis has been laid by the ld. App that all the three appellants were identified by PW-1 and PW-7 who had no enmity with them. However, **it is not the case of the prosecution that they knew the appellants prior to the date of incident. As such on account of highly suspicious way of holding their Test Identification Parade, their deposition of identification of the appellants becomes doubtful**. Taking all these facts into consideration, I am of the considered view that the conviction of the appellants cannot be sustained in this case as the prosecution has **failed to prove its***

> ***case beyond reasonable doubt***. *Accordingly, all the three appeals are allowed. A copy of this order be sent to the Jail superintendent who would release the appellants forthwith if not wanted in any other case. A copy of the order be also sent to the trial court along with the trial court record, if any."*
>
> *(Emphasis by us)*

447. In this case, the court disbelieved identification of the accused persons *inter alia* for the reason that identification of the appellants was found untrustworthy. The court also disbelieved the identification of the accused in the TIP held about 15 days after the arrest, for the reason that the identity of the accused persons having been revealed to the witnesses and the possibility of photographs of the accused being shown to the witnesses could not be ruled out.

448. The ld. trial judge in para 159 (**pg 693**) of the impugned judgment has considered the testimony of Pooja (DW-3) wife of accused Vishnu and has noted that the telegram sent by Pooja was admittedly received by Inspector Arun Kumar (PW48/A).

449. In the present case as well, the defence has led credible evidence that the police had taken the album of the accused Vishnu on 17th September, 2009 which was supported by the documentary evidence of the telegram in this regard admittedly having been sent and received by the police. It is trite that the defence has to merely create a doubt with regard to the prosecution version.

450. In fact, the trial court has failed to note that the police did not deny the contents and did not send any response to the telegram. It did not repudiate the contents of the telegram. There

would be no reason for Pooja (DW-3) to send this telegram if the album of the accused had not been taken by the police officers. There is no basis at all for the finding in para 159 of the impugned judgment that sending of the telegram was an attempt on the part of the accused Vishnu to create an *alibi* for himself other than the general bias to disbelieve the defence.

451. In fact the testimony of Pooja (DW-3) was extremely material inasmuch as Vishnu was neither described nor named by any of the witnesses in the statements under Section 161 of the Cr.P.C. There is no recovery of any weapon at his instance. The only piece of evidence to link Vishnu to the commission of the offence is his dock identification by witnesses months after the occurrence.

452. Sunil (PW-1) (**pg 33**) has stated that he had identified Vishnu in the police station, when he was being interrogated by the police. In these circumstances, the refusal to participate in the Test Identification Parade by Vishnu appears to be justified.

453. The only evidence led by the prosecution so far as Vishnu is concerned, is that of his alleged dock identification by the prosecution witnesses. I have discussed at length, the impossibility of the prosecution witnesses being in a position to identify the occupants of the Indica car and several reasons therefor in great detail above. There is no evidence that these witnesses had ever known or seen the appellants, most specifically Vishnu, at any time before the incidents on the 22nd of February 2009.

454. Even if it could be believed that the witnesses have given honest evidence that they had actually seen Vishnu on the 22nd of February 2009, none of them have pointed out any distinguishing features or marks which could enable his identification at a subsequent date.

455. In this background, the dock identification, more than a year after the occurrence, by the prosecution witnesses of Vishnu, as one of the assailants shooting from the Indica, is completely impossible and unbelievable. This appellant cannot be convicted on this tenuous evidence without anything more to link him to other appellants or the commission of the offence.

(v) *Arrest and identification of Rajesh Pandey*

456. Our attention is also drawn to the testimony of Sunil (PW-1) who refers to "*the person/occupant" in the Indica car in the front of left side seat and his body up to waist was out of the window when shot was fired*. At the second shooting spot also, PW-1 refers to only "*the boy who had fired on our Santro car earlier also in a same position when his body up to waist was out of the front left side window of the Indica car, had fired again towards we and the vehicle*" (**pg 17)**. At a later stage, he refers to "***boys*** *who fired from the front left side window of the Indica car as well the driver in that Indica car were those amongst four boys who were there present outside Chintoo Car Point when we had left that spot just prior to this incident and I can identify those two boys also if shown to him*".

457. The appellant Rajesh Pandey was the last to be arrested. The police claim to have received secret information regarding the presence of Rajesh Pandey that he was sitting at New Delhi Railway Station, Near Ajmeri Gate (**pg 439**).

458. Thereafter accompanied by his staff and Sunil Kumar (PW-1), he claims to have reached the New Delhi Railway Station. On the pointing out of Sunil Kumar (PW-1), Inspector Arun Kumar (PW-48A) claims to have arrested Rajesh Pandey vide memo Ex.PW1/C (**pg 1001**). His personal search was conducted vide Ex.PW1/D.

459. The prosecution has examined Head Constable Subhash Chand (PW-40) (**pg 360**) as having accompanied Inspector Arun Kumar (PW-48A) on the 27th of August 2009 to establish the arrest of Rajesh Pandey on the 11th of November 2009.

460. Inspector Arun Kumar (PW-48A) and Head Constable Subhash Chand (PW-40) have testified that Rajesh Pandey made a disclosure statement (Ex.PW40/A) and led the police to the place of the incident which was noted in memo Ex.PW40/B.

461. Rajesh Pandey refused TIP on 19th November, 2009 for the reason that he had *"been shown to the witnesses at police station by the police*" (**TCR pg 3825).**

462. This witness was identified in court by the following witnesses Sunil (PW-1) on 8th March, 2010, Paramjeet (PW-5) on 20th April, 2010 and Surender (PW-8) on 12th August, 2010. It is noteworthy that according to these witnesses, he was sitting behind the driver towards further right in the Indica car. At best, the

witnesses could have had a fleeting glimpse of the passing Indica at the drink cart and nothing thereafter. No description of the occupants of the Indica has been found to have been given by any of the witnesses. The evidentiary value of such dock identification is certainly unreliable to premise the conviction.

463. After the arrest of Rajesh Pandey, on 2nd of January 2010, a second supplementary chargesheet was filed submitting that his disclosure statement corroborated the disclosures of Sushil Arora, Sonveer and Vishnu and facts disclosed by accused Vishnu during investigation.

XIV. Necessity of TIPs and value of dock identification of complete strangers months after the occurrence

464. For the first time, in court, on the 20th of April 2010 (**pg 93**), Paramjeet (PW-5) identified Sonveer, Vishnu and Hemant Garg as those three boys who had got out from the Indica car at the Chintoo Car Point and was standing outside the office of the accused. This witness was confronted with his statement under Section 161 of the Cr.P.C. (Ex.PW5/D) where he had not mentioned the description of the culprits to the police (**pg 102**).

465. In court, Varun (PW-6) has identified Rajesh Pandey, Sonveer, Vishnu and Hemant Garg as involved in the brawl over taking out of the vehicle (**pg 113**) and pointed towards Sonveer and Vishnu as those two persons who were firing with their firearms while occupying the Indica (**pg 114**).

466. The witness admitted that he had not told the police the names of the accused persons Sonveer and Vishnu, but claimed in the witness box that he had told the police that accused Sonveer and Vishnu were firing *"while they have taken out upper half of their body out of the Indica front and rear side windows of the car..."*. But I find that in his statement under Section 161 of the Cr.P.C. (with which he was confronted), Varun has only stated that one silver coloured Indica came at great speed; overtook from the right side and fired at their car. Varun (PW-6) has categorically stated that he was not able to see the persons who had fired from the moving Indica car (**pg 132**). He claimed that he had given the physical description of the offenders regarding their complexion, height etc. in his statement to the police and he has also claimed that he had told the police that the he had seen Sonveer and Vishnu firing from their firearms.

However, when confronted, such information was also not found recorded in his statement Ex.PW6/PA. The witness thus made material improvements in his evidence.

467. I find that Varun (PW-6) (**pg 131**) could not even tell whether any glass had fallen inside the car consequent to the bullet piercing it. He was also not aware whether any blood had fallen inside the Santro car from the wound sustained by Ankit. Can dock identification by such a witness be relied upon at all?

468. In the present case, I am concerned with persons who are complete strangers to the prosecution witnesses. Four Santro occupants (PWs-1, 5, 6, 8) and two public witnesses (PWs-2 and 4)

have claimed to have seen two shooters seated on the left side window seats of the Indica and hanging out of the windows, wielding firearms who were engaged in shooting at the black Santro. The witnesses vary in their testimony with regard to the other occupants and make identification in court.

469. None of the witnesses remotely suggest that there was any feature of the occupants of the silver grey Indica car which would distinguish them from other persons. No description of these persons is mentioned in the statements of the witnesses under Section 161 of the Cr.P.C.

470. It is in evidence that Sushil Arora was not even called upon to participate in any Test Identification Parade by the prosecution.

471. I may also notice the judicial pronouncement reported at ***(2009) 15 SCC 35, Ramesh v. State of Karnataka***. In this pronouncement, the Supreme Court has culled out the principles laid down in judicial precedents on the evidence of identification of accused persons at the trial for the first time. I extract hereunder the relevant portion of the pronouncement in paras 28, 29, 30 and 32 which read as follows :

> ***"28.*** *Mr Chaudhary would submit that in all cases, it is not necessary to hold the test identification parade. That may be so. In a case of this nature, the test identification parade would have been meaningless as the appellants were shown to PW 3 in the police station. The appellant was shown to PW 3 at the police station. He was identified in the court also.*
>
> ***29.*** *Reliance has been placed by Mr Chaudhary*

on ***Malkhansingh v. State of M.P. [(2003) 5 SCC 746 : 2003 SCC (Cri) 1247****] , wherein this Court opined: (SCC pp. 751-52, para 7)*

> *"7. ... The* ***evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character****. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure.* ***Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration****."*

It was furthermore held: (SCC p. 753, para 10)

> ***"10.*** *It is no doubt true that much evidentiary value cannot be attached to the* ***identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason***

to remember the person concerned, if the identification is made for the first time in court."

Judged by the aforementioned legal principles laid down therein, in our opinion, the identification of the appellant by PW 3 in the court cannot be held to be trustworthy.

30. *Reliance has also been placed by Mr Chaudhary on a judgment of this Court in* ***Asharfi v. State [AIR 1961 All 153****] , wherein it was held that identification by only one person may not be relied upon stating: (AIR p. 166, para 46)*

"46. ... ***Hence, only one identification cannot eliminate the possibility of the pointing out being purely through chance and for this reason is insufficient to establish the charge****."*

xxx xxx xxx

32. *In* ***Ravindra Laxman Mahadik v. State of Maharashtra [1997 Cri LJ 3833 (Bom)****] , in a case involving Section 395 of the Code of Criminal Procedure, it was opined: (LJ pp. 3833-34, para 9)*

"9. I find merit in Mr Mooman's submission that it ***would not be safe to accept the identification evidence of Manda Sahani****. Manda Sahani in her examination-in-chief stated that on the place of the incident, there was* ***no light****. In her cross-examination (para 6) she stated that* ***it was dark at the place of the incident but, slight light*** *was emanating from the building situate on the shore. The* ***distance between the building and the place where Manda Sahani and her husband were looted*** *has not been unfolded in the evidence. The learned trial Judge has observed that the evidence of Vinod Sahani is that the incident took place at a distance of about 100 ft from the Gandhi statute, where the meeting was held. What he wanted to convey was that hence there must have been light at the place of*

incident in my view, on the face of the definite statement of Manda that it was dark as there was only slight light, and bearing in mind that the incident took place at 9.30 p.m. in the month of February 1992, it would not be safe to conclude that there was sufficient light on the place of the incident enabling Manda Sahani to identify the appellant."

The decision of the Allahabad High Court in Asharfi [AIR 1961 All 153] was followed therein."

(Emphasis by us)

472. Valuable light is shed on the issue under consideration in a pronouncement of the Supreme Court reported at ***(2015) 6 SCC 623, Iqbal & Anr. v. State of U.P.*** wherein the court has deconstructed the evidence on record and recreated the scene of the crime. Even though, the observations were made in factual context, however, the observations of the court deserve to be extracted inasmuch as, I have discussed above, that it is impossible for strangers to be able to affirmatively identify the accused persons in the facts situation in the present case. I extract hereunder paras 11, 12, 13 and 15 of the pronouncement wherein the value of identification of the miscreants in the Test Identification Parade has been discussed. The same reads as follows :

"11. *In our considered view,* ***it is unbelievable that on a new moon night when it was pitch dark, the witnesses who were frightened and who were hiding themselves behind the walls in order to save themselves, could have seen actual faces of the accused persons just by flash of torchlights*** *on their faces and in the light of*

lantern. ***Further, there were about 14-15 dacoits in number, all armed with deadly weapons and were continuously making ingress and egress in the house of the deceased, it becomes inconceivable as to how the witnesses standing at a distance in a feeble light would have been able to identify the dacoits.***

12. When the witnesses are in a panicky state and standing at a distance of three-and-a-half yards and five-six yards, it is doubtful whether the witnesses would have gained an enduring impression of the identity of the accused. *In the commission of offence of dacoity, identification becomes susceptible to errors and miscarriage of justice. In Hari Nath v. State of U.P. [(1988) 1 SCC 14 : 1988 SCC (Cri) 14] , this Court held as under: (SCC pp. 19-21, paras 16-19)*

> *"16. ... The conduct of an identification parade belongs to the realm, and is part of the investigation. The evidence of test identification is admissible under Section 9 of the Evidence Act.* ***But the value of the test identification, apart altogether from the other safeguards appropriate to a fair test of identification, depends on the promptitude in point of time with which the suspected persons are put up for test identification. If there is unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself, detracts from the credibility of the test.***
>
> *17.* ***The one area of criminal evidence susceptible of miscarriage of criminal justice is the error in the identification of the criminal. Indeed Prof. Borchard's Convicting the Innocent records several criminal convictions in which the accused was subsequently proved innocent. The major source of the error is to be found in the identification of the accused by the victim of the crime. Indeed the learned author refers to the source of mistaken identification thus:***

'The emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally — the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused.'

(See Identification Parades II—Criminal Law Review, 1963—p. 546.)

18. Glanville Williams in The Proof of Guilt — (Hamlyn Lectures) — refers to the errors of recognition breeding an invincible assurance in the witnesses, highly deceptive for those who are not forewarned of such possibilities, and excerpts Gorphe's results of a continental investigation, thus:

***'There is no difference from the subjective point of view**, between true and false recognition, so far as their intrinsic qualities are concerned, and there are no objective signs to distinguish one from the other. ... **The witness's certainty may not be immediate, without this delay being necessarily a sign of error. Nevertheless, error is more frequent when recognition comes some time after seeing** ....*

The act of recognition is very open to suggestion in all its forms…. Resemblance is a matter of relativity. For a white person, all negroes are like each other, and conversely. A person can much better distinguish those of his own age and condition than those of different ages and condition. Uniform is a cause of fallacious resemblance, above all for those who do not wear it.'

19. ***The evidence of identification merely corroborates and strengthens the oral testimony in court which alone is the primary and substantive evidence as to identify."***

(emphasis supplied)

13. *As noticed earlier, test identification parade was conducted in jail on 15-11-1979 by PW 6 Special Executive Magistrate in which the witnesses PW 1, PW 2 and PW 3 identified the accused.* ***As far as test identification parade is concerned, it is relevant to note that accused Kripa has contended that he had been falsely implicated in the case because of the rivalry*** *with Rampal Singh and his maternal uncle Mangeram. Accused Kripa also pleaded that the witnesses knew them as they were living in nearby villages and because of rivalry, they were being falsely implicated in the case. So far as Appellant 2 Khurshed and another co-accused Kishnu are concerned, they had stated that they were arrested by the police from their houses and they were shown to the witnesses at the* ***police station and they were also photographed before holding the test identification parade.***

xxx *xxx* *xxx*

15. ***The evidence of identification of the miscreants in the test identification parade is not a substantive evidence. Conviction cannot be based solely on the identity of the dacoits by the witnesses in the test identification parade. The prosecution has to adduce substantive evidence by establishing incriminating evidence connecting the accused with the crime, like recovery of articles which are the subject-matter of dacoity and the alleged weapons used in the commission of the offence."***

(Emphasis by us)

473. Let us examine the position regarding knowledge of names of the appellants. Tikla (PW-9) had business dealings with Sushil Arora alone and had met Rajesh Pandey with him inside the Chintoo Car Point on the 20th February, 2009. On the 22nd of February 2009, out of all the prosecution witnesses, only Tikla (PW-9), Hemant (PW-10) and Gajender Singh (PW-11) had actually met Sushil Arora and Rajesh Pandey. There is no evidence of Manveer (PW-2), Ranjeet Singh (PW-4), Paramjeet Singh (PW-5), Varun (PW-6) and Surender (PW-8) having ever seen Sushil Arora prior to the incident. So their names and features were known to only Tikla (PW-9), Gajender (PW-11) and Hemant (PW-10) and not to any of the eye-witnesses. Hemant Garg stands named as the owner of the Indica in the official registration records wherefrom his name has emerged.

474. Qua the other two Sonveer and Vishnu, a mere altercation over parking was asserted, that too of the short duration of a couple of minutes.

475. The incidents of shooting have occurred on the 22nd of February 2009 in a flash of moments, the accused persons were in a fast moving Indica.

476. The five witnesses were occupants of the black Santro car which had tinted glasses. The shooters were shooting at it from a fast moving Indica in the first incident. Then when it halted behind the Santro, the panic stricken prosecution witnesses were bent upon on somehow escaping. In such a scenario, there is little possibility

and scope of the prosecution witnesses having noted facial features or other physical attributes of the occupants of the Indica so as to be able to recognize them.

477. I may usefully consider a recent pronouncement of the Supreme Court reported at ***(2016) 4 SCC 735, State of Maharashtra v. Syed Umar Sayed Abbas & Ors.*** wherein the court has disbelieved identifications by eye-witnesses in circumstances similar to those set out hereinabove. In this case, on 12th August, 1995 at about 3:00 pm, when the deceased was sitting in a Ganesh Festival *pandal*, busy in talking with PW-6 (an injured eye-witness) who was a contractor for decoration of the *pandal*, two unknown pesons entered the *pandal* and opened fire on the deceased from point blank range. Allegedly, these assailants were escorted by three other persons as well. The noise of the firing created commotion in the *pandal*. When PW-8 tried to flee, he was hit by one of the bullets resulting in his fall. The assailants managed to escape. When rushed to the hospital, the deceased was declared brought dead. In this case, the conviction of the five of the accused pesons was reversed by the High Court. The challenge by the State before the Supreme Court was rejected by the court observing that the prosecution had arrayed five eye-witnesses including one injured eye-witness but the incident of firing occurred in such circumstances wherein much time was not available to the eye-witnesses to clearly see the accused, though it was broad daylight. There was a commotion after the firing and everyone was running to shelter themselves from the firing. In

such a situation, it was imperative that the test identification parades were conducted without any delay. The TIPs were conducted, the first about one and a half months of the incident; while the second was held after more than a year of incident (because an accused person was arrested after a year). In this case, the High Court was of the view that the trial court had placed unwarranted reliance on the TIPs in arriving at the guilt of the accused persons when the same suffered major discrepancies along with the inconsistencies of the depositions of the eye-witnesses to that of the injured eye-witness' account.

The main issue which was considered by the Supreme Court is whether the identity of the accused was properly established with the aid of the testimonies of the eyewitnesses and whether the test identification parades were conducted properly.

478. It was held by the Supreme Court that it was highly doubtful that the eye-witnesses could have remembered the faces of the accused after such a long time. I extract hereunder paras 9 and 16 to 18 of the pronouncement which set out the factual narration (very similar to the facts of the present case) as well as the consideration by the Supreme Court hereafter :

> *"9. There are **five eye-witnesses**, including the injured eyewitness. We shall peruse their statements one by one. PW1 allegedly recognized two persons, who shot at the deceased and the injured PW6, as A1 and A12, but his evidence suffers few infirmities. He stated that he first heard some shots and then some noise like bursting of firecrackers and saw the accused firing at PW6 when he was running towards the Police Chowky nearby. The*

major inconsistency is with respect to his deposition regarding the Test Identification Parade. He stated that in the ***Test Identification Parade held on 30.8.1995****, at Arthur Road Prison, he had identified* ***four persons out of 10-12 persons standing in the row****. According to the prosecution, the Test Identification Parade was conducted by PW21 (Special Executive Officer) on 30.9.1995. Even if it is presumed that the date was stated to be incorrect by mistake, the fact remains that PW21 deposed that he conducted 2 Test Identification Parades on that day. In the first Parade, he placed A1 and one more accused who died later and in the second, he placed A3 and A4 for identification. At no point of time, 4 accused were put together for identification for PW1 to identify out of the whole group. This contradiction shows that it is not clear as to whether he rightly identified the accused. Also, he stated that in another parade held after almost a year, he identified A12. That parade was conducted by PW18 (another Special Executive Officer). We are aware that A12 was arrested by the first week of September, 1996 and thus the Test Identification Parade was conducted on 4.10.1996, but it is too large a gap for PW1 to have remembered his face.*

xxx xxx xxx

16. *The learned counsel for the respondent-accused has cited the decision of this Court in* ***Siddanki Ram Reddy v. State of A.P. [Siddanki Ram Reddy v. State of A.P., (2010) 7 SCC 697 : (2010) 3 SCC (Cri) 483****] wherein it was held: (SCC pp. 703-04, para 24)*

> ***"24. When an attack is made on the injured/deceased by a mob in a crowded place and the eyewitnesses had little time to see the accused, the substantive evidence should be sufficiently corroborated by a test identification parade held soon after the occurrence and any delay in holding the test identification parade may be held to be fatal to the prosecution case****."*

17. *It is very clear that* ***in the present case the incident of***

***firing occurred in the circumstances wherein <u>much time was not available for the eyewitnesses to clearly see the accused</u>**. In such a situation, it was of much more **importance that the <u>test identification parades were to be conducted without any delay</u>**. The **first test identification** parade was held by PW 21 after **about 1½ months of the incident. The second test identification** parade was conducted by PW 18 **after more than a year of the incident**. Even if it is taken into account that A-12 was **arrested after a year and within one month thereafter the test identification parade was conducted, <u>still it is highly doubtful whether the eyewitnesses could have remembered the faces of the accused after such a long period. Though the incident took place in broad daylight, the time for which the eyewitnesses could see the accused was not sufficient for them to observe the distinguishing features of the accused, especially because there was a commotion created after the firing and everyone was running to shelter themselves from the firing.</u>**"*

xxx xxx xxx

*18. **In view of the discussion in the foregoing paragraphs, we are of the considered view that the testimonies of the witnesses suffer various infirmities and contradictions and the Test Identification Parade was not conducted properly and was delayed. The High Court is, therefore, correct in giving the benefit of doubt to the accused as their identity had not been clearly established by the prosecution**.*

(Emphasis by us)

479. I find that the Supreme Court has disbelieved the identification of the accused persons by the prosecution witnesses on the several grounds which exist in the present case as well. Just as the facts in the precedents, the witnesses do not know the accused persons from before. There was no sufficient opportunity

to see the accused persons. Either no TIP was held or it was many months after the occurrence.

480. I may also refer to the pronouncement reported at ***1992 (3) CRIMES 5, State of Maharashtra v. Sukhdeo Singh & Anr.*** This case was related to the assassination of General A.S. Vaidya. In this case, the accused was identified for the first time in court after a long lapse of time. It was held that it would be extremely risky to place implicit reliance on such identification without corroboration.

481. I extract hereunder the observations of the court which shed material light on the instant case :

> *"19. From the facts discussed above it becomes clear that the direct evidence, if at all, regarding the identity of the persons who moved about in different assumed names is either wholly wanting or is of such a weak nature that it would be hazardous to place reliance thereon without proper corroboration.* ***As pointed out earlier the direct evidence regarding identity of the culprits comprises of (i) identification for the first time after a lapse of considerable time in Court or (ii) identification at a test identification parade. In the case of total strangers, it is not safe to place implicit reliance on the evidence of witnesses who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court. In the present case it was all the more difficult as indisputably*** *the accused persons had since changed their appearance.* ***Test identification parade, if held promptly and after taking the necessary precautions to ensure its creditability, would lend the required assurance which the court ordinarily seeks to act on it****. In the* ***absence of such test identification parade*** *it would be* ***extremely risky to place implicit reliance on***

identification made for the first time in Court after a long lapse of time and that too of persons who had changed their appearance. *We, therefore, think that the learned trial judge was perfectly justified in looking for corroboration. In Kanan & Ors. v. State of Kerala, [1979] SCC 621 this Court speaking through Murtaza Fazal Ali, J. observed:*

> *"It is well settled that* ***where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I. parade to test his powers of observations.*** *The idea of holding T.I. parade under Section 9 of the Evidence Act is to test the* ***veracity*** *of the witness on the question of his* ***capability to identify an unknown person whom the witness may have seen only once****. If no T.I. parade is held then it will be wholly unsafe to rely on his testimony regarding the identification of an accused for the first time in Court."*

We are in respectful agreement with the aforequoted observations."

(Emphasis by us)

482. No description at all of any of the accused persons has been given by any witness. No sketch of any of the accused persons was drawn up by the police. No hue and cry notice in order to enable the police to trace out the accused persons was effected.

483. A vital witness was the drink cart vendor Niranjan s/o Jitender described and shown on the site plan (Ex.PW26/B). The Santro was going from the Karol Bagh side towards the Dhaula Kuan and was on the left side of the road. It is in the evidence of

the witnesses that this cart vendor was supplying drinks to the black Santro and therefore, would have been facing the road when the Indica went past in the same direction. This vendor was best positioned to testify about the shooting as well as identification of the Indica occupants. Despite his availability, his critical evidence, especially regarding identity, has been kept away.

484. In the present case, only Sushil Arora had surrendered one day after the incident.

485. In the present case, no TIP of Sushil Arora was conducted at all. So far as Rajesh Pandey is concerned, he was arrested only on 11th November, 2009 i.e. more than nine months after the incident, and certainly there could be no meaningful identification.

486. Hemant Garg surrendered in court on the 10th of August 2009 i.e. five and a half months after the incident. For the first time, his TIP was conducted on the 26th of August 2009. There was unwarranted delay in holding the TIP, not only after the incident but of two weeks even after his arrest. After failure of the two of the witnesses (Ranjeet Singh – PW-4 and Paramjeet Singh – PW-5) to identify him on the 26th of August 2009, the TIP by two more witnesses (Sunil – PW-1 and Surender – PW-8) though present, was not conducted on 26th August, 2009 but was conducted on 28th August, 2009. This by itself renders Hemant Garg's identification by the witnesses suspect. The dock identification of Hemant Garg by Paramjeet Singh (PW-5) and Ranjeet Singh (PW-4) is suspect.

487. On the same aspect, reference may be made to the pronouncement of a Division Bench pronouncement of this court reported at ***1995 SCC OnLine Del 418, Ten Singh v. State (Delhi Admn.)***. In this case, the court observed that the investigating officer recorded the statement of eye-witnesses two or three days after the offence even the witness was actually available on the date of the occurrence. Before the test identification parade, the investigating officer did not take the trouble to keep the face of the accused person muffled before he was produced for the parade. The dock identification was also disbelieved.

488. Sonveer was arrested on 27th August, 2009. His TIP was offered only on 4th of September 2011 which he refused on the ground that he had been shown to the witness.

489. Similarly Vishnu was arrested on 29th September, 2009 and he refused his TIP on 5th October, 2009.

490. The judgment in ***Ten Singh*** has been discussed by the ld. trial judge in para 62 of the impugned judgment (**pg 694**) and held inapplicable for the reason that in ***Ten Singh,*** the witnesses were severly injured and in deep shock**.**

I may note that in the present case, it is the case of the prosecution that the occupants of the Indica car were wielding firearms and shooting bullets at the Santro car. The extent of apprehension and anxiety of these occupants would be much graver. The failure of the eye-witnesses to give any description of the accused persons who were complete strangers to the witnesses or refer to any special marks or features certainly would vitiate

identification of the accused in a TIP held several months after the incident (in August 2009 in the case of Hemant Garg) or the dock identifications of all the appellants even later.

491. Varun (PW-6) was never even called upon to participate in any TIP for the purposes of identification of Hemant Garg or the other appellants.

492. In support of the submission that in these circumstances, even though Hemant Garg had been identified in the TIP on 28th August, 2009, it had no evidentiary value, reliance is placed on the Division Bench pronouncement of this court reported at ***(1990) CRI. L.J. 68, Parmod Kumar v. The State*** wherein the court had observed thus :

> ***"8.*** *The evidence of identification by its very nature is weak type of evidence. It is therefore all the more necessary that the prosecution should affirmatively prove that there was no possibility of the accused being shown to anybody.* ***The witnesses who are examined by the prosecution should have been asked as far as possible to give broad description of the accused while recording their statement under section 161 Cr.P.C.*** *An invalid plea taken by the accused would not validate the prosecution action unless it is shown that proper precautions were taken not to show the accused to any one before the test identification parade.* ***The accused does not know and will not know if he has been seen by the eye-witnesser. He has only to show a mere possibility of his being shown to the witnesses***.
>
> ***9.*** *In* ***the present case, we find complete justification*** *for Mr. Sethi to urge that* ***the appellant was justified in refusing to join the test identification parade***. *The appellant, in our view, on the facts this case, has sufficiently shown that there was possibility of his being*

shown to the witnesses. The appellant was arrested on 25th of November 1982 and on the same day, according to the prosecution case and the evidence, he is said to have made a disclosure statement. After making the disclosure statement he was taken to Roshanara garden where he is stated to have got recovered the alleged weapon of offence. It was only thereafter that his face was allegedly muffled and he was taken to the court for test identification parade. The investigating officer has not been examined by the prosecution. He, in fact, was the only person who could have given the details in respect of the pre-cautions taken by him to rule out the possibility of the appellant being seen by the eye-witnesses. In the circumstances of this case, therefore, is every possibility that the appellant might have been seen by the witnesses when the recovery was allegedly being made at the instance of the appellant. The least that can be said is that the ***possibility of his being seen by the witnesses during this period could not be ruled out. That apart, none of the eye-witnesses examined in this case had given any sort of description of the appellant in their statements under section 161 Cr.P.C****. It is the prosecution case that* ***during the process of the recovery the appellant was not in muffed face****. In our view, therefore,* ***the appellant was justified in refusing to join the test identification parade as he has clearly established the possibility of his being shown to the eye-witnesses during the course of the alleged recovery of the weapon of offence. In this case since the appellant was not known to the eye-witnesses from before the identification of the appellant for the first time in the court without any supporting evidence is not a valid identification and cannot be made the basis for his conviction. On this ground alone the conviction of the appellant*** *is not sustainable and we hold accordingly. The result is that we allow this appeal and set aside the conviction and sentence passed by the*

learned Additional Sessions Judge and acquit the appellant."

(Emphasis by us)

493. On the same aspect, reliance has also been placed on a Single Bench pronouncement of the Punjab and Haryana High Court reported at ***(1990) C.C. Cases 82 (HC), Gamdur Singh & Anr. v. The State of Punjab*** wherein the appellants contended that the witnesses had not given their description in their statements and further their faces had not been kept muffled at the time of production in the court. The informant had given no definite mark of identification. In these circumstances, it was held that the prosecution had ample chance to see the accused prior to the TIP and therefore, the identity of the accused had not been established beyond reasonable doubt. It was held thus :

"*11. I have considered the arguments. Rup Singh, in his statement to the police, gave the description of the two persons who snatched his motor cycle.* ***The description given by Rup Singh is general and can fit in hundreds of young men. He has not given any special mark of identification.*** *In his statement in Court, he stated that he had gone to C.I.A. Staff to identify motor cycle and visited Court in connection with release of motor cycle on Sapurdari and he was not sure whether on the day he visited the Court, the accused – appellants were also there or not. The accused-appellants were arrested during the night of March 23/24, 1985.* ***When they were produced before Shri Kuldip Singh, Judicial Magistrate 1st Class, their faces were not muffled. As Roop Singh has not given any definite mark of identification and the accused were taken to Court without muffled faces and he further does not exclude the possibility of his presence***

in Court on the day of their remand, the stand taken by the accused-appellants that they had not participated in the identification parade as they had been shown to the witnesses in C.I.A. Staff cannot be rejected out of hand. It is a well settled principle of law that identification in Court for the first time is not of much value*. The motor-cycle when recovered bore No.HRX-2679. Prosecution has not led satisfactory evidence qua the identification of the motor cycle. Nobody from the registering authority has been examined nor any test identification of the motor cycle was conducted. Prosecution is dependent upon the testimony of Rup Singh, who, for the first time in Court, says that the accused-appellants are the persons, who had snatched the motor cycle. But the absence of any detailed description in request for test identification is made, are the circumstances which go against the prosecution case. The refusal of the accused-appellants not to participate in the test identification parade on the ground that they had been shown in the C.I.A. Staff may not be without basis. A reading of the evidence suggests that Rup Singh had ample chance to see the accused-appellants before test identification parade either in C.I.A. Staff or when they were being produced in Court without muffled faces."*

(Emphasis by us)

494. It is evident therefore, that the description in broad terms as given by Ranjeet Singh (PW-4) in his statement under Section 161 of the Cr.P.C. can fit thousands of persons. No specific mark of identification with regard to the appellants was pointed out by any of the witnesses in their statements in the police station.

495. Inspector Jagat Singh (PW-47) has further categorically stated that in Sushil Arora's disclosure recorded on 24th February, 2009 "*he had not revealed the names of other three persons*".

496. All the circumstances which weighed with the courts in the above extracted precedents for doubting identification of accused persons by prosecution witnesses exist in the present case. It is trite that the prosecution must prove the case beyond reasonable doubt.

497. Ranjeet Singh (PW-4) completely failed to identify Hemant Garg in the TIP in which he participated on the 26th of August 2009. Yet in his evidence, recorded six months later on 19th April, 2010, he identifies Hemant Garg, a complete stranger.

498. In order to be able to explain how he was able to identify the appellants, Ranjeet Singh (PW-4) has given a completely new twist in the shooting episodes. PW-4 has claimed that they got out of the Indica car at the drink cart as well as at the spot at traffic light.

499. I have noted above the fact that Paramjeet (PW-5) also failed to identify Hemant Garg in the TIP held on 26th August, 2009. Yet also made a dock identification of Hemant Garg (**pg 93**) six months thereafter on 20th April, 2010 during his evidence, as the driver of the Indica. Varun (PW-6) (**pg 114**) was not even called by the investigating officer to participate in the TIP. However, he also made a dock identification on of Hemant Garg 21st April, 2010 during recording of his evidence.

500. It is to be noted that Surender (PW-8) (**pg 138**) in his testimony recorded on 12th August, 2010, does not name Hemant Garg as present at the Chintoo Car Point. He states that "*three boys present that office at Karol Bagh ...*" and pointed to Sonveer,

Vishnu and Rajesh Pandey. Surender (PW-8) however, identifies Hemant Garg in court as the driver of the Indica car.

501. Hemant Garg's wife Smt. Shalini appeard as DW-2 to establish that her husband Hemant Garg was running pearl shop at Bedanpura, Karol Bagh, New Delhi. DW-2 testified that the silver grey Indica car bearing No.DL3C AX 2192 was registered in the name of her husband Hemant Garg.

502. The record placed before us shows that the two persons best placed to identify Sonveer and Vishnu did not do so. Tikla (PW-9), the person who stated that he had intervened in the brawl outside the Chintoo Car Point and actually separated the squabbling parties, states that he cannot identify those persons. He does not identify Sonveer as one of these persons. Manveer (PW-2), a bystander to the shootings, is categorical that he cannot identify the assailants or the occupants of the Indica. PW-2 does not identify Sonveer and Vishnu.

503. Clearly, the dock identification by the witnesses more than one year after the incident is suspicious and conviction cannot be premised on the sole basis of this dock identification.

504. Before us, the prosecution eye-witnesses do not disclose identity or description of the accused persons in the FIR or during investigation. The appellants were complete strangers to the witnesses. There was no opportunity (or fleeting opportunity) to view the persons involved in the commission of the crime. Sushil Arora was arrested on 24th February, 2009. Yet he was not put through a TIP. So far as TIP of Hemant Garg on 26th and 28th

August, 2009 is concerned, the same was suspect. Two witnesses failed to identify him.

505. The other accused persons, arrested long after the incident (7 to 9 months thereafter), have given plausible explanations for why they refused to participate in the TIPs. There is strong evidence suggesting confabulation between the witnesses before implication of the accused persons. The financial transaction propounded as the genesis for the crime, would be a strong ground for false implication as well. The witnesses in these circumstances glibly affected dock identification of the appellants in 2010 more than a year after the incident which by itself is quite unbelievable. As laid by the Supreme Court in ***Sukhdeo Singh***, such belated identification of unknown persons whom the witnesses have, at the most, had fleeting glimpses of is completely valueless.

506. These identifications of complete strangers of whom the witnesses had either fleeting glimpses of the shooters on the left side windows of the window or none at all (of the driver and rear seat passengers in the middle and rear right side window seat of the Indica) months after the incident cannot be relied.

507. The alleged identifications of the appellants months after the incident by the prosecution witnesses either in the police station or in the TIP in August, 2009 and more than a year after the incident in court during recording of their evidence are certainly not above suspicion. I therefore, find it unsafe to accept the identifications of the appellants to sustain the conviction.

XV. Conduct and testimony of Narender Singh (PW-12) who got Ankit admitted to hospital – credibility of

508. The prosecution has led evidence that Shri Narender Singh (PW-12) s/o Shri Rajender Jaiswal, a transporter, who was a resident of 7/9, Kishangarh, Mehrauli, New Delhi (**pg 214**), removed the injured Ankit to the AIIMS Trauma Centre.

509. Both the MLC No.154179/09 (Ex.PW50/A) (**pg 785**) and DD No.17A (Ex. PW34/B) contain the name of the person who had brought the injured as Satpal Singh r/o H.No.61, Chhattarpur Enclave.

510. Shri Narender Singh (PW-12) claimed that while returning to Mehrauli in a white Santro bearing No.DL4CAG 7179 he had spotted the victim lying on the ground with face down near a black Santro and heard from the public that he had suffered a firearm bullet injury. He had picked up the victim in his car and got him admitted at the Trauma Centre, AIIMS.

511. As per Narender Singh (PW-12) (**pg 214**), on 22nd February, 2009, he had travelled with his friend Jagmohan to Dashgara, Todapur where his friend Jagmohan's inlaws stayed. At about 1:45 pm while returning from Dashgara, when they reached at the red light point after crossing Buddha Garden, he had recognized the black Santro car (No.DL2FFK 0002) belonging to Paramjeet @ Monu (PW-5) from Mehrauli, whom he knew for the reason that he was also in transport business.

512. This witness explained that at the hospital, he had given his name as Satpal, an imaginary name, as well as a wrong address

when he had got the injured admitted at AIIMS, as he did not want to undergo police harassment. PW-12 has also disclosed that the white Santro driven by him was registered in the name of his cousin Rajesh Falswal.

513. It is noteworthy that the MLC No.154179/09 recorded at the Trauma Centre, AIIMS however, contains the correct name of Ankit while the parentage and address are "*unknown*". At the same time, DD No.17A recorded at P.S. Chanakya Puri at 3:50 pm on the 22nd of February 2009 (Ex.PW34/B) (**pg 760**) contains the correct name and correct address of Ankit as H.No.35A, Ward No.1, Mehrauli. Ankit's parentage in the DD No.17A though has been stated to be "*unknown*".

514. The prosecution fails to explain how they were able to trace Narender Singh (PW-12) as his correct details were not known. The witness tried to explain that some members of the public on the spot may have noted his car number and conveyed it to the police. I mention this as the evidence on record points towards his being linked to Tikla (PW-9) and possibly accompanied him that day.

515. It is to be remembered that the DPCR forms Ex.PW29/A and Ex.PW30/A (**pg 1039-40**) (the first information received by the police control room) also contain the name Narender Singh (PW-12) and the telephone no.9971054074 which, according to Manveer (PW-2) belonged to him.

516. Narender Singh (PW-12) was admittedly known to Paramjeet Singh (PW-5) who was a resident of Mehrauli. Tikla

(PW-9) was of the same area. The deceased Ankit was also a resident of Mehrauli. Sunil (PW-1) also a resident of Mehrauli is closely known to Paramjeet (PW-5) as well as Ankit.

The above would suggest that Narender Singh (PW-12) and Manveer Singh (PW-2) were known to each other and also connected to the persons (including Paramjeet and Ankit) who visited the Chintoo Car Point on the 22nd of February 2009.

517. What is shocking is that though Narender Singh (PW-12) has been propounded as a good samaritan, despite finding Ankit fighting for his life with bullet injuries and his having recognized Paramjeet's black Santro with a glass window punctured by a bullet, he makes no effort to contact Paramjeet @ Monu or to ascertain his well being or to find out the turn of events. Narender Singh's (PW-12) anxiety to remove all trace of his actions in assisting the witness are borne out from his further testimony that there was a lot of blood in the car when the victim was taken to the hospital and that he had got the blood washed off at the service station in Vasant Kunj the very same evening.

518. In para 114 (**pg 675**), the trial court has held that non-examination of ***Jagmohan*** (stated by Narender to be accompanying him in the white Santro) does not impact the case in any adverse manner which is erroneous inasmuch as the conduct of Narender Singh (PW-12) is extremely suspicious and his testimony certainly needs corroboration. The testimony of Narender (PW-12) is incomplete and suggests deliberate suppression. Given the

seriousness of the matter, the prosecution was bound to lead evidence so as to mitigate the suspicion.

519. In para 118 (**pg 667**) of the impugned judgment, the trial judge has held that it was in the testimony of I.O. S.S. Rana (PW-26) that he had investigated and had found the name and address of Satpal as mentioned on the MLC to be fictitious. This fact by itself required that the testimony of Narender (PW-12) be tested and accepted only with corroboration. In para 118, the learned trial court has wrongly framed the question as to what could be the motive of Narender (PW-12) to admit having taken the injured to the hospital, if indeed he was not the said person?

520. So far as Narender (PW-12) is concerned, it is not a question of false evidence alone but a question of deliberately concealing some material facts and the truth from the court. I am of the view that the trial court has also completely overlooked the material evidence that Narender Singh (PW-12) had identified the black Santro as belonging to Paramjeet @ Monu clearly suggesting that he was connected with him. His conduct in having rushed the injured to the hospital also points out towards something beyond his having been merely a Good Samaritan who was concerned about the rushing of injured person to the hospital. The learned trial judge has also overlooked completely the fact that the conduct of Narender Singh (PW-12) was unnatural and suspicious.

521. Certainly Narender Singh (PW-12) is suppressing the truth and the truth of his revelations deserved to be verified. But the prosecution has failed to do so.

XVI. Medical evidence of Ankit's condition at admission in AIIMS Trauma Centre

522. It is essential to note the evidence on record with regard to the treatment received by Ankit when he reached the hospital. When Ankit was rushed to the Trauma Centre, AIIMS, upon arrival he was examined by Dr. Mukesh Kumar who recorded the MLC No.154179/09 (Ex.PW50/A) (**pg 785**). As per this MLC, the patient was brought to the casualty by a passerby who found him lying on the road, with the alleged history of gun shot wound. The following observations with regard to Ankit's injuries and state of health stand noted in Ex.PW50/A which reads thus :

> *"Alleged H/o Gunshot wound. Brought by passerby. Found lying on the road. Presented in a drowsy state with gasping breathing.*
> *A - full of blood*
> *B - Gasping breathing*
> *SPO2 - 84%*
> *BP - 80/54*
> *P - 190/min.*
> *Ext. Injury - Oozing of blood from scalp with wound at the Rt. Shoulder (...as noted by S.R. Surgery)*
> *Pupil R > c sluggish reaction on Rt. Side*
> *Pt. Immediately intubated c 78 ET Tube."*

523. At the time of examination at 2:20 pm as per the MLC (Ex.PW50/A) in the hospital, Ankit was still alive, though he was gasping and blood was oozing from his injury on the scalp with another wound on the right shoulder.

The medical evidence of the MLC discloses that Ankit was drowsy but not unconscious. If Narender (PW-12) is believed, he reached the spot after the incident and found an unknown injured Ankit on the road. The correct personal details of the patient recorded on Ex.PW50/A suggest that they were given by the injured Ankit who did not disclose any names of the assailants or particulars of the incident.

524. Despite prompt treatment, unfortunately, at 4:15 pm, on the 22nd of February 2009 itself, Ankit was declared dead. Information of his death was given by Duty Constable Jageshwar from the AIIMS Trauma Centre to the Police Station Chanakya Puri which was logged as DD No.20A (Ex.PW13/A). Copy of this D.D. was handed over to Constable Jahan Singh (PW-13) (**pg 222**) for handing over to Inspector S.S. Rana (PW-26). At the hospital, Inspector S.S. Rana (PW-26) assigned Constable Sandeep Kumar (PW-14) and Constable Jahan Singh (PW-13) the duty of securing the dead body of the victim till late hours that night when it was removed to the AIIMS mortuary.

525. On 22nd February, 2009, Inspector S.S. Rana (PW-26) also deposited eight parcels and one car No.DL2FFK 0002 out of which one parcel was duly sealed with the seal of "*CMO Trauma Centre*" and the others were sealed with the seal of '*SSR*' (**pg 366**) with Head Constable Rajender Singh (PW-41) (**pg 366**) the MHC(M) at the police station Chanakya Puri. PW-41 had made the entry in the register No.19 Sr. No.1134 in the case FIR No.35/09.

526. The prosecution has also completely failed to explain as to who identified the injured as Ankit in the hospital while recording MLC No.154179/09 at AIIMS and given his correct address.

527. I also am unable to ascertain from the record of the case as to who gave the police Ankit's name and his correct address as recorded in DD No.17A at 3:50 pm on the 22nd February, 2009 by P.S. Chanakya Puri.

528. In the disclosure statements attributed to Sushil Arora (Ex.PW26/J) as well as that attributed to Sonveer (Ex.PW17/D) refer to Tikla (PW-9) having come to Chintoo Car Point with 15-20 associates in several cars. The prosecution witnesses do not give any testimony in this regard.

529. These missing links lend support to the contention of the appellants that the prosecution has not disclosed the real or complete truth and that there were persons other than the three in the Esteem (PW-9, PW-10 and PW-11) and the five in the Santro (PW-1, PW-5, PW-6, PW-8 and the deceased) who knew the truth and have not been produced.

XVII. Post-mortem on the body of Ankit

530. The autopsy was conducted on the body of Ankit on the 23rd of February 2009 by Dr. Arvind Kumar (PW-18) (**pg 242**). In the post-mortem report (Ex.PW18/A) (**pg 783**), the doctor has noted the following ante mortem injuries :

> *"1. Abrasion of size 3x2cm reddish brown colour near hairline on left side of forehead.*

2. Abrasion of size 3.5x1.5cm reddish brown colour just above eyebrow on left side of forehead.
3. Abrasion of size 5x5cm reddish brown colour lateral to left thigh on left side face.
4. Contused abrasioin of size 2x1cm on dorso-lateral aspect of left forearm near wrist with underline extra-vasation of blood.
5. Abrasion reddish brown colour 2x1 cm on dorsum of right wrist.
6. Two abrasions reddish brown colour of size 1x0.5cm each on left knee cap.
7. Two abrasions reddish brown colour of size 1x0.5cm and .5x.5cm in middle 1/3 of left leg anteriorly."
8. Stitched wound of size 1.5cm on left parieto-occipital rigion of scalp. On dissection there were massive diffuse extra-vasation of blood below scalp (prominently on left side). Skull showed fracture of left occipito-parietal bone (3x1cm) and posterior cranial fossa with fracture line extending up to middle cranial fossa and involving left temporal bone. There were corresponding tears in dura matter. Brain was showing extensive laceration with a communicating gap from posterior superior surface of left occipital lobe to interior surface of occipito temporal lobe. Track was filled with clotted blood and pieces of bones. On dissecting the lower portion of occipital bone bullet of ***size .9 x .7 cm was recovered from left lateral side of neck*** *at level of C1-2 vertebrae. (Track of wound – left parieto occipital region (entry) to left side of neck laterally, directed above downword and anteriarily. Small metallic fragment of bullet was recovered from wound track on left temporal region.*
9. Stitched wound of size 1 cm in mid axillary line of right side chest.
10. ***Firearm entry wound*** *of size 1.3 x 1 cm on right arm posterior* ***lateral aspect upper 1/3rd region*** *with abrasion collar (3 mm) and contusion collar (1 cm)*

around entry wound, with inverted margin and oozing of blood. The wound was situated 14.5 cm below left shoulder top, 23 cm above left elbow, 35 cm below top of head, and 144 cm above of left heel. The track of wound was in muscular plane entering in to the chest cavity with extensive extra vacation of blood on right side chest wall. The track was entering in to pleural cavity through 3rd inter coastal space/(right) pleural cavity was filled with blood. The track of wound was through lower lobe of right lung then through diaphragm in to right lobe of lever. Bullet was recovered from right lobe of liver."

531. While noting the injury No.8, in the post-mortem report (Ex.PW18/A), it appears that Dr. Arvind Kumar (PW-18) conducted a dissection of the lower portion of the occipital bone of the deceased Ankit whence a bullet was recovered therefrom.

Another bullet was recovered from the right lobe of the liver.

532. After the post-mortem was completed on the deceased Ankit vide Post-Mortem No.135/09, the doctor handed over to the investigating officer *inter alia* the following exhibits vide Ex.PW26/M ***(*pg 772*)*** :

*"(i) One glass bottle containing a **bullet found in the liver of the deceased.***

*(ii) A glass bottle with **piece of bullets – a small piece from the left piece of the brain** and the **larger piece from the left upper cervical region,** both sealed with the seal of forensic medicine JPN 80C, AIIMS, New Delhi.*

*(iii) A **blood sample on a gauze** again sealed with the seal of forensic medicine JPN 80C AIIMS New Delhi.*

(iv) A sample seal on a white peice of paper (Ex.PW26/M)."

533. I find in the testimony of Dr. Arvind Kumar (PW-18) (**pg 244**) that the following samples and bullets were preserved and sealed and given to the investigating officer along with the sample seal:

> *"(i) Blood sample of Ankit in a gauze before us.*
> *(ii)* ***Bullet*** *recovered from* ***the liver****.*
> *(iii)* ***Bullet recovered from the left side neck noted*** *in the injury no.8 above.*
> *(iv)* ***Metallic fragment recovered from brain****. (from base of left temporal lobe)"*

534. So far as the cause of death was concerned, the doctor had opined that the same was a result of shock and haemorrhage due to the ante mortem firearm injuries Nos.8 and 10, noted above which was sufficient to cause death in the ordinary course of nature individually as well as collectively.

535. The time of death was opined to be around 21 hours before the post-mortem.

536. I find that it is in the testimony of the doctor that no burning, singing, tattooing or blackening was seen in the firearm injury nos.8 and 10 which suggests that Ankit received the injury from a firearm which was at a distance from his body, not at close range.

XVIII. ***No disclosure statement by Sushil Arora or pointing out the spots***

537. The prosecution has claimed that the case was unravelled upon the arrest of Sushil Arora on the 24th of February 2009 who voluntarily gave a disclosure statement (Ex.PW26/J) disclosing the

names of the other persons involved in the commission of the offence and their roles. The prosecution also relies on a pointing out memo (also Ex.PW26/J) attributed to Sushil Arora.

538. Mr. Vikas Arora, learned counsel for the appellant has staunchly disputed making any such disclosure statement (Ex.PW26/J) or pointing out the spot (Ex.PW26/J). For the purposes of first submission, it is contended by Mr. Vikas Arora, learned counsel for the appellant that by the 24th February 2009, the police had decided on the case it was going to prove, identified who it was going to implicate and the roles it was going to ascribe to them. Mr. Arora submits that effort was therefore made to pen down and attribute a disclosure by Sushil Arora to support the police theory. Ld. Counsel would submit that because it is completely cooked up, the police have erred and made material errors so much so that the alleged disclosure must be completely disbelieved and the prosecution witnesses have to be held to be untruthful. Mr. Vikas Arora, ld. counsel submits that Sushil Arora has seriously disputed signing these two documents and that the Ld. trial judge has erred in not recording any finding at all on this important issue and relying upon these documents as authentic in the impugned judgment.

539. I examine this evidence and the challenge thereto under the following sub-headings :

(i) *Pleadings filed by police on 24th February, 2009, 20th March, 2009, 18th April, 2009 and court orders refer to "unknown persons"/"associates"*

(ii) *Disclosure statement (Ex.PW26/J) - whether bears signature of Sushil Arora?*

(iii) *Ocular evidence contradicts disclosure statement*

I propose to discuss the above sub-headings in *seriatim :*

(i) *Pleadings filed by police on 24th February, 2009, 20th March, 2009, 18th April, 2009 and court orders refer to "unknown persons"/"associates"*

540. According to the first investigating officer Inspector S.S. Rana (PW-26) (**pg 284**), on 24th February, 2009, Pushkar Raj (DW-6), brother of Sushil Arora produced him in the police station who was then arrested vide arrest memo Ex.PW26/H and subjected to a personal search vide memo Ex.PW26/I.

541. Inspector S.S. Rana (PW-26) testified that, during interrogation, Sushil Arora gave a disclosure statement (Ex.PW26/J) on the 24th of February 2009 (**pg 89**) disclosing that his co-accused in the incident were one Rajesh Pandey and three other persons, namely, Hemant Garg, Sonveer and Vishnu. Pushkar Raj (DW-6) was present at that time.

542. It is to be noted that the disclosure statement sees the light of the day for the first time when it came to be filed with the chargesheet dated 23rd May, 2009 against Sushil Arora. I also find that it is stated in this chargesheet dated 23rd May, 2009 that Manveer Singh (PW-2) had disclosed the registration number of the Indica involved in the occurrence. Its details were collected and it was found that the Indica was owned by Hemant Garg.

Clearly, there was no disclosure of the name of Hemant Garg as one of the occupants of the Indica in any disclosure statement.

543. It is evident that the names of Sushil Arora and Rajesh Pandey were known to Tikla (PW-9) as they had met Tikla (PW-9) on the 20th of February 2009 as well as on 22nd of February 2009.

544. The prosecution has also relied on a pointing out memo allegedly prepared at the instance of Sushil Arora by Inspector S.S. Rana (PW-26) on the 24th of February 2009, pointing out the place where the occupants of the Indica car ("***Rajesh Pandey ke aadmi***") had shot upon the Santro car as well as the spot where the second incident of firing took place which is also marked as Ex.PW26/J (**pg 792**).

545. Sushil Arora has taken the defence that his signatures have been taken forcibly on blank papers and documents (**pg 312**).

546. Our attention is drawn to the disclosure memo (Ex.PW26/J) wherein the investigating officer has recorded the unfolding of the events attributed in the statement to Sushil Arora. I find that Ex.PW26/J makes a reference to "***Rajesh Pandey's men***" firing at the boys who had come out of the Santro car and tried to escape. There is reference to "*Rajesh Pandey's men*" at two places on this memo. Clearly, if Sushil Arora had disclosed the identity of the other persons involved in the commission of the offence, their names would be mentioned in Ex.PW26/J as well instead of the reference to "*Rajesh Pandey's men*".

547. In support of this challenge, Mr. Vikas Arora, learned counsel for Sushil Arora has drawn our attention to the following

documents in the nature of police applications which are available on the record of the lower court which mitigate against the making of the alleged disclosure statement or the pointing out memo:

(i) Our attention is drawn to a remand application dated 24th of February 2009 (**TCR pg 2741**) whereby the police remand for Sushil Arora stands sought on the ground "*another four assailants, namely, Rajesh Pandey and* ***three unknown*** *are to be arrested....*".

(ii) An application dated 20th of March 2009 was filed by the police (**TCR pg 2725**) seeking issuance of non-bailable warrants only against Rajesh Pandey and Hemant Garg and no one else. It is an admitted position that other than Sushil Arora, none of the accused had been arrested on the 20th of March 2009.

(iii) An application for anticipatory bail was filed by Hemant Garg on 17th of April 2009 filed by the police. Our attention is also drawn to the reply to this application dated 18th of April 2009 filed under the signatures of Inspector Jagat Singh, SHO of the P.S. Chanakya Puri. This reply refers to alleged dispute between the Complainant party on "***issue of money matters***" with the second party i.e. the assailants consisting of "***Sushil Arora, Rajesh Pandey*** *and* ***their other three associates***".

In this reply, it is also stated that "*on* ***24.2.09*** *accused Sushil Arora* ***surrendered and he was arrest***. ***A hunt for accused Rajesh Pandey*** *and* ***his associates*** *was made but all are absconding. The* ***details taken from traffic computer revealed that the owner of Indica car no.DL3CY 2192 is Hemant Garg*** *son of Brijesh Mohan Garg...(illegible)...*".

Opposing the prayer for anticipatory bail of Hemant Garg, the SHO S.S. Rana (PW-26) had in the reply dated 18th April, 2009 also stated that "*accused/applicant Hemant Garg along with Rajesh Pandey,* ***Sushil Arora had hired conspirator*** *and killed Ankit Minocha brutally and inflicted bullet injury to Surender and all are absconding except Sushil Arora. Hence in the wake of above facts, his bail is staunchly opposed*".

548. This anticipatory bail application filed by Hemant Garg was rejected by an order dated 20th of April 2009 (**TCR pg 2265**) passed by J.R. Aryan, Additional Sessions Judge noting as follows:

> "*Sushil Arora* ***taken on four days police remand.....to ascertain names and details of three other accused culprits*** *but I.O. admits that* ***no further investigation/clue could be worked out****...*"
>
> *(Underlining by us)*

549. It is evident from these two applications dated 24th February, 2009, 20th March, 2009 and reply dated 18th April, 2009 filed by the investigating agency, that if Sushil Arora had made the disclosure as on 24th February, 2009 as alleged, the names of the other accused persons would have definitely been mentioned therein. The police would have sought NBWs for the other assailants as well. Even till the 20th of April 2009, there had been no disclosure by Sushil Arora of the names of the assailants falsifying the making of the disclosure statement. Most importantly as per the IO's admission in court, even in the four days police remand of Sushil Arora, no clue regarding their identity could be

obtained. Clearly, till the 20th of April 2009, no disclosure statement stood made by Sushil Arora.

550. The case of the prosecution is crystalised in the charges which were framed on 22nd August, 2009 against Sushil Arora which can be summed up as follows:

- ***A criminal conspiracy by Sushil Arora, Rajesh Pandey and three others unknown;***
- *to commit offence of murder and attempt to murder without specifying who was to be murdered;*
- *and in execution of that criminal conspiracy and in furtherance of common intention, all five accused persons, occupants of Indica car DL 3 CAX 2192, overtook black Santro car no. DL2FFK0002 in which Sushil, Varun, Ankit, Surender and Paramjeet were travelling;*
- *and near Buddha Garden, 'someone of you' five accused persons fired fire arm bullet shot aiming at the occupants of Santro Car and that bullet hit victim Ankit.*
- *And at some distance at red light point where occupants of Santro came out of the vehicle to escape, 'you accused persons' fired bullets on the victim in which Surender suffered a bullet injury.*

This charge illustrates that till 22nd October, 2009, the investigating agency knew the names of only Sushil Arora and Rajesh Pandey and did not know the name of three others; it did not know which of the five alleged accused persons fired the bullet which hit Ankit. The allegation is that the bullets were aimed "*at occupants of Santro Car*".

Therefore, as per the charge sheet, till 22nd August, 2009, as per the prosecution, the names of the three other persons were unknown; that the conspiracy related to murder of occupants of the

Santro; and that Ankit suffered injury only in the first episode of shooting.

551. When questioned, the investigating officer Inspector S.S. Rana (PW-26) (**pg 284**) has stated that on 24th of February 2009, Sushil Arora had made the disclosure when he was about to leave the police station for court to take up remand proceedings against Sushil Arora. He has further stated that Ranjeet Singh (PW-4) had also reached the police station at that time. The assertions on the court record clearly belie the testimony of the IO as the application for his remand makes no reference to it.

552. The testimony of Inspector S.S. Rana (PW-26) that Sushil Arora had disclosed the names of three persons other than Rajesh Pandey is completely falsified by the categorical testimony of Inspector Jagat Singh (PW-47) (**pg 425**), the SHO of the Police Station Chanakya Puri who has specifically stated that "*I had interrogated accused Sushil Arora along with Inspector Rana 24.2.2009 and his disclosure statement was recorded in which he had specifically named co-accused Rajesh Pandey*" i.e. only Rajesh Pandey but had not revealed the names of the three other accused persons.

553. Inspector Jagat Singh (PW-47) has also claimed (**pg 425**) that he "*had come to know the names of other three persons by 27.2.2009 but at present I do not remember on the basis of which document or fact*".

The witness (PW-47) was however, unable to disclose either the basis of which document or fact, he had come to know the names of other three accused persons.

554. Inspector Jagat Singh (PW-47) was also unable to disclose the date on which steps were initiated to apprehend the remaining three accused. This witness could not admit or deny if "*steps for the first time were initiated in April or May 2009*". The witness admitted that he had taken orders from the court for issuance of NBWs against the accused Vishnu and Sonveer "*after filing the chargesheet against the accused Sushil Arora*". The chargesheet against Sushil Arora was filed only on the 22nd/23rd of May 2009 i.e. 90 days after he had been arrested in the case.

555. This categorical testimony of Inspector Jagat Singh (PW-47) completely demolishes the prosecution case that the identity of the other three persons was disclosed by Sushil Arora on the 24th February, 2009. Inspector Jagat Singh (PW-47) establishes that no disclosure statement was made on the 24th of February 2009 and that Ex.PW26/J has been fabricated subsequently.

556. Ex.PW26/J was stated to have been signed by Sushil Arora. It is signed by Inspector S.S. Rana (PW-26) as well as by one Head Constable Satish Kumar (PW-32A) as an attesting witness.

557. The pointing out memo (Exh. PW26/J) has been signed by Inspector S.S. Rana (PW-26) and purportedly witnessed by Head Constable Satish Kumar (PW-32A).

558. I also find Head Constable Satish Kumar was examined as PW-32A (pg 333) on 24th February, 2009 as present during the

arrest of Sushil Arora and as having witnessed the police documentation of that date. He testifies that on 24th February, 2009, Sushil Arora accompanied by his brother Pushkar Raj came to the police station and that he was a witness to his arrest. Head Constable Satish Kumar (PW-32A) does not refer to Sushil Arora making any disclosure statement nor to pointing out any site of the incident.

559. It is in the testimony of Inspector S.S. Rana (PW-26) (**pg 284**) that Pushkar Raj (DW-6) had brought Sushil Arora on 24th February, 2009 who was admittedly present at the time Ex.PW26/J has been scribed. The disclosure has not been attested by Pushkar Raj or by any other independent witness (**pg 311**).

560. There appears therefore, to be substance in the challenge on behalf of the appellant Sushil Arora that he made any disclosure statement disclosing names of assailants.

561. I find that the ld. trial court has discussed the disclosure statement in para 164 **(pg 695)** to para 168 of the impugned judgment.

562. The ld. trial judge has held in para 168 of the impugned judgment that the names of all the persons involved in the offence stood disclosed in the disclosure statement (Ex.PW26/J) dated 24th of February 2009 attributed to Sushil Arora and recorded by Inspector S.S. Rana (PW-26). In the light of the assertions by the investigating officer in the remand application dated 24th February, 2009 (**TCR pg 2741**) the application dated 20th March, 2009 (**TCR pg 2725**) seeking NBWs against only Rajesh Pandey and Hemant

Garg as well as the reply dated 18th April, 2009 to the anticipatory bail as well as the order dated 20th April, 209 of the learned Additional Sessions Judge **(TCR pg 2265)** on the anticipatory bail application of Hemant Garg, it stands amply established that no disclosure of names had been made on the 24th of February 2009 by Sushil Arora thereby supporting the case of the appellants that Sushil Arora had not made a disclosure statement. The testimony of Inspector Jagat Singh (PW-47) also establishes that Sushil Arora did not make the alleged disclosures. Thus, the conclusion of the learned trial judge that the names of the assailants were disclosed to the investigation agency by Sushil Arora in the disclosure statement (**Ex.PW26/J**) (**pg 32-35**) is contrary to evidence, erroneous and not sustainable.

(ii) *Disclosure statement (Ex.PW26/J) - whether bears signature of Sushil Arora?*

563. The making of the disclosure statement is challenged by Mr. Vikas Arora, learned counsel for the appellant on one more pertinent point. He has asserted that the prosecution has alleged that Sushil Arora appended his signatures on the disclosure statement (Ex.PW26/J) (**pg 791**) as well as on the pointing out memo (also marked as Ex.PW26/J) (**pg 792**). Learned counsel would contend that the signatures claimed by the prosecution as being of his client, are not his signatures thereon and that the prosecution has failed to establish so. Mr. Arora would call upon the court to compare the appellant's signatures as are available on the arrest memo (Ex.PW26/H) (**pg 787**) and the personal search

memo (Ex.PW26/G) (**pg 788**) and submit that Sushil Arora's signatures thereon do not match the signatures to be found on both the exhibits marked as Ex.PW26/J.

564. It is also in evidence that two post-dated signed cheques were given by Sushil Arora to Tikla (PW-9) as security. The record shows that the following two cheques were produced by Tikla (PW-9) before the IO/Insp. SS Rana who seized them vide seizure memo dated 23rd February, 2009 (Exh. PW9/C) (**pg 775**) (**TCR pg 3925A & 3925) :**

Cheque No.	***A/C No.***	***Amount (Rs.)***	***In Favour of***	***Drawn on***
504611	*000000484097*	*5,00,000/-*	*Mahender Singh*	*Barclays Bank PLC, Ground and First Florr, Eros Corporate Tower, Nehru Place, New Delhi - 110019*
504612	*000000484097*	*5,00,000/-*	*Mahender Singh*	*Barclays Bank PLC, Ground and First Florr, Eros Corporate Tower, Nehru Place, New Delhi - 110019*

These cheques were proved in evidence as Ex.PW9/A (**TCR pg 3925A**) and Ex.PW9/B (**TCR pg 3925**).

565. Inspector Jagat Singh (PW-47) investigated the authenticity of the signatures on these cheques. By his letter dated 8th of May 2009 from the Branch Manager of the Barclay's Bank PLC, Eros Corporate Tower, Nehru Place, New Delhi – 110019, vide Ex.PW47/A (**pg 815**), a specific query was made as to whether the signature on the attached photocopy of the two cheques was similar to the record of the specimen signatures held by the bank. The

verification report (Ex.PW47/B) dated 8th of May 2009 was received from the bank verifying that the signature on the cheque matched the specimen signatures of Sushil Arora which were available with the bank.

566. I find that the disclosure statement (Ex.PW26/J) has been scribed on three pages and the signatures appear only on the last page of this document (ExPW26/J) (**pg 791**).

567. I have carefully scrutinized the above six signatures attributed to Sushil Arora, his admitted signature (that is on the two cheques, arrest memo and personal search memo) and compared them with the disputed signatures on the disclosure statement.

568. I have no hesitation in holding that the signatures attributed to Sushil Arora as are found affixed on the disclosure statement (Ex.PW26/J) and the pointing out memo (also marked as Ex.PW26/J) (**pg 792**) do not match the admitted signatures on record. I find that the signatures on the two cheques (Exh. PW9/A & B); the arrest memo (Ex.PW26/H) and the personal search memo (Ex.PW26/G) (**pg 787-88**) have been affixed by the same person while the signatures on the disclosure statement (Ex.PW26/J) and pointing out memo (Ex.PW26/J) belong to some other person. In view of the above discussion, I have no hesitation in holding that the disclosure statement and the pointing out memo (both Ex.PW26/J) is not signed by Sushil Arora.

569. The first and foremost requirement of the admissibility of a disclosure attributed to an accused person is proof that the same

has been voluntarily and actually made by the accused person. In our view, the prosecution has miserably failed to establish so.

(iii) Ocular evidence contradicts disclosure statement

570. I am conscious of the limits of admissibility of an inculpatory statement attributed to a person while in police custody in view of the prohibitions contained in Sections 24 and 27 of the Evidence Act. But given the submissions of the appellants, it is necessary to advert to the contents thereof in the present case, as, even if it could be held that the disclosure statement was made by Sushil Arora, its contents also falsified and contradicted by the ocular evidence tendered by the alleged eye-witnesses to the incident. I am not relying upon the contents of the disclosure but merely placing the same here for comparison.

571. So far as the contents of the disclosure statement are concerned, reference has been made to Tikla's visit on the 20th of February 2009 with three – four persons. Rajesh Pandey had also brought three persons whom he introduced as Hemant Garg, Sonveer and Vishnu who were possessed with pistols and had allegedly committed several murders. Hemant Garg was alleged to be owning an Indica car. In the disclosure statement, it is noted that on the 20th of February 2009, Sushil Arora avoided Tikla (PW-9) and that Tikla left abusing and threatening that he would return on 22nd of February 2009 and take his money. The voluminous oral evidence including that of Tikla (PW-9) and his associates (PWs-10 and 11) contains nothing in these terms.

572. As per Ex.PW26/J, on the 22nd of February 2009, Tikla had arrived at the Chintoo Car Point at 12:30 pm along with *15-20 men in several cars*. At that time, Sushil Arora's elder brother Pushkar and Rajesh Pandey had explained to Tikla and sought two to three months time but he was not agreeable and again, *left the shop abusing and threatening*. A short while thereafter, some noise came from the parking in the front at which all three of them went outside and found that *Tikla's men were badly beating Sonveer and Hemant* and it was learnt that a quarrel had erupted over taking out of the vehicles. *After the thrashing*, Tikla and his men got into their respective cars and went away.

573. As per Ex.PW26/J, Sushil Arora and the others were furious and accompanied by Rajesh Pandey and his three associates, he got into the Indica car and started chasing the occupants of Tikla and his men.

574. Ex.PW26/J describes the seating plan in the Indica. It refers to Hemant Garg as the driver of the Indica; Vishnu sitting in the front adjacent to him; Sonveer sitting in the rear on the left side window seat of the Indica behind Vishnu; *Rajesh Pandey on the extreme right behind the driver while Sushil Arora was seated in the rear middle seat*.

575. Ex.PW26/J also states that Vishnu and Sonveer had taken their respective pistols in their hands; that they saw the black Santro bearing No.0002 a little ahead of the Buddha Garden gate and Hemant Garg drew up the Indica alongside the Santro and Vishnu and Sonveer started firing at it. Hemant Garg then pulled

the Indica to the left in front of the Santro but the Santro overtook from the right side and started rushing towards Dhaula Kuan side.

576. Ex.PW26/J further states that at this, all five of them had got out of the Indica but rushed back into the car and started chasing the Santro. A little distance ahead because of the traffic light turning red, they saw the Santro car standing behind some vehicles. Hemant Garg stopped the Indica on the right side of the Santro and the five Indica occupants got out of the car. Vishnu fired at the person coming out of the rear right side of the Santro as the four other passengers in the Santro got out of the car and ran from the spot. Vishnu and Sonveer had fired at the fleeing persons.

577. It is recorded in Ex.PW26/J that Rajesh Pandey, Hemant Garg and Sushil Arora were exhorting that "*goli maron saalon ko bachne na payein*".

578. A comparison of some material divergences between the disclosure statement and ocular evidence is made below :

Disclosure Statement (Ex.PW26/J)	***Ocular Evidence of PWs***
As per the disclosure statement, Sushil was repaying the loan amount taken from Tikla (PW-9) with interest ***@5% per month****.*	*As per Tikla (PW-9), Sushil was repaying the loan amount with interest* ***@2% per month*** *(pg 171).*
On 22nd February, 2009, Tikla is stated to have come again at Chintoo car point to collect the loan amount ***accompanied by 15-20 persons in several cars****.*	*Whereas evidence has been led that* ***only two cars had come****, an Esteem in which* ***Tikla had come alongwith his associates Sudhir, Hemant and Gajender****; and a black Santro in which PWs* ***Sunil, Paramjeet, Surender, Varun, deceased***

	***Ankit had come**.*
*It was also stated in the disclosure that **on 22nd February, 2009 Tikla had gone out of the office dissatisfied, abusing and threatening Sushil after the latter asked for further 2-3 months time to repay the balance amount**.*	*Whereas as per Tikla and other witnesses, **the talks had ended in a settlement on the 22nd February, 2009**.*
On hearing a commotion at the parking lot outside, all three (Sushil himself, his elder brother Pushkar and Rajesh Pandey) came out of the office.	*But as per Prosecution and the other witnesses, **after the talks, only Tikla and his associates had come out of the office**. Reliance is made to a scuffle between Varun and/or Ankit from Tikla's side and 2/3 persons over moving out of vehicle in which Tikla intervened and separated.*
*As per the disclosure, on coming out, **Sushil saw Tikla's people badly beating Vishnu, Hemant and Sonveer**.*	
Sushil** stated to have been **sitting in the rear middle seat of the Indica Car.	*Whereas, as per PW1 Sunil, **Sushil was seated at the rear extreme right seat behind the driver's seat**.*
*Sushil then stated that **all five of them had got out of the Indica near the Budha garden gate and immediately sat inside again**.*	*None of the prosecution witnesses support this theory (including PW-2 Manveer), It is **only in Ranjit (PW-4's) dubious testimony that all the occupants of the Indica had gotten down and had "hurriedly reoccupied their Indica Car."***

579. Ranjeet Singh (PW-4) and Paramjeet (PW-5) were unable to state whether Sushil Arora and Rajesh Pandey were at all in the Indica car.

580. After pointing out Sonveer, Vishnu and Hemant Garg as present in the car, Surender (PW-8) states (**pg 137)** that there were "*one or two more boys*". He further categorically testified that (**pg 139**) "*I cannot identify Sushil Arora and Rajesh Pandey*".

581. Sunil (PW-1) an alleged eye-witness on the other hand is quite positive and has insisted in the witness box that Sushil Arora was sitting behind the driver while Rajesh Pandey was sitting in the middle on the rear seat of the Indica. Three other eye-witnesses are unable to place them while one fails to identify them as occupants in the car.

The disclosure statement (Ex.PW26/J) however, places Sushil Arora in the middle while Rajesh Pandey sat behind the driver (**pg 22**).

Thus the disclosure statement attributed to the appellant Sushil Arora is thus contrary in material particulars to the oral testimony of the witnesses especially on their categorical identification by Sunil (PW-1) with regard to the seating in the Indica car.

582. These contradictions are material. The contradictions lend support to the categorical defence of Sushil Arora, Rajesh Pandey and Hemant Garg given the allegation of the prosecution that the two shooters were hanging out of the Indica while firing, it was not possible to view the other occupants from the Indica.

583. I have no hesitation in holding that not only the disclosure statement does not bear the signatures of Sushil Arora but

disclosure statement contradicts ocular account of alleged eye-witnesses**.**

XIX. Disclosures attributed to Sonveer (Exh PW 17/D & 17/E) and recovery of weapon pursuant thereto

584. I now examine the other material circumstance relied upon by the prosecution. This is the prosecution evidence regarding recovery of a weapon pursuant to a disclosure attributed to Sonveer. I also examine the evidence of ballistic examination and whether the prosecution has succeeded in connecting the weapon to the offence. Sonveer was arrested on the 27th of August 2009 i.e. more than six months after the incident.

585. After the arrest at about 7:00 pm on the 27th of August 2009 from the place opposite Coffee Home, near Hanuman Mandir, Connaught Place, the police have attributed a disclosure statement (Ex.PW17/D) having been made by Sonveer (**pg 964-967**) on the 27th of August 1997 itself.

Thereafter, he was taken for pointing out the place of occurrence in police custody which he did vide memo (Ex.PW49/C) (**pg 974**).

586. I have discussed above the challenge by Sonveer to his very implication and identification by the prosecution witnesses. I now examine this appellant's challenge to the making of any disclosure statement and to the recovery of any weapon at his instance. Ld. counsel submits that the prosecution had to establish the culpability

of his client beyond reasonable doubt which it has miserably failed to do.

587. In the disclosure attributed to Sushil Arora, it is mentioned that on the 22nd of February 2009, Tikla (PW-9) had come to the Chintoo Car Point with 15-20 associates in several cars. Our attention is drawn to an identical statement in the disclosure attributed to Sonveer (Ex.PW17/D) (**pg 965**). This is not supported by the prosecution witnesses.

588. On the 4th of September 2009, Inspector Arun Kumar (PW-48A) moved an application (Ex.PW49/G) for production warrant of Sonveer on 7th September, 2009. Thereafter another application on 7th September, 2009 (Ex.PW49/H) was moved by him for granting three days police remand of Sonveer.

589. The prosecution claims that in this police remand, on 8th of September 2009, Sonveer made a second disclosure statement (Ex.PW17/E) (**pg 968**) disclosing that he had handed over the weapon of offence to one Sanju of Mangol Puri in the first week of May. It is alleged that he also had disclosed that on 14th May, 2009, when he had gone to meet Sanju at Mangol Puri, he learnt that Sanju had been arrested by the police a day before itself along with the same pistol and had sent him to Tihar jail.

590. Mr. Rajeev Mohan, ld. counsel for Sonveer submits that the first disclosure statement dated 27th August, 2009 (Ex.PW17/D) (**pg 964**) makes no mention of handing over any weapon in the first week of May to Sanjay @ Sanju @ Khatta, arrested on 14th of May 2009, in the. On the contrary, this disclosure statement refers to

the pistol having been concealed in Faridkot, Punjab which he could get recovered. No recovery was effected pursuant thereto. This alleged disclosure is completely inadmissible and could not have been admitted in evidence.

591. Ld. counsel would also challenge this second disclosure statement of 8th September, 2009 contending that the same has been claimed to have been made only after second police remand of the appellant which by itself caused serious doubts about its veracity.

592. Mr. Rajiv Mohan, ld. counsel for Sonveer would assail the alleged recovery pointing out that in the first disclosure statement dated 27th August, 2009 (Ex.PW17/D), the description of a weapon stood mentioned and that the police had 11 days to ascertain as to whether any weapon of this description had been seized by the police from 26th February, 2009 till 27th August, 2009.

593. The submission is that the police claims to have already seized a weapon in FIR No.150/09 from Sanju @ Sanjay @ Khatte on 14th May, 2009. Therefore, no recovery was effected pursuant to the alleged disclosure (Ex.PW17/D). It is contended by Mr. Rajiv Mohan, ld. counsel that therefore, even if it is believed that Sonveer made the statement attributed to him as having been made on 8th September, 2009 about the possession of the weapon with Sanjay @ Sanju @ Khatte, it cannot be read against him as it did not lead to the recovery in view of Section 27 of the Indian Evidence Act.

594. It is also submitted that no circumstance is also brought out in the evidence which could be admissible by virtue of Section 8 of the Evidence Act.

595. Sonveer has claimed that Sanjay was arrested the same night of 14th May, 2009, by the police station Mangol Puri in proceedings under Sections 107 and 151 Cr.P.C. The contention is that therefore, even before Sonveer's arrest, the police had information regarding both Sanju @ Khatte and him.

596. It was stated by Inspector Arun Kumar (PW-48A) that ASI Narender Tyagi had verified the fact that a weapon had been seized from Sanjay @ Khatte in FIR No.150/2009 under Section 25 of Arms Act by the P.S. Mangol Puri.

597. The prosecution has relied on certain steps taken by the investigating officer thereafter in the case arising out of FIR No.150/09 which was registered on 14th May, 2009 at P.S. Mangol Puri against one Sanjay @ Sanju @ Khatta resident of S-875, Mangol Puri. Our attention is drawn to an application dated 8th September, 2009 (**pg 999**) filed by Inspector Arun Kumar (PW-47) seeking transfer of the case property (pistol) of FIR No.150/09 P.S. Mangol Puri, Delhi to the present case. On this application, by an order dated 14th September, 2009, the court directed that the case property of FIR No.150/09 be handed over to the I.O. of the present case.

598. The prosecution examined S.I. Ajay Karan Sharma (PW-37) (**pg 351)** who undertook investigation in the case arising out of FIR No.150/09 P.S. Mangol Puri. It is in his testimony that while

investigating this case, S.I. Deepak, Special Staff, Outer District had given him information that on 13th May, 2009, the accused Sanjay @ Sanju @ Khatte was present in his house No.S-875, Mangol Puri on its roof. When the raid was conducted on his house, the police went to the roof through the staircase and found Sanjay @ Khatte sleeping. The witness has deposed that on seeing the police, Khatte jumped to the first floor balcony and fell on the ground floor and he got injured. He was apprehended by Constable Manish, Special Staff as he was injured. As per PW-37, "*Constable Manish recovered one pistol from the right*" dub of the pant of Khatte, which he handed over to him. The witness claims that he checked the pistol; found it contained four live rounds; prepared a sketch of the pistol and rounds and took its measurement. The seizure memo of this pistol was produced by S.I. Ajay Karan Sharma (PW-37) and proved in the present case as Ex.PW37/B (**pg 833**). The description of the pistol shows that behind the trigger, it had a hammer. Ex.PW37/B records the description of the cartridges as well.

599. The original case file of FIR No.150/09 under Section 25 of the Arms Act registered by P.S. Mangol Puri was produced during the trial in the present case.

600. Mr. Mohan, ld. counsel has also drawn our attention to the extract of the *rukka* in FIR No.150/09 which was registered against Sanjay @ Sanju @ Khatte which has been proved on record as Ex.PW37/C. He would submit that the *rukka* notes the description

of the pistol which was allegedly recovered from Sanju @ Khatte and notes the presence of a hammer on it.

601. Ld. counsel would also draw our attention to the description of the recovered cartridges which are stated to be 2.5 cms in length with a diameter of 0.9 cms. Out of the four of the recovered cartridges, three were brass plated and had the copper top. On the base of three of these cartridges, 'KF 7.66' stands inscribed. On the base of one out of the three of the cartridges, there was a mark of a hammer. The fourth recovered cartridge was completely of brass and the words "*S&B 7.65 B1*" were inscribed on this.

602. Mr. Mohan, ld. counsel has drawn our attention to the sketch of the bullets (Ex.PW37/A) recovered in FIR No.150/09 which was prepared by S.I. Ajay Karan Sharma (PW-37) (**pg 351**) who was its investigating officer pointing out that one of the bullets was shown having the mark of a hammer strike.

603. PW-37 stated that he had converted the pistol with the 4 cartridges into the parcel sealed with the seal of 'AKS' which was taken into possession vide seizure memo Ex.PW37/B and that the *rukka* (Ex.PW37/C) was sent to the police station for registration of the FIR.

604. It appears that the MHC(M) produced the case property which was an envelope sealed with the seal of FSL and another seal (which is not legible) bearing particulars of case FIR No.35/09 which was opened and found to be containing a pistol. The witness (PW-37) identified the pistol (Ex.PW37/I) which was the one

recovered from the possession of Sanju @ Khatte along with four live cartridges.

605. Mr. Rajiv Mohan, ld. counsel for Sonveer has drawn our attention to the testimony of Head Constable Moti Ram (PW-33) who has stated that on the 14th of May 2009, he was posted in P.S. Mangol Puri and was working as the Mohrar Malkhana. He has stated that S.I. Ajay Karan Sharma deposited one *pulanda* stated to be containing a pistol and rounds which stood sealed with the seal of 'AKS'. This deposit was entered in the Malkhana Register No.9 at Sr. No.5257 relating to FIR No.150/09 along with the FSL form bearing subsequent seal impression. I find that Head Constable Moti Ram (PW-33) **(pg 342)** has deposed that on the 26th of June 2009, the *pulanda* of the case FIR No.150/09 was sent to the Foresnsic Science Laboratory ('*FSL*' hereafter), Rohini vide RC No.36/21/09 through Constable Chandra Prakash along with FSL form who deposited the same at the laboratory. The FSL result was received on 10th of September 2009 along with parcel duly sealed with the seal of 'FSL'. PW-33 has testified that the FSL result was handed over to ASI Dinesh.

606. In the trial of the present case, on the 14th of September 2009, when the court considered the application of Inspector Arun Kumar (PW-47) for handing over the pistol of the case No.150/09 to him for testing in the Ballistic Laboratory, FSL, Rohini for expert opinion, the sealed case property was available in the court. The order dated 14th September, 2009 records that it stood sealed with the seal of '*FSL, Rohini*' and was found to be containing one

pistol and four rounds cartridges, out of which one was empty and three were live.

607. Mr. Mohan, ld. counsel has rightly contended therefore, that when the property was produced before the Metropolitan Magistrate on 14th September, 2009 (**pg 1000**) in the present case, it had already undergone a forensic science laboratory examination as is manifested from the seal. We do not have the benefit of this examination.

608. Head Constable Moti Ram (PW-33) (**pg 343**) also testified that on 14th September, 2009, the parcel bearing seal of FSL in FIR No.150/09 was transferred to P.S. Chanakya Puri by the order of the court. The *malkhana* register containing the relevant entry has been proved as Ex.PW33/A. The witness also established the entries in the road certificate register which included R.C. No.36/21/09 (Ex.PW33/B); the receipt from the FSL regarding deposit of the parcel on 25th June, 2009 (Ex.PW33/C). In his cross-examination, PW-33 has clarified that he had not physically verified the contents of the *pulanda* but had mentioned the contents in the road certificate register on the basis of the FSL form entries. The defence brought out overwriting in the date of 14th May, 2009 and the particulars of the seal where the *pulanda* was sent to the FSL in an attempt to cloud the dispatch and samples sent to the laboratory.

XX. Recovery of bullets and cartridges from the shooting sites

609. Mr. Rajeev Mohan, ld. counsel for Sonveer as well as Ms. Aashaa Tiwari, learned APP for the State have extremely carefully taken us through the evidence of the recoveries of bullets from the body of deceased Ankit as well as from the spot. Our attention has been closely drawn also to the recovery of fired cartridges and seizure memos of all recoveries in the case as well as the result of the forensic examination thereon.

610. I may note that in the statement under Section 164 of the Cr.P.C. dated 21st May, 2009 (Ex.PW1/B) recorded on oath before Shri Saurabh Kulshrestha, Metropolitan Magistrate, Sunil Kumar (PW-1) has stated that one bullet was shot by the persons sitting on the back side. He states that when they were at the cold drink cart vendor, a silver coloured Indica car came there and "*usme se ek ladke ne hamari car par goli chalayee*. *Ankit jo hamari car mein betha hua tha use ek goli lagi*". In other words, Sunil Kumar was categorical that from the Indica car, only one person fired a solitary bullet at the Santro. Thereafter he states that "...*Ve ladka aage ki seat par betha hua tha. Ve driver ke saath wali seat par baitha hua tha*....("*that boy was sitting in the front seat next to the driver*").

611. So far as the firing at the red light is concerned, Sunil Kumar (PW-1) has stated that the Indica was following them to the red light. From the rear, "*unhone 8-10 goliyan chalayeen*. *Ek goli Ankit ke sar mein lagi*". When translated this reads as "*they fired 8-10 bullets and one bullet hit Ankit on his head*".

612. I have noted above the bullets and metallic fragment recovered by Dr. Arvind Kumar (PW-18) from Ankit's liver, neck and brain in his post-mortem (Ex.PW18/A).

613. The investigating agency has also proved on record a seizure memo of recoveries of a lead piece and a fired cartridge effected on the 22nd February, 2009 about 200 metres from the stationary black Santro car no.DL2FFK 0002, which were relateable to the first episode of firing near the drink cart. As per the seizure memo (Ex.PW24/E) (**pg 774**), the following were recovered and sealed in a plastic container with the seal of 'SSR' :

(i) One lead piece.
(ii) One fired cartridge with the mark KF7.65 (at a distance of 5-6 metres from the lead piece)

614. On the 22nd of February 2009, at the T-point on the Simon Bolivar Marg, vide seizure memo Ex.PW24/D, the police also claims to have recovered the following (**pg 765**):

> *"One fired cartridge from the front of the car at the katchcha side of the road with its front side flattened (Ex.PW24/D) as per the seizure (Ex.PW24/X7), the cartridges bore the mark KM7465."*

These cartridges were sealed in a plastic container with the seal of 'SSR'.

615. In our discussion of the post-mortem report (Ex.PW18/A), I have noted the bullets recovered from Ankit's body which were handed over to the police for investigation.

XXI. Forensic Evidence – reports of the ballistic, biology and serology examinations on the seized articles and samples

616. During the course of hearing of these appeals on the 2nd of August 2016, it was submitted by Ms. Aashaa Tiwari, ld. APP for the State that all the recovered and seized articles were subjected to an examination by the FSL and the reports of the ballistic and serological experts were filed on trial court record. However, on account of *bona fide* error these reports had not been tendered in evidence before the ld. Trial Court. Ms. Tiwari submitted that they could be legally tendered in the present appeals without production of the experts who had given opinion by virtue of Sections 293 and 391 of the Cr.P.C. Ld. APP had drawn our attention to these documents from the FSL which were lying in original on the record of the lower court.

617. Consequently, by an order dated 2nd August, 2016, as the appellants were not present in court, we recorded the following proceedings :

> *"1. It is submitted by learned APP for the State that on account of bona fide error, the reports of the FSL had not been tendered in evidence before the Trial Court. The learned APP submits that these reports can be legally tendered in evidence by her in these proceedings without production of these experts by virtue of Sections 293 and 391 of the Cr.P.C.*
> *2. The appellants are not present in court. Let them be produced before this court when this aspect of the matter shall be considered. The Registry shall issue production warrants for their appearance on 8th August, 2016.*

List for further arguments on 3rd August, 2016."

618. On 8th August, 2016, we recorded the following order :

"1. Learned APP has drawn our attention to the following ***documents from the Forensic Sciences Laboratory*** *which are* ***lying in original on the record of the lower court*** *:*

(i) Report of FSL 2009/F-4309 dated 8th December, 2010 (pg no.3901-02 of the trial court record).

(ii) Report of FSL 2009/B-2203/498-Ba Dated 8th December, 2010 (Pg no. 3903-6 of the trial court record).

(iii) Letter of FSL 2009/B-2203/9446 dated 15th December, 2010 (pg no. 3909 of trial court record).

(iv) Report of FSL 2009/B-2203 dated 15th December, 2010 (pg no. 3911-13 of trial court record).

(v) Report of FSL-2009/B-2203 dated 15.12.2010 (pgs 3907 of trial court record).

2. We have ***heard*** *the learned Additional Public Prosecutor and the* ***learned counsel for all the five appellants*** *(convicted by the trial court) on the request for the above records of FSL to be tendered in evidence in terms of Section 293 read with Section 391 CrPC.*

3. ***Copies of the these documents have been supplied to each of the five appellants(convicts) and their contents have been explained to them****.*

4. ***Learned counsel for the appellants(convicts) do not have any objection to the formal tendering of the*** *reports without prejudice to their objections on the*

relevance and contents thereof. Let the statement of the Additional Public Prosecutor be recorded."
(Emphasis by us)

619. The appellants had been thus produced before us on the 8th of August 2016 when copies of the reports were supplied and contents explained to all of them. Learned counsel for the appellants had stated that they did not have any objection to the formal tendering of the reports without prejudice to their objections on the relevance and contents thereof. Consequently, Ms. Aashaa Tiwari, ld. APP for the State had made a statement tendering in evidence the reports of the FSL and which was thereupon assigned exhibit marks. I set out hereunder the tabulation of the documentation so tendered, exhibited and taken in evidence :

Sr.No	***Document***	***Division***	***Report given by***	***Exhibits***
1.	*Report of FSL 2009/F-4309 dated 8th December, 2010 (pg no. 3901-02 of the trial court record)*	*Ballistic*	*Mr. Krishan Chandra Varshney, Asstt. Director-Ballistic*	***Exhibit HC-A***
2.	*Report of FSL 2009/B-2203/498-Ba Dated 8th December, 2010 (Pg no. 3903-6 of the trial court record)*	*Ballistic*	*Mr. Krishan Chandra Varshney, Asstt. Director-Ballistic*	***Exhibit HC-B***
3.	*Letter of FSL 2009/B-2203/9446 dated 15th December, 2010 (pg no. 3909 of trial court record)*	*Biology*	*Director*	***Exhibit HC-C***
4.	*Report of FSL 2009/B-2203 dated*	*Biology-division*	*Mr. V. Sankaranarayan,*	***Exhibit HC-C/1***

	15th December, 2010 (pg no. 3911-13 of trial court record)		*Sr. Scientific Assistant-Biology, Forensic Science Laboratory, GNCTD*	
5.	*Report of FSL-2009/B-2203 dated 15.12.2010 (pgs 3907 of trial court record)*	*Biology division (Seriologist)*	*Mr. V. Sankaranarayan, Sr. Scientific Assistant-Biology, Forensic Science Laboratory, GNCTD*	***Exhibit HC-C/2***

620. Inasmuch as these reports were taken on record for the first time after making copies available and explaining the same to the appellants, in continuation of their statements recorded by the trial court, on 8th August, 2016, further statements under Section 313 of the Cr.P.C. of all the appellants was recorded by us. In these statements, the appellants had denied the correctness of the reports and maintained that they were innocent. They had also refused to make any additional statements.

621. In his supplementary statement under Section 313 of the Cr.P.C., on the 8th of August 2016, Sonveer had additionally stated that the articles respecting which reports Ex.HC-A and Ex.HC-B were sought to have given opinion, were not connected with him.

622. I now examine the forensic evidence under the following sub-headings for convenience :

(i) *Forensic examination of the black Santro bearing No.DL 2FFK 002*

(ii) *Ballistic examination of seized articles*

(iii) Biological and serological examination of seized articles

I propose to discuss the above sub-headings in *seriatim :*

(i) Forensic examination of the black Santro bearing No.DL 2FFK 002

623. Our attention is drawn to the Crime Scene Report dated 28th September, 2010 (Ex.PW19/A) given by Dr. U.R. Anand, Sr. Scientific Officer, Ballistic Division, Forensic Science Laboratory, Rohini, Delhi upon a physical examination of the black Santro bearing No.DL2FFK 0002. This report was proved during trial as Ex.PW19/A wherein it had been observed as follows :

> *"1. There was a **one entry hole** (marked as H1) was present on the rear **right side fix quarter window of** Santro Car, around the **hole concentric and radical cracks were also observed which may be caused by a projectile discharged through a firearm. Swab from hole and control swab have been taken**.*
> *2. One dent mark (marked as H2) was present on the right hand side bonnet of car. **Swab from impact and control swab** have been taken.*
> *The **exhibits were handed over to IO** and IO was advised **to send the exhibits to Forensic Science Laboratory for detailed examination**."*
>
> *(Emphasis by us)*

Thus swab from the hole on the right side fixed window of the vehicle and a control swab was taken. The crime team opined that the cracks and hole may have been caused by a projectile through a firearm. In the present case, there is evidence that two persons were firing with firearms.

(ii) *Ballistic examination of seized articles*

624. I also find that the trial court order dated 14th September, 2009 has carefully noted that the sealed *pulanda* containing only the pistol was handed over to Inspector Arun Kumar (PW-47) with the direction to redeposit the pistol after getting it tested in the *malkhana* of police station Mangol Puri. The Magistrate has noted on 14th September, 2009 that the sealed *pulanda* containing the cartridges was handed back to the MHC(M), P.S. Mangol Puri. The order dated 14th September, 2009 manifests that the cartridges recovered in that case were never taken on the record of the present case.

625. This is also supported by the seizure memo (Ex.PW49/5) dated 14th September, 2009 (**pg 962)** prepared by Inspector Arun Kumar noting the seizure of a sealed *pulanda* bearing the court's seal '*VS*' containing a pistol which was handed over to him pursuant to the said direction of the court.

626. Mr. Mohan, ld. counsel for Sonveer has disputed the veracity of the articles, which were deposited with the Forensic Science Laboratory for testing. Our attention is drawn in this regard to the evidence of Head Constable Rajender Singh (PW-41) (**pg 366**) who was posted as the MHC(M) at the police station Chanakya Puri on the 22nd of February 2009. This witness has testified receiving from Inspector S.S. Rana (PW-26) eight parcels and one car, out of which one was sealed with the seal of 'CMO' Trauma Centre while the remaining were sealed with the seal of '*SSR*'.

627. This witness has further testified that on 14th September, 2009, Inspector Arun Kumar had deposited one parcel sealed with the seal of '*BS*' stated to be containing a pistol.

628. On 29th May, 2009 and 15th October, 2009, the exhibits of the present case were sent to the FSL, Rohini.

629. So far as the exhibits which were sent on 15th October, 2009 are concerned, PW-41 has stated that vide RC No.86/21, one parcel and five live cartridges were sent to the FSL, Rohini through ASI Narender Singh (**pg 367**).

630. Ms. Aashaa Tiwari, ld. APP for the State has drawn our attention to the road certificate dated 15th October, 2009 which certifies that one *pulanda* containing a pistol; one sample seal of Shri Vishal Singh, MM and five live cartridges were sent to the FSL.

631. On the 29th May, 2009, the exhibits were sent vide R.C. Nos.23/21 to 28/21 through Head Constable Satish. Results of the forensic examination were received on 24th December, 2010.

632. Mr. Mohan, ld. counsel has attempted to cast a doubt that the result of FSL has been obtained upon planted cartridges submitting that the investigating officer had the cartridges of FIR No.150/09 in which one had the hammer pin strike mark on it.

It therefore, becomes necessary to examine details of the bullets and cartridges recovered in this case.

633. In this regard, I find that the laboratory reported the results of the ballistic examination as well vide examination report

No.FSL 2009/B-2203/498-Ba dated 08th December, 2010 of Ballistics Division of FSL, Delhi (**TCR pg 3903) (Exh. HC - B)**.

634. I find that under cover of a letter dated 14th October, 2010, the pistol was sent to the FSL, Rohini, Delhi in one sealed parcel through ASI Narender Singh which contained the following article:

"***2. DESCRIPTION OF ARTICLES CONTAINED IN THE PARCEL(S)/EXHIBIT(S)***

Parcel no.	***No. & Seal Impression***	***Description of Exhibit(s) contained in parcel(s)***
1	*5 V.S*	*One improvised pistol of 7.65mm bore already marked exhibit 'F1' in FSL case No.2009/F-2514.*

635. The examination report of the Ballistics Division dated 8th December, 2010 bearing no. FSL 2009/F-4309 has been exhibited as Ex.HC-A which reads as follows :

> *"**3. RESULTS OF EXAMINATION/OPINION***
> *(1) The **improvised pistol pistol 7.65mm** bore marked exhibit 'F1' is designed to fire a standard 7.65mm cartridge. It is in **working order** in its present condition. Test fire conducted successfully.*
> *(2) The **7.65mm cartridge from laboratory stock was test fired** through 7.65mm bore improvised pistol marked exhibits 'F1' and **test fired cartridge case marked as 'TC1/1'** & **recovered test fired bullet was marked as 'TB1/1'**.*
> *(3) The exhibit **'F1' is a firearm as defined in the Arms Act, 1959.**"*
>
> *(Emphasis by us)*

The exhibit was thereafter resealed with the seal of 'KCV FSL Delhi'.

636. It would therefore, appear that the laboratory used a sample cartridge from laboratory stock which was test fired from the pistol. The pistol (Ex.F-1) was found to be in working condition. The test fired cartridge case was marked as TC1/1 and the recovered test fired bullet was marked as TB1/1.

637. I have noted above that the bullets stood recovered from the spot; bullets and remnants recovered from Ankit's body; clothes of Ankit and Surender. Swabs from the impact point and a control swab were taken from the Santro car which were subjected to a ballistic examination. Under the cover of a letter dated 29th May, 2009, the SHO of the P.S. Chanakya Puri, New Delhi sent seven sealed parcels bearing No.C-3, C-4, C-9, C-10, H-1, H-2 and C-5 and two control samples bearing No.C-1 to C-2 seized in connection with the case FIR No.35/09 (present case) which were received in the laboratory on 25th October, 2010 and 23rd November, 2010. The articles which were forwarded as well as parcels in which they were contained, have been described in the FSL report dated 8th December, 2010 (Ex.HC-B) (**pg v)** as follows:

*"**DESCRIPTION OF ARTICLES CONTAINED IN THE PARCEL(S)/EXHIBIT(S)***

Parcel No.	***No. & Seal Impression***	***Description of Exhibit(s) contained in parcel(s)***
C-3	*01 S.S.R.*	*One 7.65mm cartridge case marked exhibit 'EC1' and one deformed 7.65mm cartridge case marked exhibit 'EC2'.*
C-4	*01 S.S.R.*	*One 7.65mm cartridge case (without percussion cap) marked exhibit 'EC3' and one bullet marked exhibit 'EB1'.*
C-9	*01 FORENSIC MEDICINE JPNATC*	*One deformed marked exhibit 'EB2' and one metallic piece marked exhibit 'MP1'.*

	AIIMS	
C10	*01 FORENSIC MEDICINE JPNATC AIIMS*	*One bullet marked exhibit 'EB3'.*
H-1	***3 S.S.R.***	***One swab said to be taken around the hole on glass of Santro Car no.DL 2FF K 0002 marked as 'H1'.***
H-2	*3 S.S.R.*	*Swab said to be taken from suspected scratch mark on Santro Car no.DL 2FF K 0002 marked as 'H2'.*
C-5	***5 FSL VSN DELHI***	***One torn sweater marked exhibit 'C1' having one hole on right torn sleeve marked as 'HC1', one torn Vest marked exhibit 'C2', one Jeans pants marked exhibit 'C3', and one underwear marked exhibit 'C4'.***
C-1	*5 FSL VSN DELHI*	*One control swab said to be lifted from glass of Santro Car no.DL 2FF K 0002.*
C-2	*5 FSL VSN DELHI*	*One control swab said to be lifted from right side of bonnet of Santro Car no. DL2FF K 0002.*

638. I may note that injured Ankit's sweater having one hole on right torn sleeve and torn vest sent as parcel C-5 by the police, were marked Ex.C-1 by the laboratory and were also subjected to a forensic examination.

639. As per Ex.HC-B, after the examination by the Ballistic Division, it was reported as follows :

> *"**3. RESULTS OF EXAMINATION/OPINION :***
> *(1) The 7.65mm cartridge cases marked exhibits 'EC1' to 'EC3' are fired empty cartridges.*
> *(2) The bullets/deformed bullet marked exhibits 'EB1' to 'EB3' corresponds to the bullet of 7.65mm cartridge.*
> *(3) The 7.65mm cartridge from laboratory stock was test fired through the improvised pistol 7.65mm bore already marked exhibit 'F1' in FSL case No.2009/F-*

2514 and received in FSL case no.2009/F-4309 (FIR no.35/09 PS : Chankya Puri) and test fired cartridge case was marked as 'TC1/1' and recovered test fired bullet was marked as 'TB1/1'.

(4) ***The individual characteristics of firing pin marks on evidence fired cartridge cases marked exhibit 'EC2' and on test fired cartridge case marked 'TC1/1' were examined and compared under the Comparison Microscope Model Leica DMC and were found identical. Hence, the exhibits 'EC1' & 'EC2' have been fired through the improvised pistol of 7.65mm bore already marked exhibit 'F1' in FSL case No.2009/F-2514*** *and received in FSL case no.2009/F-4309 (FIR no.35/09, PS: Chankya Puri).*

(5) No opinion can be given whether the evidence fired cartridge case 'EC3' has been fired through the improvised pistol 7.65 mm bore already marked exhibit 'F1' in FSL case No. 2009/F-2514 and received in FSL case No.2009F-4309 (FIR No.35/09 PS: Chankya Puri) as percussion cap having firing pin marks and breech face marks is absent.

(6) The individual characteristics of striations on bullet/deformed bullet marked exhibits 'EB1' to 'EB3' are insufficient for comparison and opinion whether these have been discharged through the improvised pistol 7.65mm bore already marked exhibit 'F1' in FSL case No.2009/F-2514 and received in FSL case no.2009/F-4309 (FIR no.35/09, PS: Chankya Puri) or not.

(7) No opinion can be given regarding one small metallic piece marked exhibit 'MP1' due to insufficient data."

(8) The hole marked 'HC1' on the torn right sleeve of sweater marked exhibit 'C1' may have been caused by a bullet discharged through a firearm.

(9) The characteristics Gun Shot Residue (GSR) particles were detected in the swab marked 'H1' said to

be taken around the hole mark on glass of Santro Car no. DL 2FF K 0002.
(10) The ***characteristics Gun Shot Residue*** *(GSR) particles were* ***detected*** *in the swab marked 'H1' said to be taken from suspected* ***scratch mark on Santro Car no. DL 2FF K 0002****.*
(11) The exhibits 'EC1' to 'EC3' / 'EB1' to 'EB3' are parts of ammunition as defined in the Arms Act, 1959."
(Emphasis by us)

640. Ms. Aashaa Tiwari, ld. APP for the State has drawn our attention to the above report (Ex.HC-B) dated 8th December, 2010 based on comparison of the cartridges recovered in the present case with a cartridge which was taken from the laboratory stock and test fired. It has been reported that the pistol (Ex.F-1) when test fired revealed that it was in working condition. It is reported at Sl.No.4 that two of the bullets EC1 and EC2 which were recovered from the spot, match the characterstics of the test fired cartridge (TC-1). However, the bullets which were recovered from Ankit's body EB1 to EB3, could not be matched for the reason that the striation on the bullet and deformed bullet EB1 to EB3 were insufficient for comparison (at Sr.No.6 of Ex.HC-B).

641. Given the firearm damage to the fixed glass pane of the black Santro, swab samples (Ex.H1) lifted by the crime team from the hole on the glass of the Santro as well as the control swab were also sent to the FSL. The FSL examined the samples and seized articles from the firearm residue perspective as well and subjected them to a ballistic examination.

As per the ballistic report (Ex.HC-B), it is reported at Sl.Nos.8 and 9, that there was gun powder residue on Ankit's sweater as well as on car window (**TCR 3905/1345)**. No such residue is reported on Surender's clothes.

642. So what would be the value of the opinion of the expert? Is such opinion to be treated as proved beyond reasonable doubt and has to be accepted *per se* as the absolute proof of facts sought to be proved? In this regard, I may refer to the principles laid down by the Supreme Court in para 30 of ***Crl.A.No.121/2008, Virender v. The State of NCT of Delhi*** decided on 29th September, 2009 which is as under :

> *"30. In* ***R vs. Ahmed Ali 11 WR Cr. 25*** *Nariman, J had made observations on medical evidence. It was stated by the learned Judge that the* ***evidence of*** *a medical man or* ***other skilled witnesses****,* ***however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion****."*
>
> *(Emphasis by us)*

643. Therefore, it is trite that the opinion of the ballistic expert is at the most corroborative evidence of facts established by the prosecution and by itself cannot be treated as proof thereof.

644. The ballistic evidence in the present case, therefore, supports the prosecution case that the black Santro was shot at resulting in the hole in the window and that Ankit received gun shot injuries. It

also points towards the possibility of the weapon recovered in FIR No.150/09 as having been used in the crime.

645. I may note that it is the case of the prosecution that two of the assailants were possessing pistols with which they were shooting, one seated on the left side front seat and the second behind him on the rear seat. So far as causing of the injury to the deceased is concerned, the same is attributed by the prosecution witnesses to Vishnu who was seated in the front seat.

Only one weapon is alleged to have been recovered in the case premised on disclosures attributed to Sonveer. The prosecution thus has to establish that this weapon was actually used by Sonveer during the commission of the offence and recovered from him. I examine this issue hereafter. I shall separately examine the objection to the admissibility of the disclosure statements.

(iii) *Biological and serological examination of seized articles*

646. The investigating agency had also seized blood stained earth, clothes etc. as detailed above. As per Ex.HC-C/1, I also find that the SHO, P.S. Chanakya Puri under cover of another letter dated 29th May, 2009 sent the following 20 parcels in connection with FIR No.35/09 for a serological examination to the FSL which were received by the laboratory and confirmed by the letter dated 15th December, 2010 (Ex.HC-C/1) reproduced hereunder :

> "*Your letter No.2199/SHO/Chanakya Puri Dated : 29.05.09 regarding 20(Twenty) parcels in connection with the*

FIR No. 35/2009 Dated : 22.02.09 u/s: 302/307/34/120B IPC R/W sec.25/27/54 A. Act P.S. Chanakya Puri duly received in this office on 29.05.09.

DESCRIPTION OF PARCELS & CONDITION OF SEALS

SEAL INTACT AS PER F.A.'s LETTER

Sealed cloth parcels	*:*	*09*
Sealed polythene bag	*:*	*01*
Sealed glass bottles	*:*	*02*
Sealed envelopes	*:*	*08*
Total	*:*	*20 (Twenty)*

DESCRIPTION OF ARTICLES CONTAINED IN PARCEL

Parcel 'S-1' :One sealed cloth parcel sealed with the seal of "SSR" containing exhibit 'S-1",kept in a plastic container.

Exhibit 'S-1': Cotton wool swab having darker stains.

Parcel 'S-2' : One sealed cloth parcel sealed with the seal of "SSR" containing exhibit 'S-2', kept in a plastic container.

Exhibit 'S-2': Pieces of road material alongwith cotton wool swab having brown stains.

Parcel 'S-3': One sealed cloth parcel sealed with the seal of "SSR" containing exhibit 'S-2', kept in a plastic container.

Exhibit 'S-3': Cotton wool swab having brown stains.

Parcel 'S-4' : One sealed cloth parcel sealed with the seal of "SSR" containing exhibit 'S-3',kept in a plastic container.

Exhibit 'S-4': Cotton wool swab having brown stains.

Parcel 'C-1': One sealed cloth parcel sealed with the seal of "SSR" containing exhibit 'C-1', kept in a plastic container.

Exhibit 'C-1': Pieces of road material.

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Parcel 'C-2' : One sealed cloth parcel sealed with the seal of "SSR" containing exhibit 'C-2', kept in a plastic container.

Exhibit 'C-2' : Pieces of road material

Parcel 'C-3' : One sealed cloth parcel sealed with the seal of "SSR" said to contain exhibit sent in original to Ballistics Division of this laboratory for examination.

Parcel 'C-4' : One sealed cloth parcel sealed with the seal of "SSR" said to contain exhibit 'C-4' sent in original to Ballistics Division of this laboratory for examination.

Parcel 'C-5': One sealed cloth parcel sealed with the seal of '"CMO JPNATC AIIMS ND" containing exhibits 'C-5(a)', 'C-5(b)', 'C-5(c) and 'C-5'(d).

Exhibit 'C-5(a): One sweater having brown stains.

Exhibit 'C-5(b): One banian having brown stains.

Exhibit 'C-5(c): One pant having brown stains.

Exhibit 'C-5(d): One underwear having darker stains.

Parcel 'C-6' : One sealed envelope sealed with the seal of "SSR" containing exhibit 'C-6'

Exhibit 'C-7' : Gauze cloth piece having brown stains.

Parcel 'C-1': One sealed envelope sealed with the seal of "SSR" containing exhibit 'C-1' (S.No.13).

Exhibit 'C-1': Cotton wool swab.

Parcel 'C-2': One sealed envelope sealed with the seal of "SSR" containing exhibit 'C-2' (S.No.14).

Exhibit 'C-2': Cotton wool swab.

Parcel 'H-1' : One sealed envelope sealed with the seal of "SSR" said to contain exhibit 'H-1' sent in original to Ballistics Division of this laboratory for examination.

Parcel 'H-2' : One sealed envelope sealed with the seal of "SSR" said to contain exhibit 'H-2' sent in original to Ballistics Division of this laboratory for examination.

Parcel 'C-9' : One sealed glass bottle sealed with the seal of "FORENSIC MEICINE JPNATC AIIMS" said to contain exhibit 'C-9' sent in original to Ballistics Division of this laboratory for examination.

Parcel 'C-10' : One sealed glass bottle sealed with the seal of "FORENSIC MEDICINE JPNATC AIIMS" said to contain exhibit 'C-10' sent in original to Ballistics Division of this laboratory for examination.

Parcel 'C-11' : One sealed envelope sealed with the seal of "FORENSIC MEDICINE JPNATC AIIMS" containing exhibit

'C-11'.
Exhibit 'C-11' : Brown gauze cloth piece described as 'Blood in gauze'.
Parcel 'C-14' : One sealed polythene bag parcel sealed with the seal of "CMO JPNATC AIIMS ND" containing exhibits 'C-14(a)' and 'C-14(b)'.
Exhibit 'C-14(a)' : One pant having darker stains.
***Exhibit 'C-14(b)' : One underwear having brown stains.*"**
(Emphasis by us)

647. The Biology Division of the FSL submitted its report dated 15th December, 2010 with regard to these articles in Ex.HC-C1 as follows :

"***Result of analysis***

1. ***Blood*** *was detected on exhibits 'S-1', 'S-2', 'S-3', 'S-4', '**S-5(a)**', '**S-5(b)**', '**S-5(c)**', '**S-5(d)**, 'C-6', 'C-7', 'C-8', '**C-11'**, '**C-14(a)** & '**C-14(b)**'*
2. *Blood could not be detected on exhibits 'C-1', 'C-2', 'C-1' & 'C-2'*
3. *Report of serological analysis in original is attached herewith.*

Note:

1. *As regards query no.(4), (5) and (6), (7), (9) and (10) of the Forwarding Authority's letter, the report of Ballistics Division in a sealed envelope is enclosed herewith.*

II. *Remnants of the exhibits have been sealed with the seal of 'VSN FSL DELHI' and 'KCV FSL DELHI'.*"

(Emphasis by us)

648. The above extract would show that the Ex.C-5(a), Ex.C-5(b), Ex.C-5(c) and Ex.C-5(d) were seized at AIIMS and relate to the

deceased Ankit. The clothes of Surender (PW-8) with the pant and underwear have been marked as Ex.C-14(a) and Ex.C-14(b).

649. So far as the species of origin and the grouping of the blood on these articles is concerned, the Biology Division of the FSL submitted seriological report (Ex.HC-C/2) dated 15th December, 2010 opining as follows :

Exhibits	***Species of Origin***	***ABO Grouping/Remarks***
S-1' Cotton wool swab	*Human*	*No reaction*
S-2 Cotton wool swab	*Human*	*'A' Group*
S-3' Cotton wool swab	*No reaction*	----
S-4' Cotton wool swab	*No reaction*	---
'C-1' Road material	*No reaction*	---
'C-2' Road material	*No reaction*	----
'C-5(a) Sweater	*Human*	*No reaction*
'C-5(b)' Banian	*Human*	*No reaction*
'C-5(c) pants	*Human*	*No reaction*
'C-5(d) Underwear	*Human*	*No reaction*
'C-6' Gauze cloth piece	*No reaction*	------
'C-7' Gauze cloth piece	*Human*	*No reaction*
'C-8' Gauze cloth piece	*Human*	*No reaction*
'C-1' Cotton wool swab	*No reaction*	-----
'C-2' Cotton wool swab	*No reaction*	------
'C-11 Blood stained gauze cloth	*Human*	*No reaction*
C-14(a) Pants	*Human*	*No reaction*
'C-14(b) Underwear	*Human*	*'A' Group*

650. It cannot be disputed that in the present case, Ankit suffered fatal bullet injuries and therefore, his clothes would have got blood stained. The biological and serological examination (Ex.HC-C2) of his clothes confirms this fact.

651. The defence has staunchly challenged that Surender (PW-8) was at all injured in the incidents. I discuss this submission in

detail elsewhere. However, as per Ex.HC-C2, human blood of 'A' group is identified on his underwear (Ex.C-14(b)) which was the blood group of deceased Ankit. There is no evidence of any physical contact between Surender and Ankit after he received the fatal injury, casting substantial doubt on the evidence of Surender (PW-8) as an injured eye-witness.

XXII. Prohibition of admissibility of disclosures (Ex.PW17/D and Ex.PW17/E) attributed to Sonveer under Section 27 of the Evidence Act

652. In the case in hand, to connect that gun recovered in FIR No.150/09 to Sonveer, reliance is placed on two disclosure statements (Ex.PW17/D and Ex.PW17/E) allegedly made by Sonveer after his arrest. A challenge is laid to their admissibility in evidence in view of the prohibition contained in Sections 24 to 27 of the Evidence Act.

653. It has been contended by Mr. Mohan, ld. counsel for Sonveer that it is only if a fact is actually discovered in consequence of the information given by the accused, some guarantee of truth of that part is afforded, and, only such part of the information which was the clear, immediate and proximate cause of the discovery would be admissible in evidence in view of Section 27 of the Evidence Act.

654. In this regard, our attention is drawn to the pronouncement of the Supreme Court reported at ***(1976) 1 SCC 828, Mohammed***

Inayatullah v. State of Maharashtra, relevant portion of which is extracted below :

> ***"11.*** *Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases is not always free from difficulty. xxx xxx xxx*
>
> *xxx xxx xxx*
>
> ***12.*** *xxx xxx xxx It will be seen that the* ***first condition*** *necessary for bringing this section into operation is the* ***discovery of a fact,*** *albeit a* ***relevant fact****, in consequence of the information received from a person accused of an offence. The* ***second*** *is that the* ***discovery of such fact must be deposed to.*** *The* ***third*** *is that at the* ***time of the receipt of the information the accused must be in police custody****. The* ***last*** *but the most important condition is that* ***only "so much of the information" as relates distinctly to the fact thereby discovered is admissible****. The rest of the information has to be excluded. The word "****distinctly" means "directly", "indubitably", "strictly", "unmistakably"****. The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.*
>
> *xxx xxx xxx*

14. *Before proceeding further, it is necessary to be clear about the* ***precise statement which had been made by the appellant*** *to the police officer. This statement finds incorporation in the panchanama, Ext. C, and we have reproduced an English rendering of the same earlier in this judgment. While considering this statement, the High Court observed that the accused had stated that "he had kept them (drums) there". We have perused the original record of the statement which is in Hindi, and we are of opinion that by no stretching of the words this statement can be so read or construed as has been done by the High Court. The copy Ext. C of the panchanama, in the paperbook contains a correct English rendering of the same. What the accused had stated was: "I will tell the place of deposit of the three chemical drums which I took out from the Haji Bunder on first August". It will be seen that he never said that it was he who had deposited the drums at the place from which they were produced. It seems the latter part of the statement which was an outright confession of the theft, was not completely ruled out of evidence and something of it was imported into and superimposed on the first part of the statement so as to fix the responsibility for deposit and possession of the stolen drums there, on the accused.*

15. *Having cleared the ground, we will now consider, in the light of the principles clarified above, the application of Section 27 to this statement of the accused. The first step in the process was to pinpoint the fact discovered in consequence of this statement. Obviously, in the present case, the threefold fact discovered was: (a) the chemical drums in question, (b) the place i.e. the musafirkhana, Crawford Market, wherein they lay deposited, and (c) the accused's knowledge of such deposit. The next step would be to* ***split up the statement into its components and to separate the admissible from the inadmissible portion or portions. Only those components or portions which were the immediate cause of the discovery would be legal evidence*** *and not the rest which must be excised and rejected. Thus processed, in the instant case, only the first*

part of the statement viz. "I will tell the place of deposit of the three chemical drums" was the immediate and direct cause of the fact discovered. Therefore, this portion only was admissible under Section 27. The rest of the statement, namely, "which I took out from the Haji Bunder on first August", constituted only the past history of the drums or their theft by the accused; it was not the distinct and proximate cause of the discovery and had to be ruled out of evidence altogether."

(Emphasis by us)

655. Ms. Aashaa Tiwari, ld. APP for the State has drawn our attention to para 9 of the celebrated pronouncement of the Privy Council reported at ***AIR 1947 PC 67, Pulukuri Kottaya & Ors. v. Emperor,*** which reads thus :

"9. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. ***The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to****, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that* ***if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence****; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.* ***Normally*** *the section is brought into operation when a* ***person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or***

ornaments, said to be connected with the crime of which the informant is accused. *Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect.* ***On normal principles of construction their Lordships think that the proviso to Section 26, added by Section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced*** *is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is*

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

This principle has been explained in the judgments placed by Mr. Rajiv Mohan, ld. counsel for Sonveer.

656. In the illustration noted by this court in para 12 of ***Chandrakant Jha v. State (Govt. of NCT) of Delhi,*** the accused takes the investigating officer and the *panchas* to a dealer wherefrom he had purchased the weapon. Such evidence would be inadmissible under Section 27 of the Evidence Act but, if corroborated by the dealer, the conduct of the accused in taking the police to the dealer would be admissible under Section 8 of the Evidence Act.

657. In support of this submission, reliance has been placed on the pronouncement of the Supreme Court reported at ***(1969) 2 SCC 872, Jaffar Hussain Dastagir v. State of Maharashtra*** in the following terms :

> ***"4.*** *The High Court came to the conclusion that the complicity of the appellant with the crime alleged rested only on two pieces of evidence brought forward at the trial. The first was his identification by Mehta and his companion at the identification parade to the affect that he was present in the train on the material date and at the material hour. By itself this means nothing because there were a number of other persons who were*

standing in the passage at the same time and there is no suggestion ... and indeed there could be none... that any of these persons were connected with the crime. To fasten the guilt on the appellant the prosecution had to rely on the evidence furnished by the statement alleged to have been made by the appellant to the police and the Panchas in consequence whereof he was said to have led the police party to the Bombay Central Railway Station waiting hall and to the discovery of the diamonds from Accused 3. As the statement of the accused recorded above was in the nature of a confession it would come under the embargo of Section 26 of the Evidence Act unless it can be brought within the ambit of Section 27 of the Evidence Act which reads:

xxx xxx xxx

In order that the section may apply the prosecution must ***establish*** *that the* ***information given by the appellant led to the discovery of some fact deposed to by him***. *It is evident that the* ***discovery must be of some fact which the police had not previously learnt from other sources*** *and that the* ***knowledge of the fact was first derived from information given by the accused***. *If the police had* ***no information*** *before of the complicity of Accused 3 with the crime and had* ***no idea as to whether the diamonds would be found with him*** *and the appellant had made a statement to the police that he knew where the diamonds were and* ***would lead them to the person who had them***, *it can be said that the discovery of the diamonds with the third accused was a fact deposed to by the appellant and admissible in evidence under Section 27. However,* ***if it be shown that the police already knew that Accused 3 had got the diamonds but did not know where the said accused was to be found, it cannot be said that the information given by the appellant that Accused 3 had the diamonds and could be pointed out in a large crowd at the waiting hall led to the discovery of a fact proving his complicity with any crime within the meaning of Section 27***. *The fact*

deposed to by him would at best lead to the discovery of the whereabouts of Accused 3.

xxx xxx xxx

8. *The question still remains as to whether the said statement was really a discovery of a fact deposed to or whether there was no discovery within the meaning of Section 27 of the Evidence Act because the* ***police was already in possession of the fact that the Accused 3 was a person who had the diamonds****. xxx xxx xxx*

xxx xxx xxx

11. *In our view Gaud must have learnt that Parekh and/or Accused 3 had the custody of the diamonds. Therefore the* ***statement of the appellant that Accused 3 had the custody of the diamonds would not be something unknown to the police so as to constitute "a fact deposed to as discovered in consequence of the information received" from the appellant. The discovery, if any, merely related to the whereabouts of Accused 3. There was no discovery of any fact deposed to by the appellant within the meaning of Section 27****. If the police had not gone to the office of the Bombay Samachar and had not learned of the complicity of the third accused with the crime, the statement of the appellant would amount to information received from him relating to the discovery of the diamonds in the custody of Accused 3."*

(Emphasis by us)

658. In the case in hand, it is not the case of the prosecution that the appellant was taken to the residence of Sanjay @ Sanju @ Khatte or that he had pointed out the place wherefrom gun had been recovered. There is nothing at all to show that Sanjay @ Sanju @ Khatte was remaining at one place.

659. Sanjay @ Sanju @ Khatta stood arrested on 13th May, 2009 in FIR No.150/09 by the Police Station Mangol Puri and a weapon

was allegedly seized from him. The fact that Sanju @ Sanjay @ Khatte had a gun in his possession was a fact in knowledge of the police and not discovered as a result of the statement(s) attributed to Sonveer. The discovery only related to the whereabouts of Sanjay @ Sanju @ Khatte. The police already had description of the gun which stood recovered.

660. So far as the recovery of the weapon in the present case is concerned, it was effected from the *malkhana* of P.S. Mangol Puri where it was stored in the case. There is nothing in the disclosure statement (Ex.PW17/E) with regard to the weapon being stored in the *malkhana* of police station Mangol Puri. Sonveer has never stated that he had placed the weapon at the place from where it was recovered. Ex.PW17/E was clearly not the immediate or proximate cause of the discovery of the weapon.

661. Strictly speaking, it cannot be held that the weapon has been recovered because of the disclosure statement given by Sonveer @ Pinku but stands claimed to have been recovered by the police from police station Mangol Puri while investigating FIR No.150/09. Therefore, even if it could be held that the second disclosure was voluntary, in view of the prohibition contained in Section 27 of the Evidence Act, Ex.PW17/E has to be ruled out of evidence altogether.

XXIII. Whether there is reliable evidence of any previous or subsequent conduct of Sonveer which could be admissible by application of Section 8 of the Evidence Act?

662. It may also be relevant to refer to Section 8 of the Evidence Act which renders admissible conduct which is contemporaneous or antecedent to the making of a statement by an accused person admissible in evidence and reads as follows :

> *"8.* ***Motive, preparation and previous or subsequent conduct.—****Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.*
> *Explanation 1.—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act. Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant."*
>
> *(Underlining by us)*

663. Mr. Mohan, ld. counsel has placed before this court a discussion on the distinction between Sections 8 and 27 of the Evidence Act by the Division Bench of this court in the judgment

reported at ***2016 SCC OnLine Del 495, Chandrakant Jha v. State (Govt. of NCT) of Delhi.*** In this case, the court has dealt with the aspect of admissibility in evidence of conduct of the accused under Section 8 as well as Section 27 of the Indian Evidence Act and considered the distinction between the two in para 12, which reads thus :

> ***"12.*** *Sarkar on Law of Evidence, 16th Edition, 2007 at page 228, has explained the distinction between Sections 8 and 27 of the Evidence Act by way of an illustration in the following manner; where an accused takes the investigating officer and the panchas to a dealer from where he had purchased the weapon, this evidence would be inadmissible under section 27, but this evidence when corroborated by the dealer, the conduct of the accused in taking the police to the dealer is admissible under Section 8 of the Evidence Act. We have in our aforesaid narration excluded the entire disclosure statement except the portion which we feel would be admissible under Section 27 or conduct which would be admissible under Section 8 of the Evidence Act. The legal position regarding admissibility with the reference to the two Sections of the Evidence Act has been examined by us in the decision in Criminal Appeal No. 216/2015 and Death Reference No. 2/2013 arising out of charge sheet filed in FIR No. 609/2006 relating to murder of Anil Mandal @ Amit. We would like to reproduce the legal position as summarised by us in the said judgment pronounced today, which reads:-*
>
> > *"44. Section 27 of the Evidence Act has been a subject matter of interpretation in several cases, albeit the judgment of the Privy Council in* ***Pulukuri Kotayya v. King Emperor AIR 1947 PC 67*** *is still regarded as locus classicus. The decision holds that a "fact discovered" is not equivalent of the physical object recovered/produced, and that the fact discovered*

embraces the place from which the object was produced and the knowledge of the accused as to this fact. Information given by the accused must relate distinctly to that fact. Admissibility would obviously not include in its ambit, a fact already known. In ***Mohd. Inayatullah v. State of Maharashtra, (1976) 1 SCC 828****, it was observed:-*

> *"11. Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases is not always free from difficulty. It will therefore be worthwhile at the outset, to have a short and swift glance at the section and be reminded of its requirements. The section says:*
>
> > ***"27. How much of information received from accused may be proved.-***
> >
> > *Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.'*
>
> *12. The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. It will be seen that the* ***first condition*** *necessary for bringing this section into operation is the* ***discovery of a fact, albeit a relevant fact,*** *in consequence of the information received from a person accused of an offence. The* ***second*** *is that the* ***discovery of such fact must be deposed to. The third*** *is that* ***at the time of the receipt of the information the accused must be in police custody.*** *The* ***last*** *but the most important*

*condition is that only "**so much of the information" as relates distinctly to the fact thereby discovered is admissible.** The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the **information supplied by the accused which is the direct and immediate cause of the discovery**. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.*

*13. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see Sukhan v. Crown; Rex v. Ganee). Now it is fairly settled that the **expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Palukuri Kotayya v. Emperor; Udai Bhan v. State of Uttar Pradesh)**."*

*45. In **Vasanta Sampat Dupare v. State of Maharashtra (2015) 1 SCC 253** the said provision stands exhaustively examined and it was held that **recovery of the dead body of the deceased at the instance of the accused would be a fact within the special knowledge of the accused**, and therefore, the*

said recovery including the recovery of the clothes in the said case, were admissible and are relevant evidences as per section 27 of the Evidence Act. The aforesaid decision also refers to Section 8 of the Evidence Act and quotes paragraph 8 from ***Prakash Chand v. State (Delhi Administration), (1979) 3 SCC 90****, which reads:-*

> *"8… …There is a clear* ***distinction*** *between the* ***conduct of a person against whom an offence is*** *alleged, which is* ***admissible under Section 8*** *of the Evidence Act,* ***if such conduct is influenced by any fact in issue or relevant fact*** *and the statement made to a Police Officer in the course of an investigation which is hit by* ***Section 162 of the Criminal Procedure Code.*** *What is* ***excluded*** *by Section 162, Criminal Procedure Code* ***is the statement made to a Police Officer in the course of investigation and not the evidence relating to the conduct of an accused person*** *(not amounting to a statement)* ***when confronted or questioned by a Police Officer during the course of an investigation****. For example, the* ***evidence of the circumstance, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden,*** *would be* ***admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement*** *by the accused contemporaneously with or antecedent to such conduct* ***falls within the purview of Section 27 of the Evidence Act****."*
>
> *Paragraph 9 from* ***A.N. Venkatesh v. State of Karnataka (2005) 7 SCC 714*** *was also quoted. The said paragraph reads:-*
>
> > *"9. By virtue of* ***Section 8*** *of the Evidence Act, the* ***conduct of the accused person is relevant****, if such conduct influences or is influenced by any*

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

46. In ***State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600****, the two provisions i.e. Section 8 and Section 27 of the Evidence Act were elucidated in detail with reference to the case law on the subject and apropos to Section 8 of the Evidence Act, wherein it was held:-*

*"**205.** Before proceeding further, we may advert to Section 8 of the Evidence Act. Section 8 insofar as it is relevant for our purpose makes the conduct of an accused person relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. It could be either a previous or subsequent conduct.*

There are two Explanations to the section, which explain the ambit of the word "conduct". They are:

> *"Explanation 1.—The word '**conduct'** in this section **does not include statements, unless those statements accompany and explain acts other than statements**, but this explanation is not to affect the relevancy of statements under any other section of this Act.*
>
> *Explanation 2.— When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant."*

*The **conduct, in order to be admissible, must be such that it has close nexus with a fact in issue or relevant fact. Explanation 1 makes it clear that the mere statements as distinguished from acts do not constitute "conduct" unless those statements "accompany and explain acts other than statements**". Such statements accompanying the acts are considered to be **evidence of res gestae**. Two illustrations appended to Section 8 deserve special mention:*

> *"(f) The question is, whether A robbed B.*
>
> *The facts that, after B was robbed, C said in A's presence — 'the police are coming to look for the man who robbed B', and that immediately afterwards A ran away, are relevant.*

* * *

> *(i) A is accused of a crime.*
>
> *The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant."*

It was further held;-

> *206. We have already noticed the distinction highlighted in Prakash Chand case between the conduct of an accused which is admissible under Section 8 and the statement made to a police officer in the course of an investigation which is hit by Section 162 CrPC. The* ***evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where stolen articles or weapons used in the commission of the offence were hidden, would be admissible as "conduct" under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct, falls within the purview of Section 27,*** *as pointed out in Prakash Chand case. In* ***Om Prakash*** *casethis Court held that: (SCC p. 262, para 14)*
>
> > *"Even* ***apart from the admissibility of the information under Section 27, the evidence of the investigating officer and the panchas that the accused had taken them to PW 11 (from whom he purchased the weapon) and pointed him out and as corroborated by PW 11 himself would be admissible under Section 8 of the Evidence Act as conduct of the accused****."*

664. In para 13 of ***Chandrakant Jha,*** the court has considered some important precedents which also deserves to be extracted and reads thus :

> ***"13.*** *Reference to judgement in Criminal Appeal No. 1831/2011* ***Ranjeet Kumar Ram @ Ranjeet Kumar Das v. State of Bihar decided on 15th May, 2015****, would be appropriate. On recovery of a dead body of an unknown boy a FIR was registered at the police station Fakuli. On a missing complaint, a FIR was registered at the police station Vaishali. The accused when arrested in the FIR*

registered at the police station Vaishali, made a disclosure statement. The leads and clues, led to the police team from the police station Vaishali to the police station Fakuli and thereupon the identity of the dead body found prior to the arrest of the accused was ascertained. Referring to the said facts, the Supreme Court opined:

> *"19. So far as the recovery of dead body of boy under the culvert between Bhagwanpur and Bahadarpur road is concerned, as noticed earlier, a F.I.R. was registered in (Fakuli OP) P.S. Case No. 128/2006 dated 22.4.2006 under Sections 302, 201 IPC read with Section 34 IPC. Though the statement recorded from the accused Chintoo Singh (A-5) and Birendra Bhagat (A-3) did not* ***lead to any recovery as admissible under Section 27 of the Evidence Act, their statement led to the disclosure of the details of the dead body and registration of F.I.R. in (Fakuli OP) P.S. Case No. 128/2006. If no statement was recorded from the accused, place of the dead body of deceased boy would have remained*** *unknown."*

Equally pertinent are the observations of the Supreme Court in ***Mehboob Ali v. State of Rajasthan [Criminal Appeal No. 808/2010] decided on 27th October, 2015****. The contention raised by the accused Mehboob or Firoz was that no portion of the disclosure statement was admissible for currency notes were not recovered from them or their possession. In this case one Puranmal was arrested and from his possession fake currency notes were recovered. He had implicated and stated that these currency notes were handed over to him by the accused Mehboob and Firoz, who in turn implicated the third accused Anju Ali. Fake currency notes were recovered from Anju Ali. The said Anju Ali identified yet another co-accused Majhar from whose possession also fake currency notes were recovered. Information supplied by Majhar ultimately led to the arrest of Liyakat Ali from whom again fake currency notes and semi printed currency notes were recovered along with some equipment/instrument. On the question whether the*

disclosure statement of Majhar and Firoz resulting in arrest of Anju Ali could be relied, it was observed as under:

> *"15. It is apparent that on the basis of the information furnished by accused Mehboob Ali and Firoz other accused, Anju Ali was arrested. The fact that Anju Ali was dealing with forged currency notes was not to the knowledge of the Police.* ***The statement of both accused has led to discovery of fact and arrest of co-accused not known to police. They identified him and ultimately statements have led to unearthing the racket of use of fake currency notes. Thus the information furnished by the aforesaid accused persons vide information memos is clearly admissible which has led to the identification and arrest of accused Anju Ali and*** *as already stated from possession of Anju Ali fake currency notes had been recovered.* ***As per information furnished*** *by accused Mehboob and Firoz vide memos P41 and P42,* ***the fact has been discovered by Police as to the involvement of accused Anju Ali which was not to the knowledge of the Police****. Police was not aware of accused Anju Ali as well as the fact that he was dealing with fake currency notes which were recovered from him. Thus the statement of the aforesaid accused Mehboob and Firoz is clearly saved by section 27 of the Evidence Act.* ***The embargo put by section 27 of the Evidence Act was clearly lifted in the instant case****. The statement of the accused persons has led to the discovery of fact proving complicity of other accused persons and the entire chain of circumstances clearly makes out that accused acted in conspiracy as found by the trial court as well as the High Court.*
>
> *16. to 19. xxxxx*
>
> *20. Considering the aforesaid dictums, it is apparent that* ***there was discovery of a fact as per the statement of Mehmood Ali and Mohd. Firoz. Co-accused was nabbed on the basis of identification made by the accused*** *Mehboob and Firoz. He was dealing with fake*

currency notes came to the knowledge of police through them. Recovery of forged currency notes was also made from Anju Ali. Thus the aforesaid accused had the knowledge about co-accused Anju Ali who was ***nabbed at their instance and on the basis of their identification.*** *These facts were not to the knowledge of the Police hence the statements of the accused persons leading to discovery of fact are clearly admissible as per the provisions contained in section 27 of the Evidence Act which carves out an exception to the general provisions about inadmissibility of confession made under police custody contained in sections 25 and 26 of the Evidence Act."*

We would prefer to rely on the said lucid ratio as equally and affirmatively applicable to Section 8 of the Evidence Act."

(Emphasis supplied)

665. In the present case, other than the disclosure statements attributed to Sonveer, as discussed above, no contemporaneous or antecedent conduct on his part relating thereto leading to recovery of any relevant fact is pointed out. It is well settled that only such circumstance or conduct would be admissible under Section 8 of the Evidence Act, if such conduct influences or is influenced by any fact in issue or relevant fact. Not a disclosure statement *simplicitor*. Section 8 of the Evidence Act, therefore, does not come to the aid of the prosecution in the present case.

XXIV. Whether prosecution could prove linkage of weapon recovered in FIR No.150/09 to Sonveer?

666. In order to establish recovery of the gun from Sanjay @ Khatte, it is in the prosecution evidence of S.I. Ajay Karan Sharma (PW-37) that it was Constable Manish, Special Staff, Outer District who had recovered a pistol from the right dub of the pants of Khatte, who handed it over to PW-37. The recovery therefore, had to be proved through the testimony of Constable Manish of the Special Staff, Outer District. The prosecution opted not to examine him.

667. I may note that there is no reference to the recovery of the pistol being pursuant to any disclosure statement by the person accused in the FIR No.150/09 registered by P.S. Mangol Puri.

668. In the present case, the prosecution has alleged that Sanju @ Khatte had disclosed that the pistol had been handed over by Sonveer to him. Inspector Ajay Karan Sharma (PW-37) had moved an application before the learned Link Magistrate for recording the testimony of Sanjay @ Sanju @ Khatte under Section 164 of the Cr.P.C. in the present case. The ld. Magistrate recorded the statement of this witness under Section 164 of the Cr.P.C. on the 24th of September 2009 which proceedings have been proved before us as Ex.PW35/C. I find that in this statement, Sanjay @ Sanju @ Khatte had told the ld. Magistrate that he had been asked by the police to come and give the statement to the judge implicating Sonveer @ Pinku, otherwise he would be implicated in the case as an accused.

669. The investigating officer has alleged that a statement purported to have been recorded at the behest of Sanju @ Sanjay @ Khatte under Section 161, cited as witness No.59 in the list of witnesses, was filed with the challan by the prosecution.

670. Interestingly, the prosecution opted to examine Sanju @ Sanjay @ Khatte, the accused as PW-46 (**pg 379**) on solemn affirmation even though he stood implicated as an accused which was registered under Section 25/54/59 of the Arms Act, Police Station Mangol Puri.

671. I am concerned about the examination on oath of this person accused of the specific offence under the Arms Act. It is well settled that the person cannot be compelled to give evidence which may incriminate him.

What would be the consequence of any finding of this court premised on the statement of Sanjay @ Sanju @ Khatte as PW-46 in the present case to the effect that the weapon was actually recovered from his possession? Would not that finding bind the court concerned with the Arms Act case against Sanjay? This important Constitutional safeguard available to Sanju @ Sanjay @ Khatte has been completely overlooked by the trial court.

672. Sanju @ Sanjay @ Khatte (PW-46), when examined in the present case as a witness in court, has clearly testified that he had remained in judicial custody for one year in the year 2009. The witness stated that no recovery of any pistol was effected from his possession and that it had been falsely planted upon him by the police officials.

673. On request by the prosecutor, Sanjay @ Sanju @ Khatte (PW-46) was declared hostile and was subjected to cross-examination by the learned Prosecutor for the State. In this cross-examination, Sanjay stated that he had not given any statement to the police and that his signature had been procured on some documents. He completely denied that Sonveer was a friend of his or that a pistol was recovered from his possession. The witness categorically denied the specific suggestion that the pistol had been given to him by Sonveer for keeping about 8-10 days back. The witness has further testified that he could not identify the pistol being shown to him.

674. The prosecution examined Sanju @ Sanjay @ Khatte (PW-46) at its own peril. Having examined him, the prosecution is bound by his testimony. He completely disproves the recovery of the weapon and destroys the prosecution case of linkage with Sonveer.

675. The only other testimony regarding recovery of the pistol is that of S.I. Ajay Karan Sharma (PW-37). To accept testimony of S.I. Ajay Karan Sharma (PW-37) as proof of recovery of the pistol from Sanju @ Sanjay @ Khatte in FIR No.150/09, I have to completely discard the evidence of Sanju @ Khatte as PW-46 as well as his statement under Section 164 of the Cr.P.C. which was proved during trial as Ex.PW35/C. The prosecution gives no reason to disbelieve PW-46. But even if I do so, then, I find that at best the testimony of S.I. Ajay Karan Sharma (PW-37) merely establishes recovery of a pistol and four live cartridges in FIR

No.150/09 from Sanju @ Sanjay @ Khatte and nothing more. The prosecution then had the formidable burden of connecting the same to Sonveer. I find that this burden has not been discharged by the prosecution by any reliable evidence.

676. Our attention has been drawn by Mr. Rajiv Mohan, Advocate to the consideration of a similar fact situation by the Supreme Court in the judgment reported at ***(1983) 2 SCC 305, State of U.P. v. Jageshwar & Ors.*** in the following terms :

> ***"5.*** *The* ***evidence of identification of the accused*** *in the identification parade* ***suffers from the notorious infirmities*** *from which evidence of that nature often suffers. Indeed, if the circumstances of the case exclude the possibility of the villagers arriving at the scene of offence before the accused fled away, the evidence of identification loses its significance. After all, you identify in a parade a person whom you have seen in the occurrence.*
>
> ***6. The gun, Ex. 23, is alleged to have been recovered in pursuance of a statement made by accused Durga. The evidence of the Ballistic expert,*** *Shariq Alvi,* ***shows that the empty shells which were found at the spot of occurrence were fired from that gun. This would be very good evidence to connect an accused with a crime but, the police did not recover the gun from Durga****. Nor, indeed, did he make any statement that he had concealed it at a place which he would point out. The discoveries under Section 27 of the Evidence Act are not of guns and daggers used in a crime. Guns and daggers have an ancient origin and one does not have to hunt for an accused to discover them.* ***The discovery, mostly and really, is as regards the authorship of concealment. Conduct and concealment are incriminating circumstances and their discovery becomes relevant and admissible under Section 27 of the Evidence Act.***

> ***Here, we are left with the position that a gun was recovered from a person called Sunder Ahir and the shells or cartridges found at the scene of offence were fired from that gun.*** *Inexplicably, Sunder has not been examined in the case. His evidence could have shown, what is alleged by the prosecution, that Durga had borrowed his gun at about the material time.* ***Sunder, not having been a witness in the case, there is no legal evidence on the record to connect Durga with the gun***.
>
> ***7.*** *The evidence regarding the recovery of a pistol, Ex. 6, from accused Ram Vishal is less unacceptable than the evidence of the recovery of the gun from Sunder but, considering the* ***large mass of useless evidence which the prosecution led, this single circumstance will not be safe to act upon for convicting but one out*** *of 11 accused viz Ram Vishal."*
>
> *(Emphasis by us)*

In this case, thus recovery from a third person was not considered to be admissible under Section 27 of the Evidence Act. It is noteworthy that the fact situation in ***Jageshwar,*** is extremely similar to the present case. It has been observed by the court that the discovery under Section 27 of the Evidence Act with regard to the disclosure of the weapon is regards the "*authorship of concealment*".

677. In the present case as well, a gun stands recovered from Sanju @ Sanjay @ Khatte, an accused in the case arising out of FIR No.150/09.

678. In the witness box as PW-46, Sanjay @ Sanju @ Khatte has stated that there was no recovery of any pistol from his possession and that it has been planted upon him by police officials. When

cross-examined by the Additional P.P. for the State, Sanjay @ Sanju @ Khatte categorically denied the suggestion that the pistol had been given to him by the accused Sonveer. This evidence binds the prosecution.

679. The version of the police completely lacks independent corroboration. In fact, the testimony of Sanjay @ Sanju @ Khatte as PW-46 completely contradicts it. The testimony of Sanju @ Sanjay @ Khatte as PW-46 disproving the recovery cannot be ignored.

680. As per the opinion of the ballistic expert, fired cartridge cases recovered from the spot were having the same striking pin marks as of the test fired cartridge in the laboratory from the recovered weapon. Therefore, there is possibility of the weapon recovered from Sanju @ Sanjay @ Khatte on 13th May, 2009 being one of the two weapons involved in the commission of the offence. The ballistic report completely rules out that this was the gun from which the bullets were fired which caused the injuries to Ankit.

681. Even if it could be held that the gun was recovered from Sanju @ Sanjay @ Khatte, the prosecution still had to connect recovery of that particular gun with Sonveer.

682. On 27th August, 2009 and 8th September, 2009 (when the police attributes disclosures to Sonveer), the police already had recovered a weapon in FIR No.150/09 and had description of the gun which stood recovered.

683. There is no evidence at all that the weapon recovered from Sanjay @ Sanju @ Khatte had been handed over to him by

Sonveer. At best, the prosecution could establish in the present case is that a weapon stands seized in FIR No.150/09 and that in view of the report of the Ballistic Division, cartridges removed at the scene of offence could have been fired from that weapon. It also stands established that the fatal bullets (recovered by the post mortem doctor from Ankit's body) were not fired from this weapon.

684. I find that the entire discussion with regard to the recovery of the weapon has been completed in the impugned judgment in three paragraphs (**paras 169-171 pg 697**).

685. In view of the above discussion, the ld. trial court has gravely erred in overlooking the fact that the first disclosure statement attributed to Sonveer was immediately after his arrest on 27th of August 2009. He made no such disclosure as is attributed to him on 8th of September 2009.

686. The ld. trial judge has completely fallen into error in para 170 of the impugned judgment in holding that the recovery of the weapon of the offence was at the instance of Sonveer whereas it was the prosecution case itself that it was recovered from Sanju @ Khatte. I have noted above that given the deposition of Sanju @ Khatte who was examined as PW-46, the prosecution has failed to prove the recovery of the weapon of the offences even from him.

687. In para 170 of the impugned judgment (**pg 697**), the ld. trial judge has also concluded that Sonveer was the one who had shot at the occupants of the Santro car and had caused the death of Ankit. Otherwise it is the case of the prosecution even who had tried to

establish that Vishnu, the occupant of the front of the left side seat had shot fatally at the deceased Ankit.

688. I have noted above that in the statement (Ex.PW1/B) of Sunil Kumar (PW-1) recorded under Section 164 of the Cr.P.C., he had referred to a person shooting from the front without identifying who was shooting.

689. I find that other than trying to establish recovery of a gun from Sanjay @ Sanju @ Khatte and further leading forensic evidence to connect the recovered cartridges with that gun, the prosecution has led no reliable evidence to connect that particular gun to Sonveer. On the contrary, in view of the testimony of PW-46 Sanjay @ Sanju @ Khatte, there is no legal evidence to connect Sonveer to the gun recovered in FIR No.150/09.

XXV. Injury caused to Surender (PW-8) was not a bullet injury

690. It is the case of the prosecution that apart from the deceased, one more occupant of the Santro namely, Surender (PW-8) who was seated on the extreme rear window seat suffered injury on account of shooting. It is in evidence that Surender (PW-8) was (**pg 141**) employed by Sunil Kumar (PW-1) as a bus conductor who maintained his office at Mehrauli. He was also closely associated with other prosecution witnesses.

691. Ms. Aashaa Tiwari, ld. APP for the State has contended that the evidence of an injured witness stands on a higher pedestrial than other witnesses. In support of this submission, Ms. Tiwari placed reliance on the pronouncement of the Supreme Court

reported at ***(2015) 11 SCC 52, Jodhan v. State of M.P.*** wherein in paras 28 and 29, the Supreme Court held as follows :

> ***"28.*** *... A testimony of an injured witness stands on a higher pedestal than other witnesses. In* ***Abdul Sayeed v. State of M.P. [Abdul Sayeed v. State of M.P., (2010) 10 SCC 259 : (2010) 3 SCC (Cri) 1262]*** *, it has been observed that: (SCC p. 271, para 28)*
>
> > *"28. The question of the weight to be attached to the evidence of a* ***witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely*** *to spare his actual assailant(s)* ***in order to falsely implicate someone.*** *"*
>
> *It has been also reiterated that convincing evidence is required to discredit an injured witness. Be it stated, the opinion was expressed by placing reliance upon Ramlagan Singh v. State of Bihar [****Ramlagan Singh v. State of Bihar, (1973) 3 SCC 881 : 1973 SCC (Cri) 563] , Malkhan Singh v. State of U.P. [Malkhan Singh v. State of U.P., (1975) 3 SCC 311 : 1974 SCC (Cri) 919] , Vishnu v. State of Rajasthan [Vishnu v. State of Rajasthan, (2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302] , Balraje v. State of Maharashtra [Balraje v. State of Maharashtra, (2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] and Jarnail Singh v. State of Punjab [Jarnail Singh v. State of Punjab, (2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] .*
>
> ***29.*** *From the aforesaid summarisation of the legal principles, it is beyond doubt that the testimony of the injured witness* ***has its own significance and it has to be placed reliance upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and inconsistencies. As has been stated,***

the injured witness has been conferred special status in law and the injury sustained by him is an inbuilt guarantee of his presence at the place of occurrence. Thus perceived, we really do not find any substance in the submission of the learned counsel for the appellant that the evidence of the injured witnesses have been appositely discarded being treated as *untrustworthy by the learned trial Judge."*

(Emphasis by us)

692. There can be no dispute that this is a well settled principle. However, it cannot be denied that the prosecution has first and foremost to establish the presence of the witness at the crime spot, that he is speaking the truth and also that he had received injuries in the incident. In the present case, there are several reasons noted by me above whereby the defence has been able to cast a doubt in the very presence of Surender (PW-8) or the incidents having unfolded in the manner testified by him. I examine the challenge under the following sub-headings :

(i) *Presence of charring – belies the claimed manner of injury*

(ii) *No marks of hole or bullet or clothes of Surender (PW-8)*

(iii) *Fitness of Surender (PW-8) and failure to record his statement at the earliest.*

I propose to discuss the above sub-headings in *seriatim* :

(i) *Presence of charring – belies the claimed manner of injury*

693. Before us, Mr. Rajiv Mohan, ld. counsel has strongly contested the prosecution version of events pointing out that in

Surender's MLC, the doctor has observed charring around his injury. It is submitted that this firing can only happen if Surender was shot at a short distance which was not in this case.

694. In his testimony, Surender (PW-8) has explained the circumstances in which he received the injuries. Surender (PW-8) refers to the black Santro being compelled to halt at the traffic light because of the traffic, whereupon the Santro occupants had tried to flee to escape being shot. PW-8 states that the moment he came out of the Santro car "*firearm bullet hit me on my left side below waist near my hip*". He claims to have then moved and passed from the front of the Santro towards the right side of the road. Surender (PW-8) has claimed that he was the last person to come out of the Santro car.

695. In his cross-examination (**pg 167**), Surender (PW-8) claimed that the bullet had gone inside his body.

696. So far as his movements after being hit is concerned, Surender (PW-8) claims that he just kept moving and did not turn back to see what was happening behind and boarded a bus in which he reached Ring Road. At the Ring Road, he boarded another bus and reached the All India Institute of Medical Sciences ('AIIMS'). From the bus stand at AIIMS, he boarded another bus and reached the office (Sunil – PW-1's) at Mehrauli.

697. When cross-examined by Mr. Jitender Sethi, ld. counsel for Sonveer and Vishnu, Surender (PW-8) claims that he had run for 1 to 1½ kms before boarding the DTC bus going towards Gurgaon towards the right side from the red light spot. The witness claimed

that he was bleeding profusely while he was "*running to get the bus*". He even claimed that even after boarding inside the bus "*still bleeding was going on*". When questioned about requesting help, PW-8 claims that he requested the conductor that he needed medical help, whereupon he was told by the conductor to get down at the Ring Road near AIIMS for help. PW-8 has stated that even though he got down near AIIMS, he did not go inside for getting treatment. PW-8 testifies that he told no one that he had sustained a bullet injury or sought medical help.

698. The witness claimed that there was so much bleeding that there was blood on the seat of the bus which he had occupied in his travels and that his wearing clothes were soaked in blood. He claims that while travelling in the bus at the Ring Road, he did not even get seat in the bus. The witness has claimed that the driver and the conductor of the bus no.DL1PB 5261 which he took to Mehrauli were known to him and that he had narrated whole incident to them as to how he had sustained the injury.

699. Surender (PW-8) testified that "*there were blood drops falling on the ground on the distance I covered on foot*" as well. This testimony is belied by the position on the spot as the police which reached the spot within minutes of the shooting, did not find any trail of blood which, if the witness was speaking the truth, there would have been a blood trail for a kilometre and a half.

It is also unbelievable that no one would have responded to the extensive bleeding in the crowded buses which PW-8 claims to have travelled. It is certainly difficult to believe that anyone could

have travelled the distance covered by Surender (PW-8) after suffering a bullet injury.

700. According to Surender (PW-8), the manager of the Mehrauli office, also named Sunil, had taken him to Trauma Centre, AIIMS as per the instruction of Sunil Kumar (PW-1).

701. The above statements are contradicted by the documented medical evidence. Our attention has been drawn to Ex.PW39/A (**pg 784**) which is the MLC No.154188 drawn up by Dr. Anindaya (PW-39) **(pg 357)** about Surender's admission at the AIIMS at 4:01 pm on the 22nd of February, 2009. Ex.PW39/A records that the injured Surender has been brought to the hospital by his brother Yogesh and not, as claimed by Surender (PW-8), by Sunil - the manager of his Mehrauli office.

702. As per the MLC, Surender (PW-8) was a resident of Village Tripadi, Gurgaon. The MLC contains an endorsement that the patient was fit for statement. It notes the patient's history disclosed at that time as "*bullet injury (shot) on 22/2/09 at 2:00 p.m.*" while the place of incident is noted as "*Connaught Place*", not the traffic light at the T-point on the Simon Bolivar Marg.

703. Surender's MLC reports charring around the wound on his hip. In the MLC (Ex.PW39/A), at Sr. No.1, the doctor has noted the following :

> "***round wound over the left hip region*** *about 0 1cm in diameter –* ***charring around the wound****."*
>
> *(Emphasis by us)*

704. Dr. Anindaya (PW-39) has testified that charring (upon a bullet wound) occurs when a shot is fired from a close distance and that a forensic expert could clarify further.

705. Surender (PW-8) has stated that he had got down from the Santro and was running ahead, at a point away from the Indica when he received the bullet injury. There is no evidence that the assailants were ever close to PW-8 when he got injured.

706. No bullet has been recovered from the body of Surender (PW-8).

707. The presence of charring around the wound indicates that Surender did not receive the injury in the stated manner.

(ii) *No marks of hole or bullet or clothes of Surender (PW-8).*

708. It is also noteworthy that if Surender (PW-8) had suffered a bullet injury as claimed, the clothes which Surender (PW-8) was wearing over the place of the wound (his pant and underwear seized by the police and subjected to forensic examination), would have a bullet hole as well as charring and burning around it.

709. Ms. Aashaa Tiwari, ld. APP for the State has drawn our attention to a seizure memo (Ex.PW15/A) (**pg 768)** dated 22nd February, 2009, scribed by Constable Jageshwar, witnessed by Constable Satpal (PW-15) recording seizure of clothes of deceased Ankit pursuant to MLC No.154179. Clothes of injured Surender pursuant to the MLC No.154188 including were also seized vide same exhibit (Exh. PW15/A) in a *pulanda* sealed with the seal of CMO, Trauma Centre, New Delhi as well as sample seal.

710. It is significant that it is the prosecution case that Ankit had suffered an injury on his right shoulder. The laboratory in this report dated 8th December, 2010 at Sl.No.8 has opined that the hole HC1 on the torn right sleeve of Ankit's sweater could have been caused by a bullet discharged through a firearm.

711. So far as examination of the clothes of Surender is concerned, it is the prosecution case that Surender also suffered a bullet injury on his right leg. His underwear and pant were seized and sent to FSL. In the laboratory, Surender's jeans pants were marked as Exh. 'C3' and underwear was marked Exh. 'C4'.

712. As per the report of the ballistic experts, clothes (Ex.HC-B) were examined by them. Ex.HC-B records the finding that the hole (marked HC-1) on the Ankit's sweater (Ex.HC-1) may have been caused by a bullet. On Surender's (PW-8) clothes, the forensic experts have not reported finding any sign of a hole or other mark which could be attributed to an intrusion by a bullet. If Surender had suffered a bullet injury, there was bound to be a hole in the clothes corresponding to the injury. The fact that there was none by itself establishes that Surender's injury was not a bullet injury.

713. In the serological report Ex.HC-C/2 dated 15th December, 2010, Surender's pant was marked as C-14(a) and the underwear as C-14(b) for identification while Surender's blood sample on a cotton wool swab was marked as S-1 and S-2. As per this report dated 15th December, 2010, Surender's blood group 'A' was found on his underwear while his pant was also having stains of human blood.

714. It is noteworthy that so far as Surender's clothes are concerned, other than the blood stains on the underwear and pant, the FSL has not reported any hole on either on the pant or the underwear worn by Surender (PW-8) at the time he claims to have suffered the bullet injury. Even though the MLC doctors reported charring around the wound, no burns are found on the clothes which he was wearing over it. Charring would suggest shooting at a close range. However, the ballistic experts have also not identified any gun shot residue on the clothes which injured Surender claimed to have been wearing when he suffered the injury.

715. It is Surender's definite evidence that he is a resident of Gurgaon and on the 22nd February, 2009 after the shooting, he never reached his house. There is no evidence at all that he changed his clothes after he suffered the injury. On the contrary, he had handed over his clothes to the doctor who further gave them to the police for the forensic investigation. The entire evidence with regard to Surender having suffered the bullet injury is false.

716. It is noteworthy that the prosecution has not produced Surender's pant and underwear (though seized and sent for the forensic examination) as an exhibit during trial, an important circumstance. This is material evidence which, though available has been consciously and deliberately withheld (Ex.HC-B) thus completely falsifying the prosecution case that Surender (PW-8) was an injured eye-witness.

(iii) *Fitness of Surender (PW-8) and failure to record his statement at the earliest*

717. Inspector S.S. Rana (PW-26) (**pg 283**) has stated that Surender (PW-8) was brought and got admitted into the hospital by his brother Yogesh. In the cross-examination, he states that Surender (PW-8) reached the Trauma Centre at about 4:30 pm on the date of the incident when he was present in the hospital.

718. The padding in the case by the prosecution becomes apparent from the deposition of Inspector S.S. Rana (PW-26) (**pg 294**) who has stated that the injured Surender (PW-8) reached the Trauma Centre at about 4:30 pm when he was present in the hospital.

Inspector S.S. Rana (PW-26) has maintained that he was unable to record the statement of Surender on the 22nd of February 2009 for the reason that when he met him, he was lying unconscious in the hospital and was not in a condition to make a statement (**pg 295**). He has stated that he went to the hospital on the next day i.e 23rd of February 2009 when Surender (PW-8) was declared fit for statement and his statement was recorded.

719. I find that Inspector Jagat Singh (PW-47) also has given a untruthful account that Surender had been brought to the hospital in a "*semi conscious condition*" (**pg 391**).

720. I find that there is no medical record to support the evidence of Inspector S.S. Rana (PW-26) that Surender was unconscious. The observations of Dr. Anindaya (PW-39) as well as the MLC

reflects that all the vital parameters of Surender were within normal limits (**pg 357**).

721. Dr. Anindaya (PW-39), who examined Surender (PW-8) when he reached there and recorded the MLC, has categorically stated in his cross-examination that the patient Surender (PW-8) was fit to give the statement when he reached the hospital.

722. So far as the vital parameters of the patient are concerned, in Ex.PW39/A, the doctor has recorded that the saturation of oxygen was 100%; his blood pressure was 126/76 mm; his pulse rate was 88/m and was regular; and GCS was 15/15. These would show that the patient was fit to give the statement. There is an endorsement on Ex.PW39/A that Surender was "*fit for the statement*".

723. Surender's vital parameters clearly show that he was completely normal. Inspector S.S. Rana (PW-26) and Inspector Jagat Singh (PW-47) are giving a false explanation for recording Surender's statement only on the 23rd of February, 2009 which also cast considerable doubt on truthfulness of the prosecution case.

724. A person who had suffered a gun shot injury and had suffered bleeding in the manner described by Surender (PW-8), could not have travelled from the T-point at Simon Bolivar Marg to Dhaula Kuan to AIIMS and therefrom to Mehrauli and then back to the AIIMS. This by itself shows that he was certainly fit.

725. That PW-8 did so without informing the police or anyone else. PW-8 did not seek any medical help even though he claims to have changed buses at AIIMS. This also completely falsifies the

testimony of Inspector S.S. Rana (PW-26) with regard to Surender's fitness and medical condition. In fact, the evidence on record establishes that Surender (PW-8) came to AIIMS Trauma Centre only because he had been directed by his associates to do so. Else he would not even have sought medical help.

726. The finding of the ld. trial judge in para 178 (**pg 700**) to the effect that "*extreme courage*" had cropped up when a man was faced with extreme diversity, is certainly not supported by the established conduct of Surender on record. Surender (PW-8) has claimed that he ran away from the spot when the assailants in the Indica car opened fire and kept running for more than two hours would show that he was absolutely terrified. This is manifest also from the fact that Surender made no effort to ascertain the welfare or well being of the other occupants of the car during his travel through half of Delhi.

727. In view of the above, the finding of the the ld. Trial Judge in paras 181 and 182 of the impugned judgment that the delay in Surender (PW-8) reporting to the hospital for treatment as well as delay in recording his statement is of no consequence, is erroneous and cannot be sustained.

728. The evidence on record amply establishes that Surender had not suffered a bullet injury in the shooting. Clearly, Surender (PW-8) is not an injured eye-witness. The above circumstances clearly point out that both Inspector S.S. Rana (PW-26) and Surender (PW-8) have given false evidence in court.

729. Surender's (PW-8) oral testimony is not supported by either the medical or the forensic evidence. The evidence supports the defence contention that Surender had not suffered any injury in the incident and that his statement under Section 161 of the Cr.P.C. was not recorded by the police soon after he reached the hospital because they were in the process of putting together a false case against the appellants.

730. The medical as well as the ocular evidence amply establishes that Surender is not an injured eye-witness in the shooting episode.

731. The above narration clearly sets out that Surender (PW-8) as well as the other witnesses (PWs-1, 2, 4, 5 and 6) are not stating the truth about the incident as well as the injury which Surender (PW-8) claimed to have suffered.

XXVI. Defence evidence has to be treated at par with the prosecution

732. Consideration in the present appeal cannot end with the prosecution evidence inasmuch as the defence has led extensive evidence which has to be examined. I first set down the standards on which this evaluation must rest.

733. It is submitted by Mr. Vikas Arora, learned counsel for the appellants that the appellant Sushil Arora led defence evidence. It is submitted that he not only established that he had made applications to the police to call for his call detail records in support of his plea of *alibi* but has established without any reasonable doubt, the telephone connection which he was using;

and also led oral evidence of Pushkar Raj (DW-6) whose testimony about the amicable meeting in the morning of the 22nd of February 2009 and resolution of the dispute with Tikla (PW-9), as well as the location of the appellant at the relevant time could not be shaken in cross-examination. It is urged that the unshaken and unrebutted testimony of Pushkar Raj (DW-6) cannot be rejected only because he was the brother of the appellant and appearing as a defence witness.

734. Similar submissions have been pressed on behalf of the other appellants as well.

735. It has been vehemently urged that in defence, the appellants did not have to establish their innocence, but had to merely create a doubt on the veracity of the prosecution case against them. In support of this submission, Mr. Vikas Arora, learned counsel for the appellants has placed the pronouncement of the Supreme Court reported at ***(2002) 2 SCC 426, State of Haryana v. Ram Singh*** before us, the relevant extract whereof deserves to be extracted and reads thus :

> ***"19.*** *xxx xxx Incidentally,* ***be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one — the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution.*** *Rejection of the defence case on the basis of the evidence tendered by the defence witness has been effected rather casually by the High Court. Suggestion was there to the prosecution witnesses, in particular PW*

> *10 Dholu Ram that his father Manphool was missing for about 2/3 days prior to the day of the occurrence itself — **what more is expected of the defence case: a doubt or a certainty — jurisprudentially a doubt would be enough: when such a suggestion has been made the prosecution has to bring on record the availability of the deceased during those 2/3 days with some independent evidence**. **Rejection of the defence case** only by reason **thereof is far too strict and rigid a requirement for the defence to meet** — **it is the prosecutor's duty to prove beyond all reasonable doubts and not the defence to prove its innocence — this itself is a circumstance, which cannot but be termed to be suspicious in nature**."*
>
> *(Emphasis by us)*

736. Mr. M.N. Dudeja, ld. counsel for Vishnu has placed two judicial pronouncements in support of this very submission. I consider these two judgments hereafter.

737. In ***1981 SCR (2) 771, Dudh Nath Pandey v. The State of U.P.,*** placed by Mr. Dudeja, the Supreme Court has taken note of the prevalent bias against defence witnesses observing as follows :

> ***"19. ...Defence witnesses are entitled to equal treatment with those of the prosecution. And, courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses**. ..."*
>
> *(Emphasis by us)*

738. On the same aspect, Mr. Dudeja, ld. counsel has drawn our attention to the decision dated 18th March, 2011 in Crl.A.No.470/2006 entitled ***Lalit Kumar v. State of Delhi*** wherein the Division Bench of this court held thus :

> *"20. Learned counsel for the appellant has also contended that the evidence of the defense witnesses requires consideration which has been ignored by the trial court without any rationale. In* ***Munshi Prasad and others*** *(Supra), the* ***Supreme Court had held that the evidence tendered by the defense witnesses cannot always be termed to be a tainted one, by reasons of the factum of the witnesses being examined by the defense. It was held that the defense witnesses are entitled to equal respect and treatment as that of the prosecution and the credibility and trustworthiness should also be considered in respect of defense witnesses at par with that of prosecution before rejecting their testimony****. It is more so because a lapse on the part of defense witnesses cannot be differentiated and be treated differently than that of prosecution witnesses."*
>
> *(Emphasis supplied)*

739. It is well settled that the defence witnesses are to be given the same treatment in the witness box as the prosecution witnesses and their credibility and trustworthiness has to be evaluated on the same principles and tests as that of the prosecution. The court must make a conscious effort to ensure that the instinctive prejudice and bias against defence witnesses while examining the defence is overcome before rejecting the testimony of the defence witnesses.

740. It is also important to note that the defence has merely to create a doubt in the prosecution case and does not have to prove its pleas beyond reasonable doubt. These principles guide and bind all courts in the examination which has to be taken of the defence evidence.

741. I find that unfortunately, in the present case, the appellants led defence evidence which for the most part has been completely

overlooked by the trial court or, if examined, rejected for no good reason at all.

742. I therefore, examine in *seriatim* the evidence led by the accused persons in their defence in the present case and the scrutiny undertaken by the trial court, if at all, of this evidence.

XXVII. Defence evidence led by Sushil Arora (appellant in Crl.A.No.1284/2015)

743. Sushil Arora has led extensive evidence. I examine the same divided into the following :

(i) Oral evidence of Pushkar Raj (DW-6)

(ii) Official record corroborates the evidence of Pushkar Raj regarding altercation at the parking lot and the police intervention

(iii) Mobile of Sushil Arora and its CDR details

I propose to discuss the above sub-headings in *seriatim :*

(i) Oral evidence of Pushkar Raj (DW-6)

744. So far as the dealings with Tikla (PW-9) and the happenings on the 22nd February, 2009 are concerned, the appellant Sushil Arora examined his brother Pushkar Raj as DW-6 who as per the prosecution evidence, was present at the Chintoo Car Point on that eventful day. Pushkar Raj (DW-6) has submitted that he was carrying on the business of used cars i.e. brother of Sushil Arora in the name and style of Chintoo Car Point on the 17 Pusa Road, New Delhi. He reached this shop at 1:30 pm on 22nd February, 2009

when he found Mahender Tikla sitting with Sushil Arora and six to seven other persons and explained the business transaction in which Tikla was involved with them. As per DW-6, Tikla used to invest in used cars through the Chintoo Car Point and after sale thereof the profit used to be delivered to him for which purpose he used to visit them almost once a week. On account of paucity of space inside the shop, DW-6 came and stood near the shop in the parking area.

745. This defence witness has given a graphic account of what transpired outside the Chintoo Car Point on the 22nd of February 2009. He has stated that at the time while Tikla (PW-9) was with his associates, discussing the matter with his brother Sushil Arora inside the Chintoo Car Point, two persons were sitting on a motorcycle in the parking area. He also testified that there was a Santro car also parked outside and three persons were sitting therein. He has clearly stated that after some time, an altercation ensued between these two boys and the occupants of the Santro car over the claiming of right of way by the latter.

746. DW-6 has also clearly stated that this altercation turned into a fight between the Santro car occupants and the motorcycle riders.

747. I have noted above the prosecution evidence relating to the presence of the motorbike and altercation over its removal. Even Sunil (PW-1), Surender (PW-8), Tikla (PW-9) and Gajender (PW-11) corroborate DW-6 and have referred to an exchange of physical grappling/altercation on account of removal of a motorcycle so that the Santro could be taken out of the parking.

748. It is in the evidence of Pushkar Raj (DW-6) that several persons gathered at the spot on seeing the fight and it was he who telephoned the police control room at the no.100 using his mobile no.9891255906. According to DW-6, Tikla and his associates who were inside the shop came out at this stage. They, along with other persons in the neighbourhood, intervened in the fight and got the parties separated. DW-6 stated that thereafter the motorcycle riders left the place in one direction while the Santro car occupants went away in their car.

749. This witness has stated that, thereafter, Tikla (PW-9) came back to the shop and, from the gate of the shop itself, waived good bye to Sushil Arora. Thereafter Tikla left with his associates in an Esteem car. What is important is that Pushkar Raj (DW-6) has categorically stated that during this time, no one including Sushil Arora came out of the shop. That is to say, that Sushil Arora had no clue about the fight outside. After Tikla left, DW-6 went inside and sat with Sushil Arora.

750. It is also in the testimony of Pushkar Raj that in response to the phone call made by him, the PCR officials came to the spot. DW-6 met them outside the shop and informed them that he had made the call with regard to the *jhagra* at the parking lot. The police inquired about the whereabouts of the persons who were involved in the *jhagra*, whereupon DW-6 informed them that the persons who were fighting were separated by the neighbours and they had gone to their respective ways in their vehicles. After

recording the details of the name and address etc. of Pushkar Raj (DW-6), the police left the spot.

751. The testimony of Pushkar Raj (DW-6) could not be assailed in the cross-examination by the ld. prosecutor. It is therefore, amply established on record that there was no dispute or altercation in which Tikla was involved but two motorcycle riders got into an altercation with the three occupants of the Santro.

752. Tikla (PW-9) and his associates and Gajender Singh (PW-11) have confirmed the presence of Pushkar Raj at the Chintoo Car Point on the 22nd of February 2009 when the discussions were held with Sushil Arora.

753. The evidence of Pushkar Raj (DW-6) sheds light on the critical aspect of the movements of Sushil Arora on that fateful afternoon, DW-6 has categorically stated that on the 22nd of February 2009, he remained inside the shop till about 2:30 pm till which time he was receiving phone calls from the car dealers regarding a car deal. Thereafter Sushil Arora left the shop in his Santro car bearing registration No.DL 8CN 5173, after informing Pushkar Raj that he would do some miscellaneous works; visit car dealers in or around the Karol Bagh area and thereafter go to their father's house in Rohini.

754. Pushkar Raj (DW-6) continued to remain at the shop. In the evening of the 22nd February, 2009 at about 7:15 pm – 7:45 pm, some police officials came in the official gypsy and started inquiring about their business. They also made inquiries regarding the fight which had taken place in the afternoon over the parking.

The police took the names of Pushkar Raj as well as that of Sushil Arora and noted the details of the incident. Thereafter they left the spot and told Pushkar Raj that, in case required, upon their calling, Pushkar Raj and Sushil Arora would be required to visit the police station.

755. Pushkar Raj (DW-6) has disclosed that the next date, on the 23rd of February 2009 at about 1:30 pm, he received a phone call from P.S. Chanakya Puri, New Delhi inquiring the location of Sushil Arora as well as his own. The witness has clearly stated that when he informed the police that they were together, the police asked them to come to P.S. Chanakya Puri.

756. DW-6 has testified that consequently along with Sushil Arora, he had gone to P.S. Chanakya Puri on the 23rd of February 2009 where the police made inquiries from both of them regarding the altercation over the parking for about one and a half hours. Thereafter, both of them were let off after being told that, in case they were required, the police would call them again. The witness had stated that thereafter both the brothers had returned to their shop.

757. Again on 24th of February 2009, a phone call was received from Police Station Chanakya Puri asking the brothers to go to police station Chanakya Puri, which they did. After inquiring for about one and a half hours, the police told Pushkar Raj to leave and informed him that Sushil Arora had been arrested in a murder case.

758. Pushkar Raj (DW-6) stated that he had informed the police that Sushil Arora was with him till about 2:30 pm on the 22nd of

February 2009 and it was impossible for him to have committed the murder. DW-6 has testified that this fact was confirmed to the police by the neighbouring shopkeepers. Yet the police deliberately did not make any formal inquiries from the shopkeepers neighbouring the Chintoo Car Point or any member of the public with regard to the altercation in the parking lot or the movements of Sushil Arora.

759. DW-6 testified that he told the police that he would complain about Sushil Arora's false implication to their superiors, on which they threatened him (DW-6) also with false implication. In the cross-examination, the witness has stated that he did not know Rajesh Pandey who was present in court and that Tikla was known to him for about one and a half year prior to the incident.

760. The witness has completely denied the prosecution suggestion that he and his brother Sushil Arora had complained to Rajesh Pandey about the demands of Tikla for repayment of loan.

761. I find the prosecution case in the suggestions which have been put to Pushkar Raj (DW-6). The prosecution put the suggestion to Pushkar Raj (DW-6) that since they had no intention to repay the loan amount, Sushil Arora had spoken to Rajesh Pandey to arrange for hired goons to fix Tikla which was completely refuted. The witness has also categorically denied all suggestions that they, the brothers (DW-6 and Sushil Arora) were introduced to Sonveer, Manveer and Vishnu as hardcore criminals by the accused Rajesh Pandey or that "***a deal had been stuck to pay the accused persons a sum of Rs.5 lakhs to fix Mahender***

Tikla". It was further suggested to the witness (which DW-6 denied) that he and "*his brother* ***Sushil had decided to eliminate Mahender Tikla for the troubles that he was causing us***".

This, I find then, was the prosecution case of the "*criminal conspiracy*" and the "*common intention*" between the appellants.

762. The matter does not end here and the prosecutor has suggested to the witness (DW-6) that "*on 22.02.09 sometimes around 1:30 or 1:45 pm,* ***accused*** *Hemant Garg, Sonveer and Vishnu* ***had quarrelled*** *with deceased Ankit, Varun, Surender and Paramjeet* ***on the instigations by my brother Sushil Arora***". The witness denied this as well as the further suggestion also that he was an interested witness produced by his brother to depose in his favour or that he was making the false deposition to save his brother.

(ii) Official record corroborates the evidence of Pushkar Raj regarding altercation at the parking lot and the police intervention

763. The prosecution has led evidence of official records corroborating the testimony of Pushkar Raj (DW-6) regarding the incident at the parking lot. In this regard, telephonic information was received from the police control room at 1:45 pm at the P.S. Karol Bagh to the effect that a fight ("*jhagra*") at the 17, Pusa Road City Hospital has occurred, which was logged as DD No.20A (Ex.PW27/A) (**pg 1036**) by Head Constable Arvind Kumar (PW-

27) (**pg 325**). This DD No.20A was marked to ASI Desh Pal for further action.

764. It appears that the police control room sent the same information simultaneously at 1:45 pm to the P.S. Rajender Nagar.

765. The prosecution examined Head Constable Mahadev Prasad (PW-28) who, on 22nd February, 2009 from 8:00 am to 4:00 pm, was the duty officer in the police station Rajender Nagar. He has proved the receipt of information from the police control room at 11:45 pm regarding a quarrel at 17, Pusa Road City Hospital which was logged as DD No.23B (Ex.PW28/A) (**pg 1037-38**) and assigned to ASI Ram Phool for further action.

766. Shortly thereafter PW-28 has recorded DD No. 24B (Ex.PW26/D1) (**pg 795**) at 2:06 pm on the basis of the information from the PCR that before Dhaula Kuan on the Shankar Road, Indica No. DL3S AF 2152 or 2182 had fired a bullet shot on a Santro occupant and that vehicle had fled towards Dhaula Kuan. The informant had given this information from mobile connection no.9971054074 which information was also telephonically conveyed to ASI Ram Phool.

767. PW-28 also testified that upon return of ASI Ram Phool, he reported to the police station vide DD No.35B at 4:50 pm, though there is no reference to the incident noted in DD No.23B and 24B by him. (**pg 327**).

768. What is material however, is that these entries being DD No.20A (Ex.PW27/A) at P.S. Karol Bagh and DD No.23B (Ex.PW28/A) and 35B at P.S. Rajender Nagar on the 22nd of

February 2009 show that the quarrel outside the Chintoo Car Point was serious enough to warrant a report to the police control room by a person whose identity had not been disclosed. Unfortunately, the prosecution has suppressed the action which was taken on either DD No.20A (Ex.PW27/A) or DD No.23B (Ex.PW28/A) which established what transpired in the parking lot.

769. The failure of the prosecution to produce the police officials, namely, ASI Ramphool, P.S. Rajender Nagar and ASI Desh Pal, P.S. Karol Bagh who had proceeded to the spot in answer to DD No.20A (Exh. PW27/A) (**TCR pg 3835**) & DD No. 23B (Exh. PW28/A) (**TCR pg 3837**) which were respectively logged on the complaint to the P.C.R. of Pushkar Raj (DW-6) regarding the parking lot altercation, assumes criticality as it would have given valuable evidence about the location of Sushil Arora (or even Rajesh Pandey) at the time of their visit which would have been contemporaneous with the shooting incidents in front of the Buddha Garden and the traffic light at the T-point on the Simon Bolivar Marg intersection. Their evidence would also have established the identity of the persons between whom the said quarrel had taken place and whether these persons were involved in the shootings as alleged.

(iii) *Mobile of Sushil Arora and its CDR details*

770. I find that in support of his defence of alibi, Sushil Arora has led unshaken evidence in the testimony of Pushkar Raj (DW-6) who testified that the mobile phone No.9811071400 was registered

in his brother Sushil Arora's name. Pushkar Raj Arora (DW-6) (**pg 624**) has specifically deposed that Sushil Arora used to carry this mobile phone which used to remain with him always. He has stated that this phone was in his possession and usage on the 22nd of February 2009 including at the relevant time.

The witness has specifically denied the suggestion that on 22nd February, 2009, Sushil Arora was not carrying his mobile no.9811071400.

771. I may also refer to the further electronic evidence led by Sushil Arora. He has examined Shri Israr Babu (DW-5), the nodal officer of Vodafone Services Ltd. This witness has corroborated DW-6 that the mobile phone No.9811071400 was registered in the name of Sushil Arora vide Ex.DW5/D and has also proved its call detail records for the period 19th February, 2009 to 25th February, 2009 as Ex.DW5/A; the certificate under Section 65B(4)(c) of the Evidence Act as Ex.DW5/B and also the Cell I.D. chart i.e. the location chart dated 22nd February, 2009 for the period 1:30 to 2:30 pm of the aforenoted mobile connection as Ex.DW5/C. The location of the said mobile for the period 1:30 to 2:30 pm was marked as X1 to X16.

772. Given the elaborate submissions made on the call records of Sushil Arora, I may extract hereunder the relevant details of the mobile No.9811071400 owned by Sushil Arora.

773. Mr. Vikas Arora, learned counsel for the appellant Sushil Arora has extracted from these documents, a tabulation of the relevant extract of Ex.PW5/A and Ex.PW5/D showing us the 16

calls made from or received on the mobile No.9811071400 between 13:29:11 hrs and 14:31:36 hrs on the 22nd of February 2009 (the critical period when the shootings took place) and the location of the Cell I.D. towers which serviced these calls. I extract these details from the above documents hereafter :

SUSHIL ARORA-CDR OF 9811071400 AS ON 22.02.2009				
	Time		*Site Address*	*Page No.*
X 1	*13:29:11*	*29001*	*17 Pusa Road*	*909*
X 2	*13:59:32*	*11783*	*18/4 West Extension Area, Karol Bagh*	*886*
X 3	*14:02:13*	*29002*	*17 Pusa Road*	*909*
X 4	*14:04:06*	*32921*	*Plot no.1, Site No.7 Old Rajender nagar, New Delhi-110060*	*913*
X 5	*14:11:41*	*11782*	*18/4 West Extension Area, Karol Bagh*	*886*
X 6	*14:12:18*	*11782*	*18/4 West Extension Area, Karol Bagh*	*886*
X 7	*14:12:46*	*11782*	*18/4 West Extension Area, Karol Bagh*	*886*
X 8	*14:13:34*	*11781*	*18/4 West Extension Area, Karol Bagh*	*886*
X 9	*14:13:44*	*11781*	*18/4 West Extension Area, Karol Bagh*	*886*
X 10	*14:14:22*	*11781*	*18/4 West Extension Area, Karol Bagh*	*886*
X 11	*14:19:38*	*58311*	*T-5139, A-1, Pusa Road, Karol Bagh, New Delhi*	*936*
X 12	*14:20:36*	*58311*	*T-5139, A-1, Pusa Road, Karol Bagh, New Delhi*	*936*
X 13	*14:22:07*	*37391*	*1695, Arya Samaj Road, Karol Bagh*	*916*
X 14	*14:26:29*	*29001*	*17 Pusa Road*	*909*
X 15	*14:27:03*	*29001*	*17 Pusa Road*	*909*
X 16	*14.31.36*	*29003*	*17 Pusa Road*	*909*

774. Mr. Vikas Arora, learned counsel for the appellant Sushil Arora has explained that the above cell towers are in close territorial proximity and would be servicing Sushil Arora's phone when he was located at his office at 17 Pusa Road, New Delhi. He would point out that depending on the mobile phone traffic congestion, calls normally shift from one to another tower servicing the same area.

775. In the present case, Mr. Vikas Arora, learned counsel for the appellant has placed before us a plan of cell towers at the different places of Karol Bagh and Pusa Road, Delhi which are in a close cluster and would have served the calls made on his phone, noted as X1 to X16. The above electronic evidence would support the defence contention that Sushil Arora was located at 17 Pusa Road or thereabouts at the relevant time.

776. Our attention has also been drawn to the map showing place of the shooting and the cell towers which would be servicing such spot. So far as the spot in front of the Buddha Jayanti Park is concerned, it would have been served by the cell tower located at Dasghara. The second shooting spot at the traffic light on the Simon Bolivar Marg would have been served by the cell tower which was placed at Malcha Marg. On the 22nd of February 2009, Sushil Arora has not received any call serviced from either of these towers at any time.

777. I find that the timings of the calls made on the mobile phone of Sushil Arora and the cell towers servicing them, there is no time for a person to receive calls at the Chintoo Car Point; to reach the sites of the crime and to return to his office to receive the calls which he did.

778. In order to support the submission that after leaving the office shop at 2:30 pm, Sushil Arora proceeded in the manner he had indicated to Pushkar Raj – DW-6 (as disclosed by him to the police in their visit to Chintoo Car Point on the 22nd February, 2009), Mr. Vikas Arora, ld. counsel for Sushil Arora has also placed the extracted further details from Ex.DW5/A and Ex.DW5/C regarding the calls between the period 3:06 and 3:20 pm made from/received on Sushil Arora's mobile No.9811071400 and the tower locations which serviced these calls.

779. Inasmuch as these details support the testimony of DW-6 and the prosecution evidence about the information disclosed by Pushkar Raj (DW-6) to Inspector S.S. Rana (PW-26) regarding the movements of Sushil Arora on the 22nd February, 2009, as well as the submissions made by learned counsel for the appellant, I extract hereunder the relevant portion thereof which reads as follows :

SUSHIL ARORA-CDR OF 9811071400 AS ON 22.02.2009			
Time		*Site Address*	*Page No.*
03.06 PM	*5404*	*Hotel Orchid Garden, DB Gupta Road*	*993*
03.10 PM	*1141*	*Sarai Rohilla, Bar Mohalla*	*885*
03.15 PM	*1947*	*Inderlok*	*897*
03.16 PM	*2289*	*Ganeshpura, Shanti Nagar,*	*902*

		Trinagar	
03.17 PM	*2344*	*Narang Colony, Trinagar*	*903*
03.18 PM	*1234*	*Ashok Vihar, Phase 1*	*887*
03.23 PM	*1869*	*Pitampura*	*896*

780. In the present case, the police was requested on behalf of Sushil Arora to obtain his call detail records but they did not do so. The appellant Sushil Arora was compelled to file an application to bring the call details on record.

781. The ld. trial judge has erred in holding that Pushkar Raj (DW-6) had not established that the mobile phone was with Sushil Arora at the time of the incident. On the contrary, the above discussion manifests that his clear testimony in this regard could not be challenged in the prosecution. Further, the electronic evidence proved thus in fact corroborates the oral testimony of Shri Pushkar Raj (DW-6).

782. The evidence of Pushkar Raj (DW-6) on the aspect of his visits with Sushil Arora to the P.S. Chanakya Puri on 23rd and 24th February, 2009 finds corroboration by the testimony of the second investigating officer.

In his testimony, Inspector Jagat Singh (PW-47) (**pg 406**) has stated that Pushkar Raj met him on the date of the incident as well as subsequently on 23rd February, 2009 and 24th February, 2009.

783. Even Inspector S.S. Rana (PW-26) (**pg 298**) admits that he met Pushkar Raj (DW-6) in Karol Bagh on the date of the incident and that he came to the police station on that day. Obviously PW-

26 would not accept that DW-6 came with Sushil Arora as there is no explanation as why Sushil Arora was not arrested by him on 22nd or 23rd of February 2009 if the police actually had eye-witness accounts naming him as one of the assailants.

784. Pushkar Raj was clearly a vital witness so far as the happenings at the Chintoo Car Point was concerned. It is not for the investigating officer to take a tilted stand and he had to examine the evidence dispassionately. In fact, I find no reason why Pushkar Raj ought not to have been examined as a prosecution witness so far as the incident at the Chintoo Car Point are concerned. Though choice whether to examine a person as a witness or not rests with the prosecution, this option has to be made dispassionately and in honest discharge of the prime duty to bring the truth to light, not to support any tilted notions of a police theory, as in the present case.

785. The evidence of the locations of the cell towers which serviced his calls establishes the route taken by Sushil Arora. It corroborates the oral testimony of Pushkar Raj (DW-6) about the location of Sushil Arora at the time of the crime and his whereabouts, including his proceeding towards Rohini after 3:06 pm, a long distance away from the spot.

786. The ld. trial judge has gravely erred in rejecting the oral testimony of Pushkar Raj (DW-6), completely overlooking the vital evidence of independent witness Shri Israr Babu (DW-5) and the unimpeachable electronic evidence of the call records, which support and establish Sushil Arora's defence plea of alibi.

XXVIII. Defence of Rajesh Pandey (appellant in Crl.A.No.53/2016)

787. Rajesh Pandey completely denied involvement in the offence and also set up a plea of *alibi* that he was nowhere near the place of the incident at the relevant time. In order to support his plea, the record shows that an application dated 20th December, 2010 was filed by Rajesh Pandey **(pg 1429)** before the trial court seeking directions to M/s Bharti Airtel Ltd., the mobile company to give call details and the location of his mobile phone no. 9810545111 between 1st February, 2009 to 1st March, 2009 to establish his exact whereabouts and location at the critical time in the interest of justice.

788. The trial court issued notice dated 07th July, 2011 on this application.

789. In answer, Bharti Airtel Ltd. produced the call details of the phone no. 9810545111 for the entire period from 1st February, 2009 to 1st March, 2009 which calls were marked as X1 to X8 for identification. I extract hereunder the call details of this phone no. between 13:49 hours and 14:25 hours (**TCR pg 1457/3995 and pg 1547/4105)** :

22nd Feb.09	*13:49:43 81*	*01053 07561 IN*	*351934032329410*	*404100102788348 POP*	*X-1*
22nd Feb.09	*13:54:25 16*	*07562 07561 IN*	*351934032329410*	*404100102788348 POP*	*X-2*
22nd Feb.09	*13:55:39 111*	*07561 07561 OUT*	*351934032329410*	*404100102788348 POP*	*X-3*
22nd Feb.09	*14:05:04 4*	*01783 01783 OUT*	*351934032329410*	*404100102788348 POP*	*X-4*

22nd Feb.09	*14:05:49 30*	*01783 48121 IN*	*351934032329410*	*404100102788348 OP*	*X-5*
22nd Feb.09	*14:09:27 29*	*43551 07563 OUT*	*351934032329410*	*404100102788348 POP*	*X-6*
22nd Feb.09	*14:14:27 250*	*06142 03451 OUT*	*351934032329410*	*404100102788348 POP*	*X-7*
22nd Feb.09	*14:24:07 47*	*019720197 2 IN*	*351934032329410*	*404100102788348 POP*	*X-8*

790. So far as the location details of the cell towers which serviced the above calls are concerned, Bharti Airtel disclosed the same as follows :

Cell ID	*Site Name*	*Address*	
01053	*Karol Bagh*	*Opp Gurudwara*	
07562/3	*17, Pusa Road*		*X-1*
07561	*17, Pusa Road*	*……..*	*X-2, X-3*
01783	*Sastnagar,*	*Karol Bagh*	*X-4*
43551/2	*Pusa Road,*	*Old Rajinder Nagar*	*X-6*
03451	*Gole Market*	*……*	*X-7*
01972	*Palika Place,*	*Paharganj*	*X-8*
48121	*Sat Nagar,*	*Karol Bagh*	*X-5*

The correctness of this record is not disputed by the prosecution.

791. The call detail records of Rajesh Pandey phone show that between 13:49 hours to 14:25 hours, he was at 17, Pusa Road and in its immediate vicinity, that is to say, in the Karol Bagh area only. These details amply establish that Rajesh Pandey also was nowhere near the site where the offence took place.

This evidence has not been specifically discussed by the ld. trial judge. Only by a general observations, the electronic evidence has been swept aside.

XXIX. Defence of Hemant Garg

792. In the chargesheet, it is alleged that Hemant Garg was the driver of the Indica vehicle bearing No.DL3C AX 2192 which carried the assailants. Hemant Garg has emphatically denied the same asserting false implication in the case and has set up a plea of alibi.

793. In his examination under Section 313 of the Cr.P.C., Hemant Garg has stated that he was having a shop situated at 10/2444 Bedan Pura, Karol Bagh, New Delhi (**pg 524**). He put up a case that the Indica car bearing No.DL3C AX 2192 was registered and owned by him which is also proved on record as per the record of the Transport Authority (Ex.PW31/A). However, it is in his defence that, on the 22nd of February 2009, he stated that this car had been taken away by his friend Yogender @ Vikas, son of Raj Kishore for the purposes of selling the same as Hemant Garg wanted to purchase some other car. This appellant has pleaded false implication and taken the plea that on the 22nd of February 2009 on the relevant time, he had throughout been at his place of business in the vicinity of Pusa Road.

794. Mr. K. Singhal, ld. counsel for Hemant Garg has submitted that Hemant Garg had filed an application dated 25th October, 2013 seeking issuance of process of summons for the production of witnesses to establish his defence (**TCR pg 457)**. Inasmuch as this appellant sets out his defence elaborately in this application, I extract this application hereunder :

"***I. Mr. Vishnu @ Yoginder S/o Raj Kishan Yadav, Last address is 3/90, Veena Enclave, Rajdhani Park, Nangloi, Delhi-41***.
Present Address – unknown

It is submitted that this witness was the person who had taken the car of accused on the relevant day for its sale through some car dealer/agent. The witness is an important and crucial for the defence of applicant/accused. As per apprehension of accused, he might be the person who knows each and every aspect of the present case therefore his presence is utmost required to bring the complete truth on record. In absence of this witness, the accused/applicant would suffer irreparable loss and injury.

II. Mr. Surender Kumar, LDC or any other record deeper/clerk from the office of Motor Licensing Officer, Sarai kale Khan, Central Zone, Transport Department*, New Delhi 110013 alongwith the File relating to information furnished under the RTI Act vide communication No.MLO/CZ/64 dated 8/3/2010.*

It is submitted that the accused/applicant does not possess any driving license and even he does not know the driving and therefore he has obtained the necessary information through RTI and the same is required to be proved as per Indian Evidence Act for the just and proper adjudication of the present case.

III. Clerk/record *keeper from the* ***office of D.C.P., New Delhi to produce and prove the Log Book of Govt. Vehicle DL-1CH-6579 having*** *the log book entries w.e.f.* ***22.02.2009 to 25.02.2009***.

It is submitted that the above said vehicle has been used by the police officers during the investigation of the present case, however to show that the vehicle was not used as alleged, the log book entries are required for the just and proper adjudication of the present case.

IV. Clerk/record *keeper from the* ***office of Addl. Deputy Commissioner of Police, New Delhi District*** *to*

produce and prove the information furnished under RTI Act vide No.3048/DIC/NDD dated 26.09.2011.

The information is required as it is to be proved who was the officer concerned deputed at PS Chanakya Puri on 22.02.2009 as duty officer.

V. Record Keeper/clerk/MHC(M) from the P.S. Rajinder Nagar, Central District, New Delhi to produce *and prove the* ***DD No.23B*** *dated 22/02/2009, DD No.23A dated 22.02.2009, Dd No.24B dated 22.02.2009 all recorded at P.S. Rajinder Nagar.*

It is submitted that all the above mentioned DD are very much relevant for the consideration of this Hon'ble Court to arrive at just and proper conclusion. The DD speaks contrary to the case of prosecution.

VI. MHC(M)/Record Keeper/Clerk *from the P.S. Vikas Puri to produce the Daily Diary register (being kept for recording any entry in respect of seizing of any material by the police) dated 09.04.2009.*

It is submitted that the witness will prove the entries made in the DD on 09.04.2009 to establish that there was no seizure entry in regard to any vehicle No.DL-3C-AX-2192 has been made.

VII. MHC(M)/Record Keeper/Clerk *from the* ***P.S.Chanakya Puri*** *to produce the* ***Daily Diary register*** *(being kept for recording any entry in respect of* ***seizing of any material by the police) dated 09.04.2009****.*

It is submitted that the witness will prove the entries made in the DD on 09.04.2009 to establish that there was no seizure entry in regard to any vehicle No.DL-3C-AX-2192 has been made.

VIII. *Clerk/record keeper from the office of* ***Addl. D.C.P.-Cum-PIO, Central District, Darya Ganj, Delhi*** *to produce and prove the information furnished under RTI Act vide Letter No.2012/ 719/5080/R.T.I.Cell/Central District Dated Delhi the 12/4/12.*

It is submitted that the witness is required to produce and prove the above reply to RTI wherein

certain material information was disclosed which is running contrary to the case of prosecution."
(Emphasis supplied)

795. Out of the above, Hemant Garg could examine only his wife Smt. Shalini (DW-2); and HC Dharmender Kumar (DW-7) in support of his defence. I examine the defence led by Hemant Garg under the following headings :

(i) *Plea of false implication by Hemant Garg*

(ii) *Veracity of seizure of the Indica car involved in the commission of the crime*

(iii) *Evidence of call detail records of Hemant Garg – to establish alibi and lack of any association with the co-accused*

I propose to discuss the above sub-headings in *seriatim :*

(i) *Plea of false implication by Hemant Garg*

796. I further see that Hemant Garg has explained that on the 22nd of February 2009, he had handed over the Indica in question to one Yogender @ Vikas for selling the vehicle. In her evidence, Smt. Shalini (DW-2) has also disclosed that the Indica car registered in her husband's name was to be sold. DW-2 has categorically stated that Hemant Garg did not know how to drive. In the cross-examination, the witness completely denied the suggestion that she had made a false story that her husband could not drive.

797. Our attention is drawn to an application under Section 97 of the Cr.P.C. on the trial court record filed on 2nd April, 2009 (**TCR pg 2763/2759**) by one lady by the name Saroj praying for search for a person named ***Yogender @ Vikas*** alleging as follows :

> "*1. That the **above named person has been lifted by the police team headed by Sh. Surendra Rana S.I./Inspector, Crime Branch, Chanakya Puri, Delhi**.*
> *2. That on **21.03.2009** at about **6:30 a.m.** some persons who claimed themselves to be the police officials from the Crime Branch, Chanakya Puri, Delhi, **visited the above mentioned address and lifted the above said Yoginder @ Vikas S/O Sh. Raj Kishore** and they assured the applicant i.e. the mother of said Yoginder @ Vikas S/O Sh. Raj Kishore that they would let him free after some interrogation till the evening of the day but unfortunately the above said police officials neither set him at liberty nor produced him before any court of law till date.*
> *3. That the son of the applicant i.e. Yoginder @ Vikas is an innocent person and he has nothing to do with any crime while the applicant/mother has apprehension that the police may implicate her son falsely in any case."*
>
> *(Emphasis supplied)*

798. The SHO of the police station Chanakya Puri filed a reply dated 4th April, 2009 as follows (**pg 2757)**:

> "*It is submitted that above cited case was registered on 22.2.09 and one accused Sushil Arora was arrested on 24.2.09. During the investigation of the case it is revealed that one Indica Car No.DL-3C AX 2192 involved in the above case belongs to one Hemant Garg s/o Brij Mohan R/o 10/2444 Bedenpura Karol Bagh New Delhi but the same could not be traced yet as its owner Hemant Garg is also absconding. **During***

further investigation it is revealed that <u>Yogender @ Vikas abovesaid was in contact with Hemant Garg on the day of incident</u>. *Therefore,* ***he was called for the investigation of the case****. He reported at* ***P.S. Chanakyapuri on 1-4-09*** *and was permitted to leave on the same day with the direction to join the investigation on 2-4-09 who again reported for investigation on 2-11-09 and was permitted to leave on the same day after investigation. He was duly served notice u/s 160 crpc. for joining the investigation. It is incorrect that he was lifted from his address on 21.03.2009."*

(Emphasis by us)

799. Mr. K. Singhal, ld. counsel for Hemant Garg contends that the above reply filed by the concerned police station supports the case of Hemant Garg that on the 22nd of February 2009, the car had been given to Yogender @ Vikas for sale and the police had evidence that the two were in touch on the fateful day.

800. I have extracted above the application filed by Hemant Garg for summoning Yogender @ Vikas as a defence witness. Summons were actually issued for the appearance of Yogender @ Vikas by the court. However, these summons were returned with the report that he had left the given address and could not be found.

801. The reply of the police to Saroj's application shows that the police had collected the evidence of Yogender @ Vikas and Hemant Garg being in contact that day pointing out possibility of substance in Hemant Garg's defence. In fact, the call detail records would have established the whereabouts of Yogender @ Vikas as well as Hemant Garg at the relevant time. It is truly unfortunate and inexplicable why this evidence was not produced before the

court. It was critical for unravelling the truth in terms of both timing and content.

It cannot be disputed that these pleadings and the evidence (especially the defence evidence) on record, certainly cast a doubt cloud over the prosecution case.

802. I also find that Smt. Shalini has categorically stated that though the Indica car DL3C AX 2192 was registered in the name of Hemant Garg, he did not know how to drive and consequently the family had hired a driver by the name of Ankur. She also testified that it was she who used to drive the vehicle and produced her driving licence issued by transport department in her name.

The evidence of DW-2 remained unshaken in cross-examination. There is no reason to disbelieve her.

803. There can be no documentary evidence in the negative to the effect that a person does not know driving. The investigating agency had to establish beyond reasonable doubt that Hemant Garg was capable of driving the vehicle. The material piece of evidence to establish this fact would be issuance of the driving licence in his name. The prosecution has not led any evidence on record to show that Hemant Garg possessed a driving licence or that he knew how to drive other than his dubious identification by the prosecution witnesses.

804. Smt. Shalini (DW-2) has further explained that when the police visited their house in respect of the present case, her husband filed an application for surrender and for holding a TIP in the present case; that he was innocent and had been falsely

implicated in the case. I have discussed these proceedings earlier on in the judgment.

805. I have also extracted above the assertion of the SHO of the P.S. Chanakya Puri, on judicial record in the remand application and opposition to bail, that till verification of the ownership of the records of car registration No.DL3C AX 2192 from the traffic computer, the police had no information to connect Hemant Garg with the commission of the crime or the assailants.

806. It has been noted that the unfolding of the events noted in detail above establishes how impossible it would be for the occupants of the black Santro to see the occupants of the Indica, let alone sufficiently, to affirmatively identify each one, especially assigning them specific seating and roles in the Indica. Other than the tenuous and unbelievable identification, there is no evidence to connect Hemant Garg to the offence.

(ii) *Veracity of seizure of the Indica car involved in the commission of the crime*

807. Hemant Garg also examined Head Constable Dharmender Kumar as DW-7 who had registered the DD entries on 9th April, 2009 at the police station Vikas Puri regarding the recovery and seizure of Indica car bearing no.DL3C AX 2192 on the 9th of April 2009 which was proved on record as Ex.DW7/A. He proved the extract of the 74 DD entries in the register on the 9th of April 2009 as Ex.DW7/A (**pg 632**). The witness has testified that out of the total 45 entries in the Register No.A on 9th April, 2009, which

entries were proved on record as Ex.DW7/B, there was no entry for the recovery and seizure of the said Indica car.

808. It is not disputed that the recovery and seizure of the vehicle was required to be entered in the official records. The record of P.S. Vikas Puri certainly casts a doubt about the veracity of the recovery and seizure of the Indica car in the manner claimed.

809. The Indica car No.DL3CAX 2192 is stated to have been found abandoned on the 9th of April 2009 and seized vide seizure memo Ex.PW23/A (**pg 773**). Furthermore as per the supplementary chargesheet dated 24th October, 2009, the Indica car DL3CA2192 was got inspected by the crime team before it was seized and deposited with the *malkhana*. This report has however, not been placed before the court. Obviously because no such evidence to support the prosecution was discovered.

There is therefore, no forensic evidence in the nature of chance prints, finger prints or blood stains or recovery etc. to connect the vehicle or Hemant Garg to the offence.

810. The failure to completely investigate Yogender is also material in this regard.

(iii) *Evidence of call detail records of Hemant Garg – to establish alibi and lack of any association with the co-accused*

811. It stands established in the evidence of Shalini Garg (DW-2), wife of Hemant Garg that he was using mobile No.9999010588 at the relevant time.

812. Hemant Garg came to be arrested in the present case on the 4th of August 2009. While in jail, he moved an application dated 1st October, 2009 on 6th of October 2009 (**TCR pg. 2901**) seeking directions from the court to the Vodafone Essar Company to preserve the call detail records of the phone No.9999010588 from 19th February, 2009 to 25th February, 2009 and to produce them in court. Hemant Garg clearly pointed out in the application that though the phone was registered with Vodafone Essar in the name of his wife Shalini Garg, however, the same was being used by him for a long time. In para 4, the appellant stated that the call details and location chart of the said mobile would establish his innocence and that at the time of the incident, he was not present at the site of the murder.

813. It needs no elaboration that the usage of the phone by itself may not have established that the phone was being actually used by Hemant Garg. Consequently, the appellant has examined his wife Shalini Garg (DW-2) who testified that the appellant was using the mobile telephone bearing no.9999010588. The testimony of DW-2 to this effect stands unrefuted. As such Hemant Garg had proved the fact that he was using the said mobile at the relevant time.

814. On this application, the ld. Metropolitan Magistrate called for a report from the SHO for the 8th of October 2009.

815. Inspector Arun Kumar (PW-48A) (**pg 449**) obtained the call detail records of the phone No.9999010588 standing in the name of Smt. Shalini (DW-2) and proved the same as Ex.PW49/D5 (Colly.).

816. Hemant Garg thereafter moved further applications including the application seeking the cell I.D. details detailed in para 3 wherefrom calls had been operated on the said mobile, the relevant extract whereof is as follows (**pg 3033)**:

> "*3. That the applicant/accused wants to confirm the* ***location of following towers no. of Vodafone 44552, 27191, 28102, 12531, 12342, 12341, 23253, 33833, 14953, 42503, 23441, 12991, 10032, 19472, 24483, 40741, 28241, 29002, 12971, 10671, 16282, 26572, 24403*** *placed in defferent part of India so that the* ***location of his own Mobile Phone could be ascertained*** *and the same may be helpful to him."*
>
> *(Emphasis by us)*

817. I extract hereunder the handwritten covering letter dated 14th December, 2009 by Inspector Arun Kumar, I.O. filed before the trial court in support of and enclosing the CDRs and ownership of mobile number, as requested by accused Hemant Garg : (**pg 3043)**

> "*It is submitted that* ***CDRs & ownership of Mobile phone No.9999010588*** *is enclosed herewith as requested by accused Hemant Garg.* ***As per record, the above mentioned Mobile No. is registered in the name of Shalini Garg r/o B-131, Vikas Vihar, Vikas Nagar, Uttam Nagar, New Delhi****."*
>
> *(Emphasis by us)*

818. Inspector Arun Kumar enclosed therewith the letter received from M/s Vodafone Essar Mobile Services Ltd. enclosing the call detail records of the said mobile number for the said period, the relevant portion whereof is as follows (**pg 3045/3047)**:

> *"****9999010588 – Postpaid***
> ***Shalini Garg***

B-131 Vikas Vihar Vikasnagar Uttamnagar
New Delhi."

819. So far as the enclosed CDR is concerned, the details of calls for 22nd February 2009 (**pg 3049, 3051**) stated therein are as follows :

MSISDN	PARTY NUMBER IMSI	S DATE	S TIME	IMEI	DURA C.ID	
919999010588 OUT	09711463377 404110400446332	22/02/2009	010653	356960014269960	12	44552
919999010588 INC	09953016031 404110400446332	22/02/2009	105928	356960014269960	24	44552
919999010588 OUT	09811688688 404110400446332	22/02/2009	115107	356960014269960	207	24483
919999010588 INC	09268471562 404110400446332	22/02/2009	115857	356960014269960	1	40741
919999010588 OUT	09268471562 404110400446332	22/02/2009	115918	356960014269960	46	28241
919999010588 INC	09953016031 404110400446332	22/02/2009	134054	356960014269960	9	29002
919999010588 OUT	09953016031 404110400446332	22/02/2009	134308	356960014269960	8	29002
919999010588 INC	09711463377 404110400446332	22/02/2009	144514	356960014269960	37	12971
919999010588 INC	09899678745 404110400446332	22/02/2009	145406	356960014269960	156	10671
919999010588 OUT	09953016031 404110400446332	22/02/2009	171251	356960014269960	32	16282
919999010588 INC	09953016031 404110400446332	22/02/2009	171344	356960014269960	38	26572
919999010588 INC	09899678745 404110400446332	22/02/2009	171926	356960014269960	122	24403
919999010588 OUT	09953016031 404110400446332	22/02/2009	172150	356960014269960	28	24403
919999010588 INC	09953016031 404110400446332	22/02/2009	172407	356960014269960	32	26572
919999010588 OUT	09899678745 404110400446332	22/02/2009	174820	356960014269960	62	16282

820. The investigating officer Inspector Arun Kumar (PW-48A/49) has filed a further handwritten response dated 14th December, 2009 disclosing the location of the cell towers which

serviced the above calls. This response filed by the I.O. on the court record reads as follows (**pg 3041-42)**:

> "*Sub :- Reg. Cell details/Location of Tower of Vodaphone co.*
>
> *-x-*
>
> *Hon'ble Sir,*
>
> *It is submitted that the cell I.D. location of Vodafone Co., as noted by accused Hemant Garg, is as under :-*
>
> | | | | |
> |---|---|---|---|
> | *(1)* | *44552* | - | *Shiv Vihar* |
> | *(2)* | *27191* | - | *Peeragarhi* |
> | *(3)* | *28102* | - | *Chander Park* |
> | *(4)* | *12531* | - | *Chander Park Tri Ngr.* |
> | *(5)* | *12342* | - | *Ashok Vihar* |
> | *(6)* | *12341* | - | *Ashok Vihar* |
> | *(7)* | *23253* | - | *Sawan Park* |
> | *(8)* | *33833* | - | *Derawala Nagar* |
> | *(9)* | *14953* | - | *GT Karnal Road* |
> | *(10)* | *42503* | - | *Kanhaiya Nagar* |
> | *(11)* | *23441* | - | *Nirankari Colony* |
> | *(12)* | *12991* | - | *Karampura* |
> | *(13)* | *10032* | - | *Syndicate HSP* |
> | *(14)* | *19472* | - | *Inderlok* |
> | *(15)* | *24483* | - | *Keshavpuram* |
> | *(16)* | *40741* | - | *Khyala Ravi Nagar* |
> | *(17)* | *28241* | - | *Meera Bagh* |
> | *(18)* | *29002* | - | *Pusa Road* |
> | *(19)* | *12971* | - | *Mrignayni* |
> | *(20)* | *10671* | - | *Gole Mkt* |
> | *(21)* | *16282* | - | *Vijay Nagar, Ghaziabad* |
> | *(22)* | *26572* | - | *New Vijay Nagar, Ghaziabad* |
> | *(23)* | *24403* | - | *Ispat Nagar, Ghaziabad* |
>
> *The **mobile No.9999010588 was registered in the name of Shalini Garg r/o B-131, Vikas Vihar, Vikas Nagar, Uttam Nagar, New Delhi.***

Submitted pl.

(ARUN KUMAR) I.O.
Insp. Spc. Staff/NDD
14/12/09"

(Emphasis by us)

Thus Inspector Arun Kumar, after investigation, has reiterated that the mobile phone No.9999010588 stood in the name of Shalini Garg (DW-2), wife of Hemant Garg.

821. Ms. Aashaa Tiwari, learned APP for the State has submitted that the trial court record also contains a letter dated 7th October, 2009 from M/s Vodafone Essar Mobile Services Ltd. (**TCR pg 2975**) whereby the company has disclosed that the phone no.9999010588 was standing against one Sonamoni Roy. Based on this call detail records, the Magistrate passed an order dated 9th October, 2009 noting that the phone stood registered in the name of one Sonamoni Roy and no direction was necessary to the I.O. to preserve the record. Despite a careful scrutiny of the record, it is not clear how this letter was placed in the file. This letter has also not been proved in evidence.

822. The appellant stood incarcerated. In any case, Inspector Arun Kumar, the investigating officer had to clarify this position. There is no justification at all as to why this aspect of the matter was not investigated further and why further inquiry was not made from M/s Vodafone Essar to give an explanation as to why one number stood assigned to two registered owners.

823. So far as the appellant is concerned, the testimony of Shalini Garg that the Vodafone phone, though registered in her name, was being used by her husband on the fateful day remains unchallenged. The records of the mobile company to the effect that the phone No.9999010588 stood registered in the name of Shalini Garg were obtained by Inspector Arun Kumar (PW-49) and stand produced by him with the handwritten replies dated 14th October, 2009. The call details of the phone had been obtained by the police and the location of the cell towers were also identified. These records were produced along with reply filed by the investigating agency on judicial record which has not been withdrawn. It also does not say that the same or the enclosed record of Vodafone is incorrect.

824. The call details suggest that the appellant remained in the vicinity of his business and cast a doubt on the case of the prosecution with regard to his implication in the commission of the offence.

825. The call detail records also do not contain any call(s) exchanged by Hemant Garg with Sushil Arora or the other appellants. The ld. trial judge has considered the identification of Hemant Garg for implication in the offence from paras 151 to 155 (**pg 690**) of the impugned judgment. The impugned judgment also commences the reference to Hemant Garg only from the registration certificate (Ex.PW31/A) of the vehicle which was found abandoned on 9th April, 2009.

826. No steps appeared to have been taken towards arrest or search of Hemant Garg till he moved an application for his TIP on 10th August, 2009, in another case being FIR No.535/02, P.S. Timarpur in which he stood implicated which was dismissed by the ld. Metropolitan Magistrate.

827. The ld. trial judge has also noted that the investigating officer in the present case waited three days before moving the application (Ex.PW49/B) for TIP in the present case (para 153). In the TIP (Ex.PW4/D2) held on 26th August, 2009, two of the witnesses failed to identify the accused.

828. In the impugned judgment, the ld. trial judge has relied on the solitary evidence of the TIP on the 28th August, 2009 coupled with the circumstance of recovery of the abandoned Indica car to establish the identity of Hemant Garg as one of the five culprits involved in the incident. In our view, Hemant Garg has caused reasonable doubt to be raised about his involvement in the commission of the crime.

829. I am unable to agree with the finding of the ld. trial judge in para 155 that the identification by two of the eye-witnesses in the TIP on 28th August, 2009 and the circumstance of recovery of the abandoned Indica car established the identity of Hemant Garg as one of the five culprits involved in the incident beyond reasonable doubt as required by law.

XXX. Evidence of the call records establishes that no interaction inter se appellants and that Sushil Arora, Rajesh Pandey and Hemant Garg were not at the scene of occurrence

830. One more important fact is brought out from an comparison of Ex.DW5/A to Ex.DW5/D (the electronic record of Sushil Arora's mobile) and the call detail records of the other appellants including Rajesh Pandey and Hemant Garg who have also proved the telephone connections which they were using at the relevant time and brought on record their call details.

831. The police is unable to point out a single call exchanged between the accused persons either prior to, on the 22nd February of 2009 or subsequent thereto. This would have been evidence to support meeting of minds or commonality of object and/or intention. The absence of such evidence perhaps is the reason for the prosecution failing to produce this important evidence.

These records also establish that these appellants were nowhere near the Ridge Road or at the places of occurrence at the relevant time. This in fact, brings down the complete edifice of the prosecution case against the appellants.

XXXI. Challenge to the very presence of Ranjeet Singh (PW-4) at the spot

832. A vehement challenge has been laid by Mr. Vivek Sood, ld. Senior Counsel for Rajesh Pandey, Mr. Vikas Arora, ld. counsel for Sushil Arora, Mr. K. Singhal, ld. counsel for Hemant Garg, Mr. Rajeev Mohan, ld. counsel for Sonveer as well as Mr. M.N.

Dudeja, ld. counsel for Vishnu. It is contended that his evidence is contradicted in material particulars by all other prosecution witnesses and deserves to be completely disbelieved to the very presence of Ranjeet Singh (PW-4) at the spot or that he witnessed the incident at all. The submission is that he is a planted witness and his testimony is tutored and procured. I examine hereafter the various circumstances appearing in the evidence to support these submissions under the following :

(i) *Police record and evidence not supporting presence of Ranjeet Singh (PW-4) on the spot*

(ii) *Whether Ranjeet Singh (PW-4) proved that Indica occupants got out of the car?*

(iii) *Hospital visit by Ranjeet Singh (PW-4) – whether established*

(iv) *Prosecution witnesses disprove presence of Ranjeet Singh (PW-4) at the spot*

(v) *Inability to recall personal details*

(vi) *Acquaintance of PW-4 with family of deceased – yet did not inform them*

I propose to discuss the above sub-headings in *seriatim :*

(i) *Police record and evidence not supporting presence of Ranjeet Singh (PW-4) on the spot*

833. It is in evidence that immediately after the police control room received the telephonic information of the occurrence, which was recorded as DD No.15A at around 2:08 pm, it reached the spot

shortly thereafter. The information was transmitted to the P.S. Chanakya Puri as well as P.S. Rajinder Nagar and police personnel therefrom converged at the spot.

834. So far as the unfolding of events in front of Buddha Garden on the afternoon of the 22nd February 2009 is concerned, Ranjeet Singh (PW-4) has given an account which is not supported by the other prosecution witnesses. He claims to have been riding a scooter at about 2:00 pm near Buddha Garden when a silver grey coloured Indica car being driven "*in a very high speed*", proceeding towards Dhaula Kuan side, overtook him. When the Indica was around 10-15 metres ahead of him, he heard a sound of a fire cracker and saw two persons who had taken out their heads up to their shoulders from the left side front and rear windows of the Indica holding firearm in their hand which was also outside the car. This witness claims that the Indica car forced the black Santro car to stop. The Indica car also stopped and all five occupants of the Indica got out of the car. The black Santro moved away swerving between traffic towards Dhaula Kuan whereupon the passengers in the Indica hurriedly reoccupied it giving a chase to the Santro. At the traffic light T-point on the intersection between the Simon Bolivar Marg to the main road towards Dhaula Kuan, as the traffic had stopped on account of the light turning red, the black Santro car had stopped and again "*some boys*" came out of the Santro from both "*front and rear left side window seats*". One boy wearing a orange coloured kind of shirt came out of the Santro from the rear right side. The Indica had stopped just behind a little

distance from that of the Santro. One boy with well built physique got down from the left front side of the Indica; aimed his firearm on the head of that boy and shot him in the head. The witness stated that the boy wearing orange coloured shirt was able to walk only with difficulty with the support of the Santro car. Upon being hit, the victim fell on the spot with his face down on the ground. PW-4 states that the other four occupants of the Indica also came out of the car. As they were seen by him, he could identify them as Sushil Arora, Rajesh Pandey, Hemant Garg besides Sonveer who are present in the court. PW-4 stated that Sonveer was firing by his firearm at the boy who had got down from the Santro and started running towards the jungle area and in that firing, one of those boys had sustained a bullet injury which he could tell by the fact that he started limping.

835. Ranjit Singh (PW-4) attributed the role of exhortation to the other three occupants of the Indica who were exhorting Vishnu and Sonveer saying "*maaro saalon ko maaro saalon ko*". When the traffic light turned green, the five Indica occupants got back into the car which proceeded towards the Dhaula Kuan.

836. As per PW-4, the victim was removed to the hospital after about 5 minutes time in a white colour Santro bearing No.DL4C AG 7179 which stopped and its two occupants told the public that they were taking the victim to Safdarjung Hospital.

837. So what does this witness claim to have done after the victim was removed from the spot? As per PW-4, one public person gave a call by his mobile to the Police Control Room as a result of

which, both the PCR police as well as the local police reached the spot while he was still present there.

838. The PCR vans arrived within 5-10 minutes of the removal of the body. The witness claimed that he actually told his name and address to the officials in the PCR vehicle which had first arrived. He also claimed that the person who had called the PCR was also present when it arrived.

839. After so giving personal details to the PCR police, Ranjeet Singh (PW-4) claims to have proceeded to the Safdarjung Hospital on his scooter. It is claimed by the witness that at the time of proceeding to the hospital, he did not know the name of the victim (**pg 70**).

840. This witness claimed that he had written the numbers of the three vehicles i.e. the black Santro, Indica and the white Santro on a paper slip and then noted them in his diary (**pg 72**). He has testified that he had given the vehicle numbers to Inspector S.S. Rana while getting his statement recorded by reading it from the paper slip.

(ii) *Whether Ranjeet Singh (PW-4) proved that Indica occupants got out of the car?*

841. In order to probably explain his ability to identify the unknown assailants, Ranjeet Singh (PW-4) (**pg 59**) has changed the unfolding of the events in his testimony and stated that the occupants of the Indica car twice got out of the vehicle, firstly at the cold drink cart, then at the traffic light as well, where he had

seen them. He states that he learnt their names subsequent to the TIP proceedings as Vishnu and Sonveer whom he identified in the court as the persons on the left side front and rear window seats of the Indica car. In fact, Ranjeet Singh (PW-4) has also stated that Vishnu who was sitting next to the driver's seat in the Indica had got down of the car and shot at Ankit.

842. Ranjeet Singh (PW-4) is the only witness who has stated that at the drinks cart, an Indica car had stopped and all the five occupants of the car came out of the Indica (**pg 58**). He has testified that the Santro car "*being got stopped by the Indica car*" – thus trying to say that the Santro had been forcibly stopped by the occupants of the Indica.

Ranjeet Singh (PW-4) gave this testimony, not realising that the Santro had been halted by its occupants at the drinks cart of their own volition in order to enable them to buy drinks and had not been forced to come to a stop by the Indica car. So he is contradicted by all occupants of the Santro on this aspect.

843. Ranjeet Singh (PW-4) further says that the Santro then started moving, swerving and proceeding towards the Dhaula Kuan side. While describing the events at the traffic light, so far as the conduct of the occupants of the Indica is concerned, Ranjeet Singh (PW-4) has claimed that the Indica car arrived at the spot just a little distance behind the Santro and a boy with a well built physique got down from its left front side (**pg 59**) holding the fire arm and aimed his fire arm on the head of the boy wearing the

orange coloured shirt and shot a bullet which hit the head of the boy in the orange shirt.

844. PW-4 has claimed that two of the passengers in the Indica from the left side, both front and rear, had taken their heads up to the shoulder out of the windows. The witness has claimed that "*rest of the four occupants of the Indica car also came out of the Indica who were seen by him and identified as Sushil Arora, Rajesh Pandey, Hemant Garg besides Sonveer in court*" (**pg 60**).

845. So far as Sonveer is concerned, the witness claimed that he was "*firing by his fire arm he was holding towards the boys who had got down from santro car and had started running towards jungle area and in that firing one of those Santro car boys had sustained a bullet injury which I could see by the fact that while trying to run he had started limping*".

846. Manveer Singh (PW-2) has also suggested that two or three persons were getting into the car on the rear seat of the Indica at the spot where the first incident had happened. After hearing the sound like a cracker shot, he submits that he proceeded towards the direction where the Indica car had gone. In court, he testified that the car had started moving slowly and "*2 or 3 persons in the process of sitting inside the car on the rear seat of the car*" and that they were "*boarding in the car from its both sides*" (**pg 48**). This was an important embellishment in his court testimony. Manveer Singh (PW-2) never made any such statement before.

847. The statement of Ranjit Singh (PW-4) that the occupants of the Indica car got out at the cart vendor is completely belied by the

statement of Sunil Kumar (PW-1) in the *rukka* (Ex.PW1/A) (**pg 749**). It is stated by Sunil Kumar (PW-1), in his first ever statement, that the silver coloured Indica overtook their Santro from the left side at a tremendous speed and after moving for 15-20 metres, stopped on the left side of the *katcha* shoulder of the road from which position also bullets were fired.

848. At this point, Sunil (PW-1) has stated that Paramjeet Singh (PW-5) chased the Santro from the right side in an effort to escape the Indica, however, on account of the traffic light turning red, car was forced to stop whereupon Paramjeet tried to take away the car from the *katcha* shoulder of the road but was unsuccessful. At that point, the Indica also reached there and halted behind the black Santro.

849. Other than Ranjeet Singh (PW-4), no other person has stated that the occupants of the Indica disembarked from the vehicle. Even if he was present, Ranjeet Singh (PW-4) would have been behind both these vehicles – certainly not in a position to visualise what was transpiring between the occupants of the two cars.

850. The statement of PW-4 is also falsified by the testimony of Sunil Kumar (PW-1) who was categorical that the assailants were sitting on the left side of the Indica and firing towards "*our vehicle*"; that both the accused had taken out "*head and hand by rolling down window pains*" which testimony is corroborated by the evidence of the other occupants of the black Santro, namely, Surender (PW-8) as well as Varun (PW-6) and manifests that no one got out of the Indica car.

851. The forensic evidence in the nature of the post-mortem report of Ankit also supports this evidence as it discloses no charring on the bullet injury received on the head which would have happened if the gun shot was from close range.

852. There is no evidence to support the witness on the important aspect that the accused had got out of the Indica.

853. If the assailants did not get out of the car, then Ranjeet Singh (PW-4) admittedly got no opportunity to see the occupants of their Indica vehicle and his testimony to identify them, be it at the police station or in court, cannot be relied upon to base a conviction.

(iii) Hospital visit by Ranjeet Singh (PW-4) – whether established

854. A material contradiction in the testimony of the witness, which goes beyond merely lending doubt on his truthfulness, is the fact that the witness is categorical and assertive that the victim was taken to the Safdarjung Hospital and none other. He claims that the persons in the Santro car who had removed the victim had said that they were taking the victim to the Safdarjung Hospital.

855. The witness is further categorical that he reached the emergency gate of the Safdarjung Hospital; that he had parked the scooter in the hospital parking against the parking slip; that he had located the victim on the stretcher outside the Trauma Centre at the Safdarjung Hospital whereafter the victim was taken in the emergency where the doctor sits (**pg 85**). He claims that only the

duty officer was present and that he stayed there only for 10 minutes.

856. The witness gives an explanation for his hospital visit when he states that he was asked by "*ladies present on the spot*" to ensure that the injured was taken to the Safdarjung Hospital (**pg 85**). He did not meet any doctor or duty constable. The witness also did not meet any person known to the victim nor Tikla, Sunil, Paramjeet and Surender at the hospital where he stayed for only about 2-3 minutes. The conduct of the witness is strange as he says that he did not have any conversation with any person in the Safdarjung Hospital.

857. What completely demolishes this testimony is the fact that the injured Ankit was never taken to the Safdarjung Hospital. The victim was admitted in the AIIMS Trauma Centre. Ranjeet Singh (PW-4) never went there. As such, his entire evidence of visiting and having seen Ankit in the Safdarjung Hospital is false.

858. The witness explained that due to fear (**pg 68**), he had not even physically assisted in lifting the injured victim into the white Santro. Yet Ranjeet Singh (PW-4) expects to be believed that after witnessing the first shooting, he has gone after the Indica to witness the second shooting and then on to the hospital.

859. The witness claimed that he reached his sister's house at about 3:00 pm; stayed there for about four hours, again without uttering a word of the incident to anybody. He moved from his sister's house at about 7:30 pm, and while returning, saw police personnels at the place of occurrence at about 8:00 pm. He claims

to have stopped and told the police officials that he had witnessed the incident whereupon his statement was recorded at 8:00 pm by Inspector S.S. Rana (PW-26).

860. Several police vehicles including Victor 70; Victor 69 visited the spot and have recorded the information in the call book of the vehicles. SHO/Inspector Jagat Singh (PW-43) (**pg 372**) has proved the call book of the police vehicle Victor 60 on the relevant day as Ex.PW43/A.

861. Inspector S.S. Rana (PW-26) proceeded to the spot accompanied by SHO/Inspector Jagat Singh (PW-47) and driver Ct. Satpal Singh (PW-15). They reached the spot at about 2:00 pm and remained at the spot till they received DD No.17A logged at 3:50 pm regarding Ankit's admission to AIIMS. Neither Manveer (PW-2) nor Ranjeet Singh (PW-4) met them. Inspector S.S. Rana (PW-26) has made a categorical statement that there was no such witness on the spot (**pg 279/290**).

862. ASI Nand Kishore (PW-24) **(pg 261**) was posted in PCR Chanakya Puri and was on emergency duty at the relevant time on the 22nd of February 2009. Copy of the DD No.15A was handed over to ASI Nand Kishore (PW-24) at 2:10 pm who (**pg 261**) along with Constable Pradeep proceeded to the place of occurrence.

863. The crime team led by S.I. Harsh Vardhan Marchino (PW-42) (**pg 368**) received information through the police control room at about 2:30 pm to reach the place of incident on the 22nd of February 2009 whereupon he reached the informed place at about 3:15 pm when he found police officials already present there.

864. Constable Kalyan Shetty (PW-7) (**pg 135**) was posted with the mobile crime team on the 22nd of February 2009 and was part of the team which inspected the crime scene on the 22nd of February 2009. This witness has also corroborated S.I. Harsh Vardhan Marchino (PW-42) as well as Inspector S.S. Rana (PW-26) and Investigating Officer Inspector Jagat Singh (PW-47) in his statement that they reached the spot at about 3:15 pm as well as the details of the actions taken by the crime team. The witness had stated that by that time the local police was already there.

865. ASI Nand Kishore (PW-24) had referred to the action taken by the crime team as well as the seizures and recoveries effected from the spot.

866. Ranjeet Singh (PW-4) has stated (**pg 61**) that *"Both PCR police as well local police had reached the spot till I was there present."* However, not a single police personnel mentions his presence.

867. Inspector S.S. Rana (PW-26) (**pg 279**) has also claimed that pursuant to the receipt of DD no.15A at around 2:08 pm, he had proceeded to the spot along with Inspector Jagat Singh (PW-47) and Constable Satpal (PW-15). He makes a categorical statement that no witness of that incident was found on the spot (**pg 279**).

868. Inspector Jagat Singh (PW-47) (**pg 381**) has corroborated Inspector S.S. Rana (PW-26) in his statement and is categorical that Manveer Singh (PW-2) and Ranjeet Singh (PW-4) had not met him during their visit to the spot (**pg 390**) and also that no eye-

witness has met them at the spot when they first went to the spot and remained there.

869. It is in the evidence of Ranjeet Singh (PW-4) that the crime team remained at the spot for about two and a half hours. Yet he did not meet it.

870. In his cross-examination, SHO/Inspector Jagat Singh (PW-47) makes a reference to the presence of other public persons at the spot.

The testimony of Inspector Jagat Singh (PW-47) is corroborated by Constable Satpal Singh (PW-15) (**pg 229**) who accompanied him to the spot on the 22nd of February 2009. PW-15 has disclosed that ASI Anand Singh and Constable Pradeep from P.S. Chanakya Puri were already present on the spot while beat Constable Ajit also reached the spot. Constable Sandeep brought a DD copy on the spot. However, Ranjeet Singh (PW-4) did not meet them. He was also not found at the spot by any of the police personnel.

871. No mention is to be found of the presence of Ranjeet Singh (PW-4) who, if he was actually there, keeping in view the spirit of public service claimed by him in his statement, would have obviously approached the police officials and disclosed that he was an eye-witness to the crime and that he knew about the incident. He would have gone forward and co-operated with the police and joined the investigation but he did not do so.

872. SHO/Inspector Jagat Singh (PW-47) states that for the first time, Ranjeet Singh (PW-4) surfaced at the spot at around

7:30/8:00 pm when the police returned to the spot after the FIR was registered. Ranjeet Singh (PW-4) has also claimed that his statement was recorded at the spot at around 8:00 pm (**pg 61)** that day.

873. The record establishes that Ranjeet Singh (PW4) is familiar with police working. PW-4 has testified that in the year 1968 (*probably a typographical error in the statement*), he visited court in a case of murder of his uncle. He has further stated that his maternal cousin Inspector Dara Singh was in the Delhi Police and posted with the Police Control Room (**pg 72**). Yet this witness, if present, made no complaint or informed the police which came to the spot of his presence. He also does not meet the several police personnel in the PCR vans even though he says that he had waited for it to arrive and he did not tell the incident to the PCR officials (**pg 84**). The witness does not care to give the car number of the Indica driven by the assailants to the police even though he stated that he had noted it on the slip – a critical fact for nabbing them.

874. The circumstances casts considerable doubt on the presence of PW-4 and his having witnessed the shootings on that day.

(iv) *Prosecution witnesses disprove presence of Ranjeet Singh (PW-4) at the spot*

875. Yet another important testimony disproves presence of Ranjeet Singh (PW-4) at the spot. In his testimony, Manveer Singh (PW-2) (**pg 49**) submitted that in response to the call made to the PCR, he received a message from the police to stay on the spot.

Manveer Singh (PW-2) states that he stayed at the spot whereafter the police came there and recorded his statement and that he was alone at the spot at that time (**pg 59**).

Manveer Singh (PW-2) has categorically stated that "*no other public person was there at the spot or remained there during the duration about 1½ or 2 hours when I was present there on the spot after the incident*" (**pg 52**). Thus Manveer Singh (PW-2) also disproves the presence of Ranjeet Singh (PW-4) at the spot.

876. While Manveer Singh (PW-2) does not say Ranjeet Singh (PW-4) was an eye-witness of the incident or was present at the spot, Ranjeet Singh (PW-4) also does not state that Manbir (PW-2) had been present. However, Manveer Singh (PW-2) is featuring in the photographs taken by the crime team proved in evidence whereas Ranjeet Singh (PW-4) is not.

877. Most significantly, if PW-4 was present, the site plan (Ex.PW49/T) (**pg 1008**) would have shown the position wherefrom he witnessed the shooting incidents. The site plan does not show his presence.

878. None of the prosecution witnesses including Tikla (PW-9), Hemant (PW-10) and Gajender Singh (PW-11) (who were in the Esteem); the occupants of the Santro car i.e. Sunil (PW-1), Paramjeet (PW-5), Varun (PW-6) or Surender (PW-8) mentions the presence of either Manveer (PW-2) or Ranjeet Singh (PW-4).

879. Out of these witnesses, Tikla (PW-9); Hemant (PW-10) and Gajender Singh (PW-11), upon getting information about the shooting from Sunil Kumar (PW-1), even returned to the spot at

the traffic light from the Hyatt Hotel whence they got information that Ankit stood removed to the hospital. These witnesses did not see either Manveer (PW-2) or Ranjeet Singh (PW-4) at the spot.

880. In the witness box, Sunil Kumar (PW-1) has claimed that he rushed back to the spot upon Tikla's instructions. He also does not mention the presence of either Manveer Singh (PW-2) or Ranjeet Singh (PW-4) at the spot.

881. So far as the official record is concerned, it has been stated by the investigating officer Inspector S.S. Rana (PW-26) that he met Ranjeet for the first time on the spot at about 7:30 to 7:45 pm on the day of incident.

The evidence of the prosecution witnesses thus disproves the presence of Ranjeet Singh (PW-4) at the spot at the time of the incident.

(v) *Inability to recall personal details*

882. Mr. Vikas Arora, ld. counsel for Sushil Arora has drawn our attention to the testimony of Ranjeet Singh (PW-4) which shows that the witness could not remember names of close relatives, telephone number of even his own wife or any other material particulars which any person would normally remember. Mr. Arora, ld. counsel would call upon the court to disbelieve PW-4 when he gives graphic description of the events, car numbers details of the seating of accused persons or their identification upon, at the most a fleeting glimpse from the rear, submitting that the witness cannot be believed.

883. It is to be noted that Ranjeet Singh (PW-4) was not even able to tell how many passengers were there in the black Santro car. He refers to "*three or four more persons*" in his cross examination by Shri Vikas Arora, ld. counsel for the appellant Sushil Arora. He has stated that *"besides the victim deceased from the Santro car I had seen three or four more persons/boys who came out of the car and I saw them running away*" (**pg 69**). Further into his cross-examination stated that he could not tell the colour of the clothes of the other boys who got down from the Santro and states that he had not been able to see them by their faces. Yet he with so much certainty testifies about the Indica occupants and even identifies them.

884. Learned counsels for the appellants have drawn our attention to the testimony of PW-4 who did not even know the number of the premises where he was carrying on his business in Deputy Ganj; the date, month or year of its partnership; the mobile number of his partner or his wife; the real or complete names of the nephew i.e. son of his sister who he claimed to be visiting; the telephone numbers of his sister or his nephews; his own brother's mobile number who was residing in the same premises as he was; the details of the tenants from whom he claimed to have been regularly collecting rent; the business being conducted by his brother Shamsher; or even the make of the scooter he claimed to have been riding on the fateful day at the fateful time.

885. Perhaps the inability to remember long phone numbers could be excused, but not names of the persons with whom he was closely interacting.

886. Given this state of inability to recollect such personal details which he would be naturally expected to know, this witness' deposition, especially the graphic details of the alleged episode, as given by him, and identification of the accused persons, cannot be believed. His evidence suggests tutoring, it is certainly not natural, given the position of his memory.

887. In the context of the unnatural conduct of Ranjeet Singh (PW-4), he is emphatic that he had not disclosed to anybody the fact that he has witnessed a murder. He does not do so to the police, not to the doctors at the Safdarjung Hospital which he visited, not to his relatives with whom he spent several hours late afternoon of the 22nd of February 2009. He would suggest that he was so shocked into silence and so traumatized that he did not tell what he had witnessed to any of these persons. It is difficult to believe that a person who was shocked into such silence would return anywhere near the place of violence, that too without any reason. For this reason, it is impossible to believe that such a person would have voluntarily returned to the spot, as has been testified by him in the witness box. It is evident from his narration of the events and his conduct that the witness has given a completely false statement to support the prosecution case. His testimony is contrary to the evidence of the other prosecution witnesses.

888. Ms. Aashaa Tiwari, learned APP has placed reliance on the pronouncement of the Supreme Court reported at ***2016 (3) SCALE 522 Savelife Foundation & Anr. V. UOI & Anr***. asserting reliability of Ranjeet Singh (PW4). In this public interest litigation, several orders came to be passed by the court towards development of legal framework to protect good Samaritans i.e. members of the public who play a role in saving lives of victim. These orders resulted in the Ministry of Road Transport & Highways of the Government of India issuing notification containing guidelines on 12th May, 2005 and a further notification on 21st January, 2016 which required standard operating procedures to be drawn up for examination of such persons during investigation and trial.

889. I have discussed at length the reasons for which the testimony of PW4 is not reliable. As such this judicial pronouncement would have no bearing to the matter under consideration.

(vi) *Acquaintance of PW-4 with family of deceased – yet did not inform them*

890. Ranjeet Singh (PW-4) was cross-examined extensively on his connection with Ankit – the deceased and his family. I find that it is on record that Ranjeet Singh (PW-4) has a relationship with the family of Ankit. The witness has established his address as 5034, Gali Daroga Chhalu Singh, Pahari Dhiraj, Delhi, barely 1 km. from the office of the father of the deceased at T-403,

Chameleon Road, Delhi. The witness concedes knowledge of the fact that the father of the deceased had a office at Chameleon Road for doint business of glass. PW-4 has admitted that in October or November, 2010, with regard to "*some other incident*", he had gone to the police station Sadar Bazar with Ankit's father (**pg 82**).

891. It is in the evidence of Ranjeet Singh (PW-4) that he had been to the police station concerning the present case on four occasions and that on two of these occasions, he had been accompanied by the father and uncle of the deceased in their car to the police station.

The fact that the witness was accompanied by the father of the deceased stands corroborated by the investigating officer.

892. Despite this fact, Ranjeet Singh (PW-4), who claims to be an eye-witness to the shootings and visited Ankit in hospital, did not inform Ankit's family about the shooting or the injuries suffered by the son of someone with whom he was acquainted. This fact lends support to the defence plea that he was not present and was not a witness to the shooting.

893. The trial court has considered the testimony of Ranjeet Singh (PW-4) in paras 120 to 129 of the impugned judgment and found him a natural public spirited witness. The learned trial court has rejected the argument on behalf of the defence that Ranjeet Singh (PW-4) was a planted witness and considered his failure to disclose the incident with his sister and others as very natural.

894. In view of the above discussion, Ranjeet Singh's (PW-4) complete silence about the incidents which he claimed to have

witnessed on 22nd February, 2009 from around 2:00 pm till his statement was allegedly recorded in the night, by itself renders his testimony unbelievable. During this period, he claims to have come across police officials, doctors and hospital staff as well as his own sister whom he visited. But he doesn't disclose to them anything about the incident. Also, despite acquaintance, he does not even inform the family of the victim Ankit about the happenings. This conduct is unnatural and renders his testimony suspect. PW-4 is not found present by the scores of police teams who converged on the spot or any of the other witnesses. He makes a false statement that he found Ankit admitted in the Safdarjung Hospital.

895. It is noteworthy that Ranjeet Singh (PW-4) was unable to identify Hemant Garg on the 26th of August 2009 in a Test Identification Parade which was conducted in the Tihar Jail. Despite evidence of his inability to recollect even usual personal details in his testimony recorded fourteen months after the incident on 20th April, 2010, the witness identifies Hemant Garg as well as the other convicts, all of whom were complete strangers to him, and of whom he would, at best, have had fleeting glimpses of in a moving vehicle, if at all.

896. The witness also admitted that on the 19th of April 2010, after reaching the court, he remained seated inside the court room and did not wait for his turn in the evidence outside the court room. Though the witness also denied the suggestion that he had been shown the photographs of the accused persons by the prosecution,

he would have heard the testimony of other prosecution witnesses and evidence of their identification. The learned trial judge has also completely overlooked this aspect of the case.

897. Tested against the inability of the witness to even give the correct number of occupants in the black Santro, his account of the events and identification is unbelievable, suggesting that witness was a planted witness and his testimony tutored.

XXXII. <u>Circumstances in which investigating agency conducted itself cast grave doubt in prosecution case</u>

898. In the present case, the defence has contended that the prosecution witnesses who were occupants of the Santro were close associates and interested persons; the two purported public eye-witnesses (PW-2 and PW-4) were not present at the spot as claimed and that the investigation is tainted. Learned counsels for the appellants have urged at some length that the lodging of the FIR as well as its registration were both delayed which by itself cast strong doubt on the truth of the contents of the *rukka*. Ld. counsels would contend that there is complete failure to comply with the mandatory requirements of Section 157 Cr.P.C. and delay in the lodging and registration of the FIR casting strong doubt on the prosecution case which must be disbelieved. I examine these circumstances individually hereafter under the following sub-headings :

(i) *Unexplained delay of five hours in registering the First Information Report*

(ii) *Non-mentioning of the names or description of the accused in the FIR – effect thereof*

(iii) *Non-compliance with the mandatory requirements of Section 157(1) of the Cr.P.C. – effect of*

(iv) *Delay in preparing the inquest report by the investigating officer*

(v) *Non production and examination of a material witness – effect of*

(vi) *Investigation was biased, unfair and deliberately negligent*

(vii) *Failure to collect relevant call detail report of the prosecution witnesses as well as the accused persons*

(viii) *Presumption under Section 114(g) of the Evidence Act*

I propose to discuss the above sub-headings in *seriatim :*

(i) *Unexplained delay of five hours in registering the First Information Report*

899. Mr. Rajeev Mohan, ld. counsel for Sonveer has strongly emphasised that timing between information to the police of shooting and the second information of Ankit being removed to hospital is within a gap of barely few minutes. The police had full information yet no FIR was registered till five hours later.

900. The importance of the FIR is best stated in the words of the Supreme Court in the judgment reported at ***(1972) 3 SCC 393, Thulia Kali v. State of Tamil Nadu*** in the following terms :

> ***"12.*** *... First information report in a criminal case is an* ***extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence*** *adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The* ***object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eyewitnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation****. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. ...".*
>
> *(Emphasis by us)*

901. It is noteworthy that almost twenty five years ago, in ***AIR 1992 SC 1389, Surjit Singh @ Gurmit Singh v. State of Punjab,*** the Supreme Court had declared that "*first information report is not an encyclopedia of the entire case and is even not a substantive piece of evidence. It has value, no doubt, but only for the purpose of corroborating or contradicting the maker*".

902. In a pronouncement by the Supreme Court reported at ***(2009) 6 SCC 641, Subhash Kumar v. State of Uttarakhand,*** the court held thus :

> ***"12.*** *FIR as is well known is not to be treated to be as an encyclopaedia. Although the effect of a statement made in the FIR at the earliest point of time should be given primacy, it would not probably be proper to accept that all the particulars in regard to commission of offence must be furnished in detail."*

903. It is obvious that the entire factual matrix has to be considered. However, the importance of urgency in lodging an FIR cannot be undermined.

904. In the present case, the FIR regarding the incident which took place around 1:58 pm stands registered at 7:30 pm i.e. about five hours later when he shooting took place about 1½ to 2 kms. from the police station. The prosecution gives no explanation at all as to why the FIR is not registered at the earliest when all essential details had been placed on police record. The evidence noticed above not only suggests, but establishes that the witnesses conferred before making the statements to the police. So what is effect thereof in the present case? I now elaborate on this aspect of the matter now.

905. It is pointed out by Mr. Rajeev Mohan, ld. counsel for Sonveer, that the first ever information was received by the police at about 1:58 pm (Exh. PW29/A) (**pg 1039**). The prosecution has also proved as Ex.PW30/A, the PCR calls at 13:58 hrs (**pg 1039**) and 14:04 hrs. In this regard, DD No.15A (Ex.PW34/A) (**pg 781**)

has been reiterated. Police vehicle VTR 69 was alerted at 14:05:18 and reached the spot at 14:11:54.

906. On the PCR forms proved on record, it is recorded that the information has been received from the informant Narender Singh, a resident of Gali No.9, Shiv Ram Park, Nangloi, New Delhi with regard to a shooting incident at the red light. The information was also available with the police that the injured had been removed in a Santro car no.DL4C AG 7179 to the Safdarjung Hospital.

907. Ex.PW30/A being the extract of Form '1' of the Delhi Police Control Room (**pg 1040**) records the informant's name as Narender Singh and mentions the phone no.997105409. It is in the evidence of Manveer Singh (PW-2) (**pg 48**) that he was using this phone number.

908. Mr. Mohan, ld. counsel has submitted that the wireless log and diary of the vehicle VTR 69 (Ex.PW43/B) recorded at 2:20 pm notes a phone call from Manveer's phone no.9971054074 to the effect that at Shankar Road near Buddha Garden red light, one man had been shot from a vehicle bearing no. 2192 and thereafter had fled towards Dhaula Kuan. This vehicle has recorded at 2:20 pm that the police vehicle has reached the spot and notes the presence of Manveer Singh s/o Harnam Singh r/o PTS Colony, Malviya Nagar at the spot. It also notes the presence of the Santro car No.DL2F1C 0002 which had the bullet mark on its driver side rear window and also the presence of substantial blood on the spot. The vehicle has also noted that the injured stood removed to the Hospital.

909. At 2:40 pm, the wireless log and diary of VTR 69 records the information received from Manveer Singh to the effect that one Indica car no...2192 (**pg 2515/pg 841**) overtook the black Santro and stopped it from which 4/5 boys fled. Two shots were fired from the Indica car and one bullet had hit the head of one person. The injured's friends took him to Safdarjung hospital or in another hospital in another car. It notes that no witness was found in the spot. ASI Nand Kishore (PW-24) was present there at that time.

910. I have also noted above that the police record contains information at 15:57:35 hrs about Tikla (PW-9), resident of Mehrauli, having given loan to Chintoo Car Point and quarrel over this. Thus information of even the motive stood disclosed.

911. The above narration shows that the information of the shooting incident stood logged not only with the police control room but even by the police station Chanakya Puri at 1:59 pm on 22nd February, 2009 (Exh. PW21/A) (**pg 817–820**). I find that at 3:50 pm, police station Chanakya Puri has logged DD No. 17A (Exh. PW34/B) (**pg 760**) recording receipt of information that Ankit had been removed to the AIIMS Trauma Centre.

Thus even the local police had full information.

912. Mr. Mohan, ld. counsel would submit that therefore, by 2:40 pm, full details of the offence including the vehicles involved; the manner in which it was committed; the weapon used; names and phone number of informants and removal of the injured to the hospital stood revealed to the police. In any case, full information from an eye-witness was at the most, only one phone call away as

the police had Manveer's phone number in the first information itself.

Mr. Mohan also points out that when Inspector S.S. Rana (PW-26), Inspector Jagat Singh (PW-47) and ASI Nand Kishore (PW-24) reached the spot, they found an abandoned Santro having a bullet mark on its right rear window; blood on the ground as well as cartridges on the ground and also got information that the injured stood removed to the hospital. It is submitted that all this information by itself was sufficient to register the first information report.

913. Before us, as per the PCR call record (Ex.PW29/A) (**pg 1039**) and Ex.PW30/A (**pg 1040**) as well as the PCR call record (Ex.PW43/B) (**pg 841**) contain vital details and refer to Manveer (PW-2) as an informant.

914. I find that Ex.PW30/A notes the presence of the complainant Manveer Singh (PW-2) ("*shikayatkarta*") an eye-witness at the spot. This witness is found present when the police vans reached the spot.

915. When the police officials, including HC Jai Bhagwan, of P.S. Chanakya Puri arrived at the place of shooting, Manveer (PW-2) was actually present there.

916. It is in the testimony of Inspector S.S. Rana (PW-26) that he had called the crime team to the spot. The crime team was present at the spot from 3:15 to 5:45 pm (**Pg 839**). The photographs taken by the crime team exhibited as Ex.PW7/A5 and Ex.PW7/A6 were shown to Manveer Singh (PW-2). In fact, Manveer Singh (PW-2)

has pointed out that he features in these photographs proved by the prosecution on record establishing his presence on the spot. Thus, despite presence of the eye-witness, the case was not registered.

917. On the contrary, even though, he was present at the spot continuously, yet he was not even examined by the investigating officer. Insp. S.S. Rana (PW-26), Insp. Jagat Singh, (PW-47), who was the SHO of P.S. Chanakya Puri, and ASI Nand Kishore have dishonestly denied availability of any eye-witness on the spot when pursuant to receipt of DD No.15A they reached there. This statement is contrary to the contemporaneous record proved by the prosecution before us by way of entries in official records as well as the photographs taken at that time.

It is unfortunate that realizing the inexplicability of their actions, especially the failure to register the FIR, senior police officials as Insp. S.S. Rana (PW-26); Insp. Jagat Singh (PW-47) and ASI Nand Kishore (PW-24) have tried to cover up their omission with the falsehood that no eye-witness was available.

918. Inspector S.S. Rana (PW-26) has stated that after recording the statement of Sunil Kumar (PW-1) (**pg 282**) between 4:30 and 6:15 pm at the Trauma Centre, he had proceeded to the spot along with Sunil (PW-1).

919. Inspector S.S. Rana (PW-26) has stated that after 7:30 in the evening when he had returned to the spot accompanied by the eye-witness Sunil (PW-1), after inspection of the spot, he had prepared a site plan (Ex.PW26/B) (earlier marked as PW1/X) (**pg 757**) on the pointing out of Sunil (PW-1). Inspector S.S. Rana (PW-26) has

further stated that Constable Satpal took the *rukka* from the spot to the police station for registration of the case.

It is the Manveer Singh's (PW-2) statement that he was present at the spot at that time.

920. Leaving ASI Nand Kishore and Constable Pradeep on the spot, thereafter, Inspector S.S. Rana (PW-26) along with Constable Jagat Singh and Constable Satpal had gone to Karol Bagh in the official vehicle to the office premises i.e. Chintoo Car Point of Sushil Arora and met his brother Pushkar Raj who informed them that Sushil Arora had gone to Rohini for some work. From this office, Inspector S.S. Rana (PW-26) returned to the spot with the others and only then proceeded to the police station along with ASI Nand Kishore and Constable Pradeep. According to Inspector S.S. Rana (PW-26), in the police station, a '*boy*' who disclosed his name as Manveer Singh (PW-2) was present and claimed to be the eye-witness of the incident. Inspector S.S. Rana (PW-26) claims that it was only after 9:30 pm on the 22nd of February 2009 that he recorded the statement of Manveer Singh at the police station as also the statements of Tikla (PW-9), Varun (PW-6) and Paramjeet (PW-5).

921. Inspector Jagat Singh (PW-47) has however, stated that it is only on tracing the user of phone No.9971054074 that the police was able to track the eye-witness Manveer Singh (PW-2) who met the police for the first time at around 10:00 pm on the date of the incident in the police station (**pg 390**).

922. Inspector S.S. Rana (PW-26) makes no reference to tracking Manveer Singh (PW-2) from his mobile number but claims that he, on his own, came to the police station.

923. Manveer Singh (PW-2), however, completely contradicts both Inspector S.S. Rana (PW-26) and Inspector Jagat Singh (PW-47) on this aspect. As per Manveer Singh (PW-2) (**pg 49**), after he called the police control room, he received a response from it to wait at the spot. When the police reached the spot, it recorded his statement there and then. He does not refer to making any statement at the police station. This contradiction by itself may be explainable as fading memory. But when examined against the backdrop of the police actions and omissions and conduct of the witnesses, it is of significance and adds suspicion to the dubious nature of investigation.

924. I have noted above in detail the conduct of claimed eye-witnesses (PWs-1, 5, 6 & 8) who were with the deceased in the Santro who were carrying mobiles and did not inform the police. None cared for the injured Ankit. Instead they contacted each other, converged at the hospital and deliberated to put out an agreed story as to the sequence of events.

925. I find that in similar circumstances, the Supreme Court has completely disbelieved the prosecution case which had included eye-witnesses. In the decision dated 23rd of May 2014 in Crl.A.No.1118/2014, reported at ***2014 (7) SCALE 562, Sudarshan & Anr. v. State of Mahrashtra***, instead of approaching the police station, the appellant along with his friends who were present at the

time of the incident, first went to an advocate located 15 kms away without reporting the matter and only thereafter reported the incident to the police. The Supreme Court had concluded that there was no compliance with the mandatory requirement of sub-section (1) of Section 157 of the Cr.P.C.; that the names of the assailants were not mentioned in the inquest report even though the complainant and the two or three of his friends were present at the spot which circumstances indicated that the FIR was ante timed and that the names of the appellants were incorporated later showing them to be at the time when the statement was made by the complainant on the basis of which the FIR was registered. It was consequently, held that the appellants were entitled to the benefit of doubt and that the case against them has not been proved beyond reasonable doubt resulting in setting aside of their conviction.

926. The Supreme Court has also had an occasion to consider the evidentiary value of an FIR in the criminal case and the impact of delay in recording the same. In the pronouncement reported at ***(1994) SCC (Cri) 1390 : (1994) 5 SCC 188, Meharaj Singh (L/NK.) v. State of U.P.***, the delay in lodging FIR was considered as one of the important factors in disbelieving the prosecution case. The prosecution case revealed criminal litigation between the two parties and also that relationship between them were strained and they were hostile to each other. In this case, the deceased and his wife were attacked at about 11:00 am on 3rd of November 1977 while the FIR was lodged by the father of the deceased only at

12:45 pm on the same day at the police station which was at a distance of 4 kms from the place of occurrence. The trial court acquitted all the accused, against which order, the State went in appeal to the High Court. One of the accused Neelu died during the pendency of the appeal in the High Court and, therefore, appeal qua him abated. The High Court maintained the acquittal of Babu who was a nephew of Kalu and Neelu (two brothers), while convicting Kalu and Meharaj Singh for various offences. The acquittal of Babu by the High Court was not challenged by the State. In this case, one of the main issues which arose for consideration was whether the FIR was ante timed. So far as the significance in prompt lodging of the FIR, failure to mention essential details as names or descriptions of persons involved and the consequence of its delay is concerned, the Supreme Court has observed thus :

> ***"12.*** *FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt* ***lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story****. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external*

checks. ***One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate****. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf.* ***The second external check*** *equally important is the* ***sending of the copy of the FIR along with the dead body and its reference in the inquest report****. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case,* ***the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR****. In our opinion, on account of the infirmities as noticed above, the* ***FIR has lost its value and authenticity*** *and it appears to us that the* ***same has been ante-timed and had not been recorded till the inquest proceedings*** *were over at the spot by PW 8."*

(Emphasis by us)

927. After noting the facts with regard to the hostility between the parties, on the question of the eye-witness account, the Supreme Court noted thus :

> **"*15. The alleged eyewitnesses are undoubtedly deeply interested in the prosecution but that by itself cannot be a ground to discard their testimony. It, however,***

certainly puts this Court on its guard to scrutinise their evidence more carefully and keeping in view their unnatural conduct, as noticed above, it appears to us that none of the alleged eyewitnesses had actually seen the occurrence and they were introduced as eyewitnesses after thoughtful deliberations and consultations. It appears, that since it was a blind murder, the appellants have been roped in on account of misguided suspicion because of the previous enmity. Our independent analysis of the evidence on the record coupled with the infirmities which we have noticed above has created an impression on our minds, that the prosecution has not been able to bring home guilt to either of the appellants beyond a reasonable doubt. The trial court was, therefore, right in acquitting them and the High Court even after noticing the infirmities, in our opinion, fell in error in convicting the appellants*. The reasons given by the High Court, to set aside the order of acquittal do not commend to us. They are neither sufficient nor adequate or cogent much less compelling."*

(Emphasis by us)

928. On the same aspect, in the case reported at ***(2011) 7 SCC 421, Bhajan Singh @ Harbhajan Singh & Ors. v. State of Haryana***, the Supreme Court has emphasised the importance of prompt and early reporting of the occurrence by the informant with all its vivid details in the following terms :

"20. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding its true version. In case, there is some delay in filing the FIR, the complainant must give explanation for the same. Undoubtedly, delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained.

However, deliberate delay in lodging the complaint may prove to be fatal. In such case of delay, it also cannot be presumed that the allegations were an afterthought or had given a coloured version of events.

21. *The court has to carefully examine the facts before it, for the reason, that the complainant party may initiate criminal proceedings just to harass the other* ***side with mala fide intentions or with ulterior motive of wreaking vengeance. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution****. In such a case,* ***where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the court may take a view that it amounts to an abuse of the process of law****. (Vide* ***Sahib Singh v. State of Haryana[(1997) 7 SCC 231 : 1997 SCC (Cri) 1049 : AIR 1997 SC 3247] ; G. Sagar Suri v. State of U.P. [(2000) 2 SCC 636 : 2000 SCC (Cri) 513 : AIR 2000 SC 754] ; Gorige Pentaiah v. State of A.P. [(2008) 12 SCC 531 : (2009) 1 SCC (Cri) 446] and Kishan Singh v. Gurpal Singh [(2010) 8 SCC 775 : (2010) 3 SCC (Civ) 583 : (2010) 3 SCC (Cri) 1091 : AIR 2010 SC 3624****] .)"*

(Emphasis by us)

929. Our attention is also invited to the pronouncement of the Supreme Court reported at ***1994 SCC (Crl.) 734, State of A.P. v. Punati Ramulu & Ors.*** The observations of the court in para 5 of this judgment, on a fact situation similar to that as obtained in the present case, shed valuable light on the issue under consideration and reads as follows :

"5. *According to the evidence of* ***PW 22, Circle Inspector, he had received information of the incident from police constable No. 1278,*** *who was on 'bandobast' duty. On*

receiving the information of the occurrence, ***PW 22 left for the village of occurrence*** *and started the investigation in the case.* ***Before proceeding to the village to take up the investigation, it is conceded by PW 2 in his evidence, that he made no entry in the daily diary or record in the general diary about the information that had been given to him by constable 1278****, who was the first person to give information to him on the basis of which he had proceeded to the spot and taken up the investigation in hand.* ***It was only when PW 1 returned from the police station along with the written complaint to the village that the same was registered by the Circle Inspector****, PW 22, during the investigation of the case at about 12.30 noon,* ***as the FIR, Ex. P-1.*** *In our opinion,* ***the complaint, Ex. P-1, could not be treated as the FIR in the case as it certainly would be a statement made during the investigation of a case*** *and hit by Section 162 CrPC. As a matter of fact the High Court recorded a* ***categorical finding to the effect that Ex. P-1*** *had* ***not been prepared at Narasaraopet*** *and that it had "****been brought into existence*** *at Pamaidipadu itself,* ***after due deliberation****". **Once we find that the investigating officer has deliberately failed to record the first information report on receipt of the information of a cognizable offence of the nature, as in this case, and had prepared the first information report after reaching the spot after due deliberations, consultations and discussion, the conclusion becomes inescapable that the investigation is tainted and it would, therefore, be unsafe to rely upon such a tainted investigation, as one would not know where the police officer would have stopped to fabricate evidence and create false clues. Though we agree that mere relationship of the witnesses PW 3 and PW 4, the children of the deceased or of PW 1 and PW 2 who are also related to the deceased, by itself is not enough to discard their testimony and that the relationship or the partisan nature of the evidence only puts the Court on its guard to scrutinise the evidence more carefully, we find that in this case when the bona fides of the investigation has been***

successfully assailed, it would not be safe to rely upon the testimony of these witnesses either in the absence of strong corroborative evidence of a clinching nature, which is found wanting in this case*."*

(Emphasis by us)

930. So what could be the reason for ante-timing of an FIR? One very strong reason is to introduce witnesses. In ***(1994) SCC (Cri) 1390 : (1994) 5 SCC 188, Meharaj Singh (L/NK.) v. State of U.P.***, the ante-timing of the FIR was considered a strong circumstance for disbelieving the very presence of the eye-witnesses. I extract hereunder the observations of the court in this regard :

> ***"13. It appears that it was a blind murder and none of the eyewitnesses were actually present at the scene. The ante-timing of the FIR was obviously made to introduce eyewitnesses to support the prosecution case****. We may demonstrate this by noticing that* ***though PW 3*** *Smt Kamlesh the widow of the deceased* ***claimed that she was present with her husband at the time of the occurrence, her conduct was so unnatural that not only she did not try to save her husband by trying to provide a cover but even after her husband fell down and was inflicted repeated injuries*** *with the knife by the appellant Meharaj Singh,* ***she did not even try to go anywhere near her husband and even later on hold his head in her lap and try to provide some comfort to him****. This becomes obvious from the absence of any bloodstains on her clothes. She admitted that she had not even received a scratch during the occurrence.* ***In a situation like this, the normal conduct of any wife would be firstly to make an effort to save her husband even by taking the blow on herself and if that is not possible then at least to go so close to his person, at least after the assailants had left that there would be***

no escape from the blood oozing out of the injuries of the deceased to come on to her clothes. *Similar criticism is also available against Balbir PW 2, Shiv Charan PW 4 and Satkari PW 5. It is not the case of the prosecution that the clothes of any of them had got bloodstained.* ***The very fact that none of these witnesses went to lodge a report and instead left it to the father of the deceased to lodge the FIR would also go to show that the witnesses in all probability were not present at the spot. The absence of any blood in the field of Kirpal Singh as also the absence of blood trail from the field of Kirpal Singh to the place where the dead body was found, as admitted by PW 8, also suggests that the occurrence did not take place in the manner suggested by the prosecution and that the genesis of the fight has been suppressed from the court.*** *The evidence of Dr Pande who conducted the post-mortem examination showing that the stomach contained partially digested food material weighing about 150 gms and concluding therefrom that the occurrence must have taken place between 9.00 and 9.30 a.m. if the deceased had taken his food at 7.00 a.m. would also throw a doubt on the correctness of the prosecution version which alleged time of occurrence as 11.30 a.m., presumably to lend an assurance that PWs 2, 3, 4 and 5 were present in the field at that time. The evidence of Dr Pande also to the effect that he had found incised injuries on the deceased including a L shaped injury (injury 11) and a semi-circular injury (injury 18) is indicative of the fact that these two injuries were caused with different weapons and looking to the nature of the other incised wounds present on the deceased, the possibility that three types of sharp-edged weapons were used cannot be ruled out. That being the position, it is obvious that the* ***ocular testimony does not fit in with the medical evidence and instead it contradicts it.***

14. *It is interesting in this connection also to note that Satkari* ***PW 5*** *named Resham* ***also as an eyewitness****. The High Court* ***rightly held Satkari to be a chance witness*** *also but the* ***prosecution has not explained as to why Resham who was alleged to be an eyewitness has not been examined****. According to Balbir PW 2, Jog Raj was also an eyewitness. He too has not been examined. Shiv Charan PW 4, also named Resham and Jog Raj as eyewitnesses. Thus, it appears to us that* ***a concerted effort was made by the prosecution witnesses to introduce*** *Resham and Jog Raj* ***as false eyewitnesses in the case but since they have not been examined, it would be fair to draw a presumption, that they perhaps were not prepared to support the false case****. The High Court while setting aside the order of acquittal did not deal with these various infirmities.*

15. The alleged eyewitnesses are undoubtedly deeply interested in the prosecution but that by itself cannot be a ground to discard their testimony. It, however, certainly puts this Court on its guard to scrutinise their evidence more carefully and keeping in view their unnatural conduct, as noticed above, it appears to us that none of the alleged eyewitnesses had actually seen the occurrence and they were introduced as eyewitnesses after thoughtful deliberations and consultations. It appears, that since it was a blind murder, the appellants have been roped in on account of misguided suspicion because of the previous enmity*. Our* ***independent analysis of the evidence*** *on the record* ***coupled with the infirmities*** *which we have noticed above has created an impression on our minds, that the prosecution has not been able to bring home guilt to either of the appellants beyond a reasonable doubt. The trial court was, therefore, right in acquitting them and the High Court even after noticing the infirmities, in our opinion, fell in error in convicting the appellants. The reasons given by the High Court, to set aside the order*

of acquittal do not commend to us. They are neither sufficient nor adequate or cogent much less compelling.

16. *As a result of our above discussion, we hold that the case against both the appellants has not been proved beyond a reasonable doubt and that they are entitled to benefit of doubt. Their appeals consequently succeed and are allowed. The conviction and sentence recorded against them by the High Court are set aside. The appellants shall be set at liberty forthwith, if not required in any other case."*

(Emphasis by us)

931. I may also advert to the pronouncement of the Division Bench of this court reported at ***1976 Chandigarh L.R. (DELHI) 41, Balwant Singh v. The State*** wherein the court had concluded that in a case under Section 302 of the IPC, the daily diary was not recorded at the time mentioned therein; the FIR was also ante timed by the police; false witnesses introduced and innocent persons implicated as accused by the prosecution; the investigation was found to be tainted and recovery of the incriminating article at the instance of the accused was found to be doubtful. I extract hereunder paras 11 to 15 of the pronouncement wherein the requirements of law with regard to the maintenance of the daily diary and the registration of the FIR have been discussed :

"12. According to rule 24.1 of the Punjab Police Rules Volume III, 1959 edition, the substance of the report is to be entered in the Daily Diary. The relevant part of the rule reads as under :-

"Every information covered by Section 154, Criminal Procedure Code, must be reduced

to writing as provided in that section and substance thereof must be entered in the police station daily diary, which is the book provided for the purpose. It is only information which raises a reasonable suspicion of the commission of a cognizable offence within the jurisdiction of the police officer to whom it is given which compels action under section 157, Criminal Procedure Code."

13. In the instant case, Ex. PW14/C is the entry in the Daily Diary "A"in regard to Rukka Ex. PW1/A. The entry on being translated into English reads as follows:-

> *"At this time a writing in Hindi written and signed by Jagbir Singh, S.I. containing the statement of S. Balak Singh, s/o Lachhman Singh, r/o Qr. No. 8B, Jangpura Extension, has been received at the Police Station through Om Prakash, Constable No. 202, which having disclosed the commission of an offence u/s 302/34 IPC the F.I. R. No. 111 under the said offence has been prepared"*

14. It is clear from the entry reproduced above that the substance of the first information report was not entered in the daily diary inasmuch as neither the names of the accused nor the names of the witnesses nor any other detail in regard to the occurrence is given in the entry. The entry does not comply with the requirements of section 154 Cr.P.C. and rule 24.1 of the Punjab Police Rules. The failure to enter the substance of the F.I.R. in the daily diary is indicative of the fact that when the said entry was made full facts in regard to the occurrence were not known.

15. There is yet another vital document to verify the truthfulness of the prosecution version. According to

> *section 174 of the Code of Criminal Procedure, investigation officer when preparing the inquest report should "draw up a report of apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any(such marks appear to have been inflicted". The inquest report has to be prepared promptly because it has to be sent to the doctor along with the dead body when the body is sent for autopsy. It has a colum for writing out in brief the facts of the case. In facts about the occurrence are stated in the inquest report, it would show that atleast by that time the version of the occurrence has been given. If it does not mention the facts about the occurrence, the argument that the investigation officer was not sure of the facts when the inquest report was drawn out would carry weight – see Gurdev Singh and other v The State, 1963 Punjab Law Reporter 409."*

932. On this aspect, I may refer to the pronouncement of the Division Bench of this court reported at ***1995 SCC OnLine Del 190*** : ***1996 JCC 35, Shyam Sunder & Raj Kumar v. State (Delhi Admn.).*** In this case, the FIR was delayed by more than two hours when the police station was nearby and also informed by phone. The daily diary did not contain the names of the persons nor of witnesses. Though the occurrence was about 8:00 pm but the report was sent to the magistrate by the police only on next morning. Many eye-witnesses were related to the deceased. There was material discrepancies appearing in the statements of the eye-witnesses. The court held that the benefit had to be given to the accused persons. I may extract hereafter the precedents relied upon

by the court in paras 18 to 24, which lay down the applicable legal principles on registration of the FIR :

> *"18. In the present case, as already narrated above, the* ***police has not followed the provisions of the Code of Criminal Procedure or the Delhi Police Rules in regard to prompt recording of the F.I.R****. The substance of the* ***F.I.R. which should include the names of the accused*** *and the names of the eye-witnesses* ***was admittedly not recorded in the Daily Diary at the time F.I.R. purported to have been recorded. The special report to the Metropolitan Magistrate was not sent promptly and reached him after much delay. The inquest proceedings*** *were not carried out by the Investigating Officer promptly and* ***were held over for the next day****. No explanations have been given by the prosecution for all these lapses.*
>
> ***19.*** *In* ***Surinder Kumar & Others v. State, 42 (1990) DLT 2****, the recording of the F.I.R. was found to be deliberately delayed and* ***there were no mention of the substance containing the names of the accused and the names of the eye-witnesses*** *in the Daily Diary and there was also delay in sending the special report to the Illaqa Magistrate and coupled with other facts appearing in that case the court doubted the prosecution case holding that in all probability the case has been brought in existence after due deliberation between the alleged eye-witnesses and the Investigating Officer.*
>
> ***20.*** *In* ***Bhimappa Jinnappa Naganur v. State of Karnataka, 1993 (3) Crimes 411****, it was found that* ***eye-witnesses were not named in the F.I.R. It was held that it was quite doubtful that said persons could have*** *witnessed the occurrence when they belatedly become eye-witnesses.*
>
> ***21.*** *In* ***Lata Ram & Another v. State, 1989 Cri. L.J. 572****, there was again non-compliance with the provisions of Section 154 of the Code of Criminal*

Procedure for not recording the substance of the F.I.R. containing the names of the accused and names of the eye-witnesses and also non-compliance ***of Rule 24.1 of the Punjab Police Rules which require prompt sending of the special report to the Illaqa Magistrate and*** *keeping in view the peculiar facts of the case the court came to the conclusion that perhaps the persons who claimed to be eye-witnesses were not the eye-witnesses of the occurrence.*

22. *In* ***Daula & Others v. State of Haryana, 1987 (1) C.L.R. 89****, it was found that the weapon of offence allegedly used in the commission of murder of deceased which claimed to have been recovered by the police in persuance of disclosure statement of accused was opined by the medical expert as not the weapon which could have been used for causing fatal injuries and eye-witnesses in that case were mere relations of the deceased. The court found the case of the prosecution to be doubtful.*

23. *Reference may be also given to* ***Balwant Singh v. State, 1976 C.L.R. (Delhi) 41****, wherein again the emphasis was laid on compliance of the provisions of Section 154 of the Code of Criminal Procedure which require the substance of the FIR to be recorded in Daily Diary and Rule 24.1 of the Punjab Police Rules Volume III which require the sending of the special report promptly to the higher authorities including Illaqa Magistrate and to the provisions of Section 174 of the Code of Criminal Procedure which require preparation of the inquest report promptly and for sending of the dead body alongwith the inquest papers to the doctor for post-mortem without any delay. In the said case the court came to the conclusion be cause these provisions have not been complied with that in all probility the F.I.R. was ante timed by the police for introducing false eye-witnesses.*

> ***24.*** *In the present case there are glaring features which* ***clearly point out to the fact that in all probabilities the FIR was ante timed****. All the safeguards incorporated in the provisions of law mentioned above and emphasized in various judgments have been given a go-by in the present case. ....”*
>
> *(Emphasis by us)*

933. It is to be borne in mind that in the present case there were certain events over which the police had no control and could not postpone. The unfortunate demise of Ankit; the requirement of conducting the autopsy on the dead body; the site position and presence of persons getting captured in photographs. These events cast further suspicion on the events sought to be proved by prosecution witnesses.

(ii) *Non-mentioning of the names or description of the accused in the FIR – effect thereof*

934. The objection of false implication in the present case by the appellants is premised *inter alia* on the fact that all the accused persons have not been named in the FIR. Would this by itself completely discredit the prosecution? As per the law laid down by the Supreme Court, it is not so.

935. I find that so far as to whether reporting details as to names of assailants in the FIR is essential, in the judgment reported at ***AIR 2009 SC 2513, Kirender Sarkar & Ors. v. State of Assam,*** the Supreme Court had observed thus :

> ***"11. The law is fairly well settled that FIR is not supposed to be an encyclopaedia of the entire events and cannot contain the minutest details of the events. When essentially material facts are disclosed in the FIR that is sufficient****. FIR is not substantive evidence and cannot be used for contradicting testimony of the eyewitnesses except that it may be used for the purpose of contradicting maker of the report. Though the importance of naming the accused persons in the FIR cannot be ignored, but names of the accused persons have to be named at the earliest possible opportunity.*
>
> ***12.*** *The question is whether a person was impleaded by way of afterthought or not must be judged having regard to the entire factual scenario in each case. ...."*
>
> *(Emphasis by us)*

936. Placing reliance on ***(2013) 12 SCC 796, Mritunjoy Biswas v. Pranab @ Kuti Biswas***, Ms. Aashaa Tiwari, ld. APP for the State contends that the non-mentioning of the names of the accused in the FIR would be of no consequence. In this judgment, the Supreme Court has noted the contention of the accused that the informant had not mentioned his name in the FIR though he could have done so. The deceased, who was conscious while being taken to the hospital in a van, also did not divulge the name of the person who fired from the window apart from the other submissions. The court considered these submissions in paras 20 to 27 extracting several judicial precedents which shed valuable light on our consideration. I extract hereunder the relevant paras from 20 to 24 wherein important precedents on this issue stand extracted which read thus :

*"**20.** The **first ground** of attack is **non-mentioning the name of the accused in the FIR**. Pyramiding the said submission, the learned counsel for the appellant would submit that once the name of the accused is not mentioned in the FIR, the prosecution version in entirety is bound to collapse. In this context, we may fruitfully refer to a three-Judge Bench decision in **Pandurang v. State of Hyderabad [AIR 1955 SC 216 : 1955 Cri LJ 572] wherein it has been held on the facts of the case that the first information report did not mention the name of any person as assailant though it was alleged that the names were known** was of no consequence specially **when their names were disclosed at the time of inquest and their absence did not make the prosecution version a concocted one and further it could not be said that it was a planned one to rope someone later on**.*

***21.** In **Rotash v. State of Rajasthan [Rotash v. State of Rajasthan, (2006) 12 SCC 64 : (2007) 2 SCC (Cri) 382]** wherein the FIR did not contain the name of the appellant, before this Court a contention was advanced that the informant who was known to the accused and who could easily identify the assailant, yet he was not named in the FIR and, therefore, the prosecution case was not to be believed. **The Court took note of the fact that the investigation had taken place in quite promptitude and the accused persons were arrested being named by the witnesses**. After taking note of the fact situation the Court proceeded to observe as follows: (SCC p. 68, para 14)*

> *"14. The first information report, as is well known, **is not an encyclopaedia of the entire case**. **It need not contain all the details**. We, however, although did not intend to **ignore the importance of naming of an accused in the first information report, but herein we have seen that he had been named in the earliest possible opportunity**. Even assuming that PW 1 did not name him in the first information report, **we do***

not find any reason to disbelieve *the statement of* ***Mooli Devi, PW 6. The question is as to <u>whether a person was implicated by way of an afterthought or not must be judged having regard to the entire factual scenario obtaining in the case</u>****."*

22. *In* ***Mulla v. State of U.P. [(2010) 3 SCC 508 : (2010) 2 SCC (Cri) 1150****] the accused persons were not named in the FIR. Taking into consideration the material brought on record, the Court observed that though* ***none was named in the FIR****, yet* ***subsequently the names of the appellants had come into light during the investigation and, hence,*** *non-mentioning the names of the accused persons would not be fatal to the prosecution case.*

23. *In* ***Ranjit Singh v. State of M.P. [(2011) 4 SCC 336 : (2011) 2 SCC (Cri) 227****], after referring to the authorities* ***Rotash [Rotash v. State of Rajasthan, (2006) 12 SCC 64 : (2007) 2 SCC (Cri) 382] , Rattan Singh v. State of H.P. [(1997) 4 SCC 161 : 1997 SCC (Cri) 525] , Pedda Narayana v. State of A.P. [(1975) 4 SCC 153 : 1975 SCC (Cri) 427] , Sone Lal v. State of U.P. [(1978) 4 SCC 302 : 1978 SCC (Cri) 587], Gurnam Kaur v. Bakshish Singh [1980 Supp SCC 567 : 1981 SCC (Cri) 496] and Kirender Sarkar v. State of Assam [(2009) 12 SCC 342 : (2010) 1 SCC (Cri) 241] the Court opined that: (Ranjit Singh case [(2007) 3 CHN 78] [(1972) 1 SCC 107 : 1972 SCC (Cri) 110] , SCC p. 344, para 14****)*

"14. ... in case the informant fails to name a particular accused in the FIR, and the ***said accused is named at the earliest opportunity, when the statements of witnesses are recorded, it cannot tilt the balance in favour of the accused****."*

24. *In* ***Jitender Kumar v. State of Haryana [(2012) 6 SCC 204 : (2012) 3 SCC (Cri) 67****] it has been stated that: (SCC pp. 213-14, para 16)*

"16. ... An ***accused*** *who has* ***<u>not been named in the FIR, but to whom a definite role has been attributed</u>***

> ***<u>in the commission of the crime</u> and when such role is established by cogent and reliable evidence and the prosecution is also able to prove its case beyond reasonable doubt, such an accused can be punished in accordance with law, if found guilty****."*
>
> *(Emphasis by us)*

In ***Mritunjoy Biswas,*** the court observed that the studied scrutiny of the entirety of the evidence showed that the accused had been named at the earliest and there was nothing on record to show that he had been falsely implicated in the case by way of an afterthought.

937. There is yet another pronouncement of the Division Bench of this court in the judgment reported at ***2007 (II) DLT (Crl.) 54 (DB), Ghan Shyam & Ors. v. State*** wherein the case of the prosecution with regard to the naming of the accused persons was doubtful. If the identity of the accused persons had been revealed, the investigating officer would have mentioned these names, firstly in the inquest form and then in the brief facts which he had prepared at the time of making an application for post-mortem examination. In these documents, the names of the assailants were not mentioned. The observations of the court in para 8 on the effect thereof would guide our consideration in the present case :

> *"8. ... In any case in the facts and circumstances of this case some doubt does crop up in the mind of the Court about the veracity of the prosecution case benefit of which has to go to the accused. We are also of the view that if at all PW 5 had witnessed the incident and had named the assailants before the Investigating Officer*

Arjun Singh on the morning of 5.4.1988, which delay in reporting the matter to the police also in any case remained unexplained from the prosecution side, the Investigating Officer would have mentioned these names, firstly, in the inquest form and then in the brief facts which he had prepared at the time of making an application for postmorten examination. In these documents, as noticed already, names of the assailants were not mentioned and, therefore, the only inference which we can draw is that by 6.4.1988, the names of the assailants were not known to the police and even PW 5 Mahesh Chand had not made himself available to the police by that time claiming himself to be an eye-witness of the incident. In this view, we get fortified by the decision of the Supreme Court in Rang Bahadur Singh's case (supra), cited by the Counsel for the appellants."

938. As per the law on the issue, the question thus which has to be answered by the court is whether the appellants had been named at the earliest and the investigation effected with promptitude?

939. On the 23rd of February, 2009, at 2:25 pm, Insp. S.S. Rana (PW-26) made a request to the autopsy surgeon of Department of Forensic Medicine & Toxicology requesting for a post mortem to be conducted on the dead body of Ankit (deceased). In this request, Insp. S.S. Rana (PW-26) described a short summary of the case, referring to only DD no. 15A and discovering the Santro car at the spot, *inter alia*, having round holes with cracks *"appearing to be that of bullet"*on the right side rear gate glass. This document (Exh. PW 26/D) also doesn't contain even the FIR number or the names of any of the appellants.

940. Even in the death report dated 23rd February, 2009 (Exh. PW 26/F) prepared by Insp. S.S. Rana (PW-26) there is no reference to the names of any of the appellants.

Perhaps by itself, these omissions may be insufficient to dent the prosecution case. But when examined as part of the prosecution case in its entirety, they also add weight to the defence suggestion that the FIR is ante-timed and the prosecution case against the appellants tainted.

941. The above narration would show that as per Ex.PW30/A (**pg 1040**), by 2:20 pm, the police had full details of the incident including the numbers of the cars which were involved in the incident and an actual eye-witness Manveer Singh with his full details.

942. I find that the Delhi Police Control Room form (Ex.PW30/A) which has the record of the police vans from 14:05:18 to 15:26:13 hrs has even more details including the full details of the injured persons and the unfurling of the events.

943. The prosecution has placed the wireless log and diary of the police vehicle V-69 as Ex.PW43/B (**pg 841**). In this log, entries are found having been made at 2:08; 2; 2:20 and 2:40 pm. There is reference to receipt of information from phone No.9971054074; the bullet injury caused to a person at the red light near Buddha Garden and the assailants fleeing towards Dhaula Kuan; presence of complainant Manveer Singh s/o Harnam Singh r/o H.No.84, PTS Colony, Malviya Nagar on the spot; the black Santro DL2FFK 0002 hit with the bullet; as well as removal of the injured to the

hospital. At 2:40 pm, the statement of Manveer Singh had been logged that an Indica car no. "*(illegible).....VAX-2192*" overtook the Santro in which there were 4 or 5 boys, a bullet injury on the head of one of the occupants of the Santro; the flight of the car towards Dhaula Kuan. This entry clearly notes that companions of the injured ("*uske sathi*") have taken him to the hospital.

944. The record of P.S. Chanakya Puri (Ex.PW21/A logged at 1:59 pm; Ex.PW34/B (DD No.17A) logged at 3:50 pm establishes that P.S. Chanakya Puri also had full information of the incident.

945. In this regard, the prosecution has examined ASI Om Prakash as PW-25. I find that ASI Om Prakash (**pg 277**) was posted as the duty officer Head Constable in P.S. Chanakya Puri on 22nd February, 2009 from 4:00 pm till the midnight. It is in his evidence that Constable Satpal (**Pg 15**) had brought the *tehrir* by about 7:00 pm from Inspector S.S. Rana (PW-26) disclosing commission of the offences under Sections 302/307/34 IPC and Section 120B under the Arms Act. This witness recorded the FIR on the basis of the *rukka* and copy of the FIR along with the original *rukka* was sent back to Insp. S.S. Rana (PW-26). Factum of recording of the FIR (Ex.PW25/A) was logged as DD No.21A (Ex.PW25/B) (**pg 762)** and DD No.22A (Ex.PW25/C) (**pg 763**).

946. The registration of the FIR was recorded vide DD No 21A which was the *kyammi muqadma*. In this entry neither the names of the assailants nor the names of the witnesses are found mentioned.

947. It is therefore, evident that despite an eye-witness being present and available and all material particulars regarding the incident being available and having been documented as early as around 2:08 pm, no FIR was registered till 7:00 pm. There is no explanation for the delay in registering the FIR for almost five hours, even though, the police was at the spot within minutes of the incident, when eye-witnesses were present and available and the police station itself was barely a couple of kilometres and a few minutes away.

948. Though, ASI Nand Kishore (PW-24), Inspector S.S. Rana (Pw-26) as well as Inspector Jagat Singh (PW-47) who visited the spot immediately after receiving the information, deny presence of Manveer (PW-2) and Ranjeet Singh (PW-4) at the spot, both of them have been examined as an eye-witness.

949. In the present case as well, just as in ***Meharaj Singh (L/NK.),*** the eye-witnesses PWs-1, 5 and 6 do not make one call or complaint to the police even though they were carrying mobiles. Surender (PW-8) claimed to be injured in the attack and extensively bleeding from his injury. No blood trail was found by the police which reached the spot within minutes of the incident. There is clear evidence of confabulation and deliberation between the witnesses before the first statement (Ex.PW1/A) of Sunil (PW-1) was recorded at 6:30 pm by Inspector S.S. Rana (PW-26). On a consideration of the entirety of the evidence led by the prosecution, it has to be held that the delay in registering the FIR establishes

that a case was being plotted against the appellants and that the events did not unfold in the manner alleged.

950. The prosecution version does not inspire confidence. The complete failure of the prosecution witnesses who were occupying the black Santro to inform police; the unexplained delay in registering the FIR; names of all the assailants or their description not forthcoming despite multiple eye-witnesses as well as the several circumstances which suggest that the FIR is ante-timed and premised on an agreed version put out by Tikla (PW-9) and his associates after deliberation and concert in the AIIMS Trauma Centre to obviously wreak vengeance from Sushil Arora on account of their financial dealings.

(iii) *Non-compliance with the mandatory requirements of Section 157(1) of the Cr.P.C. – effect of*

951. It has been urged by Mr. M.N. Dudeja, ld. counsel that the delay in registering the FIR in the present case is unexplained and fatal to the prosecution. The submission is that the FIR was ante timed and fabricated which is manifested by the failure to comply with Section 157 of the Cr.P.C. by the police.

952. The Code of Criminal Procedure stipulates certain mandatory compliances which are to be undertaken by the investigating agency during the course of investigation. Amongst them, the compliance with Section 157 of the Cr.P.C. is most pertinent. Placed under Chapter 12 of the Cr.P.C. dealing with "*information to the police and their powers to investigate*", Section

157 prescribes the procedure for investigation. I extract hereunder the relevant extract of the statute to the extent necessary for the present consideration :

> *"**157. Procedure for investigation preliminary inquiry**.*
> *(1) If, from information received or otherwise, an **officer in charge** of a **police station** has **reason to suspect** the commission of an offence **which he is empowered under section 156** to investigate, he **shall** forthwith **send a report of the same to a Magistrate** empowered to take cognizance of such offence upon a police report and **shall proceed in person**, or **shall** depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender; Provided that-*
>
> *(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;*
>
> *(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.*
>
> *(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub- section (1), the **officer in charge** of the police station shall **state in his report his reasons for not fully complying with the requirements of that sub-section,** and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated."*
>
> *(Emphasis by us)*

953. Section 156 of the Cr.P.C. confers power on any officer incharge of a police station to "*without the order of Magistrate, investigate any cognizable case which a court having jurisdiction over a local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII*". Thus there is a statutory mandate upon the officer incharge of a police station to forthwith send a report of the commission of a cognizable offence to the Magistrate empowered to take cognizance of such offence upon police report. The legislative intent in so mandating the officer incharge of the police is that non-compliance of Section 157 of CrPC may lead to ante-timing of the FIR as well as padding in the investigation.

Section 157 therefore, provides the necessary safeguard to ensure that there is no padding of the investigation, either in support of a complainant or in support of any person accused of commission of the offence.

954. Prescription has been made by the Legislature in Sections 154 to 157 of the Cr.P.C., singular non-compliance whereof may enable the court to throw out the prosecution. The importance of the compliance therefore, cannot be belittled. In this regard, I may usefully refer to the Division Bench pronouncement of this court reported at ***1979 Crl.LJ 1159 : MANU/DE/0360/1979, Ramesh Kumar v. Delhi Administration*** wherein the court held as follows :

> *"29.* ***Section 154 is the only provision which says that on receipt of information relating to the commission of***

a cognizable offence it should be reduced to writing and be authenticated by the person giving it. *The substance of the information is required to be entered in a book to be kept by the officer in-charge of the police station in such form as the State Government may prescribe in this behalf.*

30. Section 157 provides for the sending of the report of information forthwith to the Magistrate empowered to take cognizance of the offence. If on information received or otherwise the officer in-charge of the police station has reason to suspect the commission of an offence, he is empowered to investigate under S. 156 of the Code.

.....Taken singly, such a delay or failure may not be sufficient to lead to the conclusion that the investigation was tainted or unfair. But when considered in conjunction with other infirmities or discrepancies, it may assume great importance and may cause suspicion about the purported time of its recording or even about its contents. First information report is expected to reflect the occurrence truly, without embellishment or fabrication. Its recording without any reasonable delay also excludes the possibility of conjuring up of a false case by the police. Thus to save the report from any kind of attack and also to derive assurance and authenticity to the facts stated in this report, compliance of the provisions of the Code and also of the Punjab Police Rules is essential. But in actual practice it has been noticed that this rule is observed more in breach.

xxx *xxx* *xxx*

37. The intendment of the legislature or that of the makers of the Rules is clear. No doubt the non-compliance of Section 154 and 157 of the Code or that of the Rules does not constitute a ground to throw away a prosecution case but it does emerge as a factor to be seriously reckoned with while appreciating the entire evidence. Its non-observance is bound to cast some shadow on the case, obviously to its detriment, because

of the adverse inference. Its degree depends upon the facts of a particular case.

38. It is further argued on behalf of the State that the intention of sending a copy of the report to the Magistrate is to apprise him about the commission of the crime in his local jurisdiction and also about the fact that cognizance has been taken by the police. On receipt of this information he is able to control the investigation and has the power to give appropriate directions under S. 159 of the Code. It is legally true. ***The retention of*** *these provisions even in Act No. (2 of 1974) Cr.P.C.,* ***1973 has its own*** *impact.* ***More so, when the*** *legislature has****, in its wisdom, neither deleted nor amended them. Thus Sections 154 and 157 have enormous importance*** *and cannot be treated as a mere surplusage. They are very salutary provisions, which can be utilised for counter-checks and balance for testing or evaluating the other evidence."*

(Emphasis by us)

955. The sending of the copy of the FIR to the *ilaqua* magistrate is one of the most important external checks of due lodging of a first information report. In para 12 of the judgment reported at ***(1994) SCC (Cri) 1390 : (1994) 5 SCC 188, Meharaj Singh (L/NK.) v. State of U.P.***, extracted hereinabove, the Supreme Court has noted that if the report is received late by the magistrate, it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been lodged unless the delay is satisfactorily explained by the prosecution.

956. The law on this subject is best stated by the Supreme Court in the pronouncement reported at ***(2011) 7 SCC 421, Bhajan Singh***

@ Harbhajan Singh & Ors. v. State of Haryana in the following terms :

> ***"24.*** *In* ***Shiv Ram v. State of U.P. [(1998) 1 SCC 149 : 1998 SCC (Cri) 278 : AIR 1998 SC 49****] this Court considered the provisions of Section 157 CrPC, which require that the police officials would send a copy of the FIR to the Ilaqa Magistrate forthwith.* ***The Court held that if there is a delay in forwarding the copy of the FIR to the Ilaqa Magistrate, that circumstance alone would not demolish the other credible evidence on record****. It would only show how in such a serious crime, the investigating agency* ***was not careful and prompt*** *as it ought to be.*
>
> ***25.*** *In* ***Munshi Prasad v. State of Bihar [(2002) 1 SCC 351 : 2002 SCC (Cri) 175 : AIR 2001 SC 3031****] this Court considered this issue again and observed: (SCC pp. 365-66, para 13)*
>
> > *"13. ... While it is* ***true that Section 157 of the Code makes it obligatory on the officer in charge of the police station to send a report of the information received to a Magistrate forthwith, but that does not mean and imply to denounce and discard an otherwise positive and trustworthy evidence on record. Technicality ought not to outweigh the course of justice—if the court is otherwise convinced and has come to a conclusion as regards the truthfulness of the prosecution case, mere delay, which can otherwise be ascribed to be reasonable, would not by itself demolish the prosecution case****."*
>
> *While deciding the said case, this Court placed relied upon its earlier judgments in* ***Pala Singh v. State of Punjab [(1972) 2 SCC 640 : 1973 SCC (Cri) 55 : AIR 1972 SC 2679]*** *and* ***State of Karnataka v. Moin Patel [(1996) 8 SCC 167 : 1996 SCC (Cri) 632 : AIR 1996 SC 3041]*** *.*

26. *In* ***Rajeevan v. State of Kerala [(2003) 3 SCC 355 : 2003 SCC (Cri) 751****] this Court examined a case where there had been inordinate delay in sending the copy of the FIR to the Ilaqa Magistrate and held that unexplained inordinate delay may adversely affect the prosecution case. However, it would depend upon the facts of each case.*

27. *A similar view was reiterated in* ***Ramesh Baburao Devaskar v. State of Maharashtra [(2007) 13 SCC 501 : (2009) 1 SCC (Cri) 212]*** *wherein there had been* ***a delay of four days in sending the copy of the FIR to the Ilaqa Magistrate and no satisfactory explanation could be furnished for such inordinate delay****. While deciding the said case, reliance had been placed on earlier judgments in* ***State of Rajasthan v. Teja Singh [(2001) 3 SCC 147 : 2001 SCC (Cri) 439 : AIR 2001 SC 990] and Jagdish Murav v. State of U.P. [(2006) 12 SCC 626 : (2007) 2 SCC (Cri) 234] (See also Sarwan Singh v. State of Punjab [(1976) 4 SCC 369 : 1976 SCC (Cri) 646 : AIR 1976 SC 2304] ; State of U.P. v. Gokaran [1984 Supp SCC 482 : 1985 SCC (Cri) 41 : AIR 1985 SC 131] ; Gurdev Singh v. State of Punjab [(2003) 7 SCC 258 : 2003 SCC (Cri) 1616] ; State of Punjab v. Karnail Singh [(2003) 11 SCC 271 : 2004 SCC (Cri) 135] ; State of J&K v. S. Mohan Singh [(2006) 9 SCC 272 : (2006) 2 SCC (Cri) 484 : AIR 2006 SC 1410] ; N.H. Muhammed Afras v. State of Kerala [(2008) 15 SCC 315 : (2009) 3 SCC (Cri) 982] ; Sarvesh Narain Shukla v. Daroga Singh[(2007) 13 SCC 360 : (2009) 1 SCC (Cri) 188 : AIR 2008 SC 320] and Arun Kumar Sharma v. State of Bihar [(2010) 1 SCC 108 : (2010) 1 SCC (Cri) 472]*** *.)*

28. *Thus, from the above it is evident that the Criminal Procedure Code provides for internal and external checks: one of them being the receipt of a copy of the FIR by the Magistrate concerned. It serves the purpose that the FIR be not ante-timed or ante-dated. The Magistrate must be immediately informed of every serious offence so that he may be in a position to act under Section 159*

CrPC, if so required. Section 159 CrPC empowers the Magistrate to hold the investigation or preliminary enquiry of the offence either himself or through the Magistrate subordinate to him. This is designed to keep the Magistrate informed of the investigation so as to enable him to control investigation and, if necessary, to give appropriate direction.

29. *It is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been ante-timed or ante-dated or investigation is not fair and forthright. Every such delay is not fatal unless prejudice to the accused is shown. The expression "**forthwith" mentioned** therein does not **mean that the prosecution is required to explain delay of every hour in sending the FIR to the Magistrate. In a given case, if number of dead** and injured persons is very high, delay in dispatching the report is natural. Of course, the same is **to be sent within reasonable time in the prevalent circumstances**.*

***30. However, unexplained inordinate delay in sending the copy of FIR to the Magistrate may affect the prosecution case adversely. An adverse inference may be drawn against the prosecution when there are circumstances from which an inference can be drawn that there were chances of manipulation in the FIR by falsely roping in the accused persons after due deliberations. Delay provides legitimate basis for suspicion of the FIR, as it affords sufficient time to the prosecution to introduce improvements and embellishments. Thus, a delay in dispatch of the FIR by itself is not a circumstance which can throw out the prosecution's case in its entirety, particularly when the prosecution furnishes a cogent explanation for the delay in dispatch of the report or prosecution case itself is proved by leading unimpeachable evidence**."*

(Emphasis by us)

957. I have noted in the present case the police record in DD No.22A (Ex.PW25/C) (**pg 763)** that the copy of FIR would be sent to the higher authorities. The prosecution has also proved the documentation in the nature of the DD No.22A regarding registration of the FIR and records that the copy of the FIR has been handed over to a special messenger for service upon senior officials and the *illaqa* magistrate. However, there is no evidence establishing date or time of its receipt by the magistrate, or that it was ever received by him. Similar circumstances have been noted by the Supreme Court in para 15 of the decision dated 23rd of May 2014 in Crl.A.No.1118/2014, reported at ***2014 (7) SCALE 562 : (2014) 12 SCC 312, Sudarshan & Anr. v. State of Maharashtra*** which reads thus :

> ***"15.*** *... Mr Umesh, Sub-Inspector, was at Chandrapur Police Station, who had recorded the FIR. He has appeared as PW 12 during trial. The FIR which was lodged with him is proved as Ext. 213. Column 15 of the FIR pertains to "date and time of dispatch to the court". This column is left blank, which means* ***that no date and time of the dispatch/delivery of this FIR to the court concerned is mentioned.*** *In the cross-examination, PW 12 was specifically asked* ***about the requirement of*** *submitting a copy of the FIR to* ***the Magistrate concerned within 24 hours****. He replied in the affirmative insofar as this need is concerned. However,* ***at the same time, he was candid in admitting that he was unable to say as to by whom and when the copy of Ext. 213 was sent to the Magistrate. A specific suggestion was put to him that the copy of the FIR was not sent to the Magistrate concerned. Though he denied, but thereafter no attempt was made to prove as to when and how the copy was sent.*** *The necessity of sending the copy of the*

FIR to the Magistrate concerned hardly needs to be emphasised. The primary purpose is to ensure that truthful version is recorded in the FIR and there is no manipulation or interpolation therein afterwards. For this reason, this statutory requirement is provided under Section 157 of the Code of Criminal Procedure, 1973."

(Emphasis by us)

958. In these circumstances, in para 16, the court observed thus :

***"16.** ... it was a glaring omission on the part of the prosecution which lends credence to the plea of the **defence about ante-timing the FIR**. It gets strengthened on finding more glaring and intriguing events taking place thereafter, which are described hereinafter."*

(Emphasis by us)

The same fate must follow in the present case as well.

959. The proof of mere dispatch of the FIR to the *ilaqa* magistrate without any evidence of the same having been actually received by him, as in the present case, is completely inadequate so far as the proof of compliance of Section 157 of the Cr.P.C. is concerned. In this regard, I may usefully refer to the pronouncement of this Division Bench of this court reported at ***1979 Crl.LJ 1159 : MANU/DE/0360/1979, Ramesh Kumar v. Delhi Administration*** wherein the court had held thus :

*"17. The law is well settled that the duty officer is required to mention the brief facts including **the name of the assailant, names of the witnesses and the weapon used in the daily diary entry about the registration of the case**. In the instant case all these details are conspicuous by their absence from D.D. entry Ext. PW 20/DA. There is no valid explanation as to why these*

details have not been mentioned. We have not been able to appreciate as to ***how the special report was sent without mentioning the name of the*** *constable through whom it was dispatched, and no efforts have at all been* ***made to bring on record the testimony of this constable which could have led corroboration to the testimony of the duty officer and other police officials about the factum of the recording of the FIR at the time at which it is*** *claimed to have been recorded.* ***We may also note that the prosecution has not even brought on record copy of the FIR which was delivered to the Ilaka Metropolitan Magistrate as a special report as the same would have indicated from the endorsement which is requires to be made by the magistrate showing the date and time of its receipt. As already referred to if Ashok Kumar was present at the spot when police came there as claimed by Dina Nath (PW 2)*** *there could hardly be any occasion for the police officer to record his statement in the hospital. Considering all these facts we have no hesitation in coming to the conclusion that the prosecution has not been able to prove on record that the FIR was recorded at th time at which it is claimed to have been recorded."*

(Emphasis by us)

960. A perusal of FIR No. 35/2009 (Ex.PW25/A) (**pg 755**) only shows that it has only been recorded that "*it will be sent*" to senior officials.

961. Ms. Aashaa Tiwari, ld. APP for the State is unable to point out either the report which ought to have been sent to the Magistrate or prove that it was actually taken and received by the Magistrate concerned. Other than this testimony, no record at all placed before this court, either in the oral evidence or the

documents that the mandate of sub-section (1) of Section 157 of the Cr.P.C. was complied with.

There is thus no evidence at all that the FIR was ever served on the magistrate, yet another circumstance supporting the defence contention.

962. Given the series of deliberate omissions, concealment of evidence by the investigating agency, material contradiction, embellishments and improvements in the evidence of the prosecution witnesses, the delay in registering the FIR, the failure to strictly establish compliance with the mandatory requirement of sub-section (1) of Section 157 of the Cr.P.C. is an important and significant aspect of the case casting suspicion and doubt on prosecution case.

(iv) Delay in preparing the inquest report by the investigating officer

963. Our attention is drawn to the evidence of Inspector S.S. Rana (PW-26). It is not disputed that Ankit expired at 4:15 pm on the 22nd of February 2009. It is in evidence that Inspector S.S. Rana (PW-26) prepared the brief facts of the case only the next day, on the 23rd of February 2009 (Ex.PW26/E). He submitted the request for conducting the autopsy (Ex.PW26/D) to the Autopsy Surgeon, Jai Prakash Narayan Apex Trauma Center, AIIMS. Inspector S.S. Rana (PW-26) also prepared a death report (Ex.PW26/F) on the 23rd of February 2009.

964. In terms of Section 174 of the Cr.P.C., the investigating officer is required to give the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

965. Ld. counsels for the appellants point out that apart from Inspector S.S. Rana (PW-26), Inspector Jagat Singh (PW-47) and other police officials were actively involved in the investigation on the 22nd of February 2009 and that there is no reason at all as to why the inquest report and request for autopsy was not made soon after death. Given the entirety of matter, again the failure of the witnesses to report and that of the investigating agency to promptly register the FIR, it is certainly strange that it took PW-26 almost two hours to scribe a one and a half page statement of Sunil Kumar (PW-1) and not make the inquest report and request for post-mortem immediately.

(v) *Non production and examination of a material witness – effect of*

966. It is the submission of the appellants that material witnesses and evidence have not been placed before the court. The contention is that this evidence would have established their innocence.

967. Mr. Vikas Arora, learned counsel for the appellants has vehemently urged that in the instant case, the prosecution has not

only concealed material evidence in the nature of witnesses but has deliberately not produced and proved the call detail records of the accused persons. This was vital evidence, especially to establish that the appellants had no involvement in the offence. Mr. Vikas Arora, ld. counsel for the appellant Sushil Arora would point out that it is in evidence that though the call detail records of Sushil Arora were obtained by the prosecution, but they were deliberately withheld by the prosecution for the reason that they did not support the prosecution case but pointed towards the innocence of Sushil Arora. It has been pointed out that it was Sushil Arora who made the application for preservation of his call detail records and subsequently led defence evidence to establish the same.

968. Before considering the factual matrix, I set out the judicial pronouncements as to what would be the impact of the failure of the prosecution to examine the material or independent or other witnesses in a criminal trial and when would this be fatal to the prosecution case?

969. Pointing out that it was the solemn duty and responsibility of the prosecution to place the best evidence before the court, reliance has been placed on paras 11 and 12 of the pronouncement of the Supreme Court reported at ***(1974) 3 SCC 774, Jamuna Chaudhary & Ors. v. State of Bihar*** wherein the court observed thus :

> *"11. The* ***duty of the Investigating Officers is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but to bring out the real unvarnished truth***.
>
> *xxx* *xxx* *xxx*

12. As neither the prosecution nor the defence have, in the case before us, come out with the whole and unvarnished truth, so as to enable the Court to judge where the rights and wrongs of the whole incident or set of incidents lay or how one or more incidents took place in which so many persons, including Laldhari and Ramanandan, were injured, Courts can only try to guess or conjecture to decipher the truth if possible. This may be done, within limits, to determine whether any reasonable doubt emerges on any point under consideration from proved facts and circumstances of the case."

(Emphasis by us)

These very principles bind the prosecution in the present case.

970. In the pronouncement of the Supreme Court reported at ***(2001) 6 SCC 145, Takhaji Hiraji v. Thakore Kubersingh Chamansing & Ors.,*** the Supreme Court has laid down the binding principles in para 19 which reads as follows :

"19. ... It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case*. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already*

adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. ***If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses****. …"*

(Emphasis by us)

The evidence led in the present case has to be examined in view of these principles.

971. On this aspect, in para 10 of the pronouncement reported at ***(1972) 3 SCC 671, Khatri Hemraj Amulakh v. State of Gujarat,*** the Supreme Court observed that the non-examination of a very material witness would give rise to an inference that if examined, he would not have supported the prosecution case.

972. On the same aspect, in the judgment of the Supreme Court reported at ***(2000) 3 SCC 454, Rang Bahadur Singh & Ors. v. State of U.P.,*** the accused persons were admittedly at loggerheads with the PW's husband who was killed in the occurrence. There were a lot of incongruity in the prosecution version. Though the incident occurred on the night of 1st of August 1978, during which the witnesses claimed to have identified the accused persons, no case was registered till the next day and there was delay in

compliance with Section 157 (1) of the Cr.P.C. as well. The names of the appellants were not mentioned in any of the papers prepared by the investigating officer including the general diary. The police also raided the house of the accused persons only on the 3rd of August 1978. It was held that it could be presumed therefrom that the investigating officer had not come to know the appellants' name till then. The circumstance of the appellants surrendering in court on their own initiative was considered important as well. The material witness had not been examined.

973. In this background, it was held by the court that the involvement of the appellants in the crime was doubtful and that it was possible that the names of the appellants were mentioned by PWs out of suspicion. On the aspect of non-examination of the material witness, the court had observed thus :

> *"**20.** It is again in the aforesaid context that we have to evaluate the impact of the non-examination of Ram Lakhan Yadav. When four witnesses were examined to speak to the occurrence normally non-examination of one more witness is not a serious flaw. But in this case non-examination of Ram Lakhan Yadav cannot be sidelined with such a reasoning. This is because it was Ram Lakhan Yadav who set fire to the haystack, in the light of which flames the culprits were identified; and it was Ram Lakhan Yadav who wa first attacked by the dacoits, and it was Ram Lakhan Yadav who had seen the dacoits earlier than any other person connected with victims' house. What he would have said about the identity of the dacoits cannot now be left in surmise. **If he also had sa d that all the dacoits were unknown persons it would have had a very deleterious impact on the veracity of the four***

witnesses who pointed to the three appellants as the dacoits.*"*

(Emphasis by us)

974. These observations would apply to the non-examination of important witnesses in the present case.

975. Inspector Jagat Singh (PW-47) has stated that he did not record the statement of the drinks cart vendor from whom the black Santro car occupants were purchasing drinks at the time of the first shooting.

976. According to Inspector S.S. Rana (PW26), a site plan was prepared on the pointing out of Sunil (PW1) within one hour thereafter.

977. Our attention is drawn to the legend accompanying the site plan (Ex.PW26/B) (**pg 757-758**) which describes point 'A' as a spot where the passengers of the Santro car No.DL2F FK 0002 purchased cold drinks from the cold drink cart (*"rehri"*) of Niranjan s/o Jitender. Therefore, the prosecution has the particulars and details of the cold drink cart vendor and yet have not produced him in the witness box.

978. In this regard, in para 134 (**pg 685**), the learned trial judge has accepted the explanation by Inspector S.S. Rana (PW-26) that nothing incriminating was disclosed by the cart vendor and held that "*no fruitful purpose would have been served in making him a witness*". In so observing, the learned trial judge has misdirected itself in ignoring the basic tenet of criminal jurisprudence that all relevant material must be placed before the court to enable it to

apply mind to the same and before arriving at the conclusion as to whether the prosecution has succeeded in establishing the case beyond reasonable doubt against the accused persons.

979. I find from the chargesheets that the cart vendor was the person who was best placed to witness the shooting and his testimony is crucial to the present case, whose identity had been disclosed as Niranjan, S/o Jitender in the site plan (Ex.PW26/B) on the trial court record.

980. Two important police personnel, one from P.S. Karol Bagh - ASI Desh Pal and ASI Ram Phool from P.S. Rajinder Nagar who actually visited the Chintoo Car Point on receipt of DD No.20A and DD No.24B respectively, have not been examined.

981. The investigating agency has attributed the disclosure statement as having been made by Sushil Arora as well as Sonveer, Vishnu, and Rajesh Pandey wherein reference is made to Tikla (PW-9) on the 22nd of February 2009 having visited the Chintoo Car Point with 15-20 persons in several cars. This could have been ascertained but has not been done. The investigating officer has conducted no investigation to ascertain as to who were other persons who visited the Chintoo Car Point. No public witnesses from the spot, even though it is in evidence that the neighbouring shopkeepers were present, have been examined.

982. Tikla (PW-9) (**pg 171)** has disclosed that his cousin Sudhir Kumar was also accompanying him on the 22nd of February 2009. The prosecution has not produced him in the witness box even

though his statement under Section 161 of the Cr.P.C. has been filed, and also no explanation is given.

983. It has come in the testimony of Manveer Singh (PW-2) that it seemed as the person who lifted the victim Ankit and removed him to the hospital was known to the injured victim. Narender (PW-12) has mentioned presence of one friend Jagmohan with him who has not been examined. These were serious aspects of the matter and deserved to be investigated.

984. It is pointed out by Mr. Rajeev Mohan, ld. counsel for Sonveer, that the prosecution has failed to examine the owner of the Santro bearing no.DL4C AG 7179 in which the deceased Ankit was removed from the spot to the hospital. Instead, the prosecution examined Narender Singh (PW-12) who had not only given written information to the Delhi Police Control Room but also wrong name and address on the MLC. It is in the evidence of this witness that he had washed the car to remove the blood of the deceased from the vehicle.

985. The prosecution does not render any explanation as to why these witnesses have not been examined. On the contrary, the witnesses who have been examined show a concerted deliberate effort to implicate the appellants. On a consideration of the entirety of evidence, it would be fair to draw a presumption that the witnesses, who were not produced, were not prepared to support a false case and that the evidence which was not produced pointed, towards the innocence of the appellants.

(vi) *Investigation was biased, unfair and deliberately negligent*

986. On behalf of the appellants, it is submitted that the investigating agency has conducted itself inappropriately in the matter, certain critical aspects of the case as asserted by the prosecution witnesses have also not been investigated deliberately. The submission is that having evolved a theory, the investigation has proceeded in a biased manner with an unfair tilt to support the same. The investigation was thus unfair and deliberately negligent.

987. In the present case, it is pointed out by Mr. K. Singhal, learned counsel that as per DD No.24B logged by the police station Rajender Nagar at 2:06 pm on the 22nd of February 2009, one Indica car bearing No.DL 3SAF 2152 was involved in the incident of shooting at occupants of Santro on Shankar Road before Dhaula Kuan (**pg 795**). Barely minutes thereafter at 02:08, DD No.15A was logged by police station Chanakya Puri informing that the victim had been removed to hospital.

988. This car number is found mentioned in the extract of the *roznamcha* which was proved in the defence evidence through the testimony of Head Constable Diwan Singh (**pg 624**) as Ex.DW4/A (**pg 876**). Mr. Singhal has emphasised that the police has not investigated this car number at all and has therefore, not followed up a material piece of evidence.

989. The prosecution also does not explain how Narender Singh (PW-12) has informed the police using the telephone no.9971054074 which stands in the name of Manveer Singh (PW-

2) in the information given to the police control room at 1:58 as per the DPCR Form (**Ex.PW29/A) (pg 1039**).

990. I have noted above the contradiction between the witnesses with regard to the vehicle which was involved in the altercation outside the Chintoo Car Point while removing the black Santro car. While several of the witnesses referred to a motorcycle which was parked blocking the car, Paramjeet Singh (PW-5) refers to an Indica car having come there.

991. There is also a contradiction with regard to the number of persons involved in the incident. As stated by some witnesses, there were two or three persons (Sunil – PW-1 in his statement under Section 161); some state three or four persons (Sunil – PW-1 in *rukka* – Ex.PW1/A; his statement under Section 164 Cr.P.C., Paramjeet – PW-5, Varun – PW-6 in his statement under Section 161 of the Cr.P.C., Surender – PW-8); lastly, four/five boys (Tikla – PW-9, Hemant – PW-10 and Gajender – PW-11).

992. The police has not cared to verify the particulars of the motorcycle or its riders – the persons who got involved in the spat outside the Chintoo Car Point, again a vital aspect.

993. DD No.20A has been recorded in P.S. Karol Bagh which was marked to ASI Desh Pal. DD No.24B stands recorded by P.S. Rajender Nagar which was marked to ASI Ram Phool. It is in the testimony of Pushkar Raj (DW-6) that the police actually came to the spot (at the Chintoo Car Point) and made inquires pursuant to the telephonic information of the altercation. The prosecution has not produced these witnesses who were critical for establishing

what has actually transpired in that incident. These witnesses would have ascertained the presence of Sushil Arora as well as Rajesh Pandey at that time.

994. I find that it is in the testimony of Inspector Jagat Singh (PW-47) (**pg 387**) that he had moved an application on 23rd May, 2009 for obtaining specimen signatures of Sushil Arora. He further states that pursuant to the court order, PW-47 had obtained his specimen signatures. The result of the handwriting expert has not been placed on record for obvious reasons.

995. It is noteworthy that the fact that the investigation was not conducted properly is manifest from the important circumstance that three investigating officers have been changed in the case. On the 22nd of February 2009 when the shooting took place, the investigation was assigned to Inspector S.S. Rana (PW-26). He conducted the investigation only from 22nd to 27th February, 2009 whereafter he handed over the same to Inspector Jagat Singh (PW-47), the SHO of the police station Chanakya Puri. It is noteworthy that Inspector Jagat Singh (PW-47) was in the police station even on the 22nd of February 2009 and claims to have accompanied Inspector S.S. Rana (PW-26) to the spot, hospital and other places where investigation was undertaken. It appears that on account of the inability of these senior officers to unravel the crime, under orders of 12th July, 2009, Deputy Commissioner of Police, New Delhi District, the investigation was handed over to the third officer Inspector Arun Kumar (PW-48A).

(vii) *Failure to collect relevant call detail report of the prosecution witnesses as well as the accused persons*

996. It is the contention of Mr. M.N. Dudeja, ld. counsel for Vishnu that concealment of the vital evidence of call detail records which were actually collected coupled with failure to collect other call records by itself leads to the irresistible conclusion that the investigation was completely and deliberately biased, unfair and tainted and that the conviction of the appellant cannot be sustained.

997. In this regard, our attention is drawn to the pronouncement of the Supreme Court reported at ***2009 (1) CAR (SC) : (2008) 16 SCC 705, Samadhan Dhudaka Koli v. State of Maharashtra*** wherein in paras 11 and 13, the Supreme Court has observed as follows :

> ***"11.*** *In her first dying declaration, Janabai attributed suffering of burn injury by reason of an accident. She categorically stated that she had not been burnt by anybody from the house nor did she do so herself. She stated that her brother-in-law, mother-in-law and neighbours came there and extinguished the fire after putting a blanket on her.*
>
> ***12.*** *A dying declaration made before a Judicial Magistrate has a higher evidentiary value. The Judicial Magistrate is presumed to know how to record a dying declaration. He is a neutral person. Why the* ***prosecution*** *had* ***suppressed the dying declaration*** *recorded by the Judicial Magistrate is not known. The prosecution must also be fair to the accused. Fairness in investigation as also trial is a human right of an accused.* ***The State cannot suppress any vital document from the court only because the same would support the case of the accused****.*

> ***13.*** *The learned Sessions Judge as also the* ***High Court****, in our opinion,* ***committed a serious illegality in refusing to consider the said question in its proper perspective. The prosecution did not explain as to why the said dying declaration was not brought before the court****. The learned Sessions Judge as also the High Court surmised about the contents thereof. Not only the contents of a dying declaration, but also the manner in which it is recorded and the details thereof play a significant role in the matter of appreciation of evidence."*
>
> *(Emphasis by us)*

998. The above narration undoubtedly supports the contentions of the appellants. I have noted the theory evolved by the witnesses supported by the investigating agency as the financial dealings being the genesis of the offence. The entire investigation was aimed at so establishing completely blanking out glaring pointers, circumstances and evidence of other motives and implications. There is no manner of doubt that the investigation in the case is biased, tainted and unfairly prejudiced against the appellants.

(viii) *Presumption under Section 114(g) of the Evidence Act*

999. Though the prosecution made allegations and the charge had been levelled against the appellants under Section 120B as well as Section 34 of the IPC, the prosecution has led not even an iota of evidence to support either of this. In this regard, scientific and electronic evidence including that of the call details was the most obvious and easily collectible piece of evidence which could have

facilitated the prosecution in establishing, first of all, the core fact as to whether the accused persons knew each other at all; then the further fact of the timing of their interactions and most importantly their location at the relevant time at Chintoo Car Point; the road in front of Buddha Garden; at the cold drink cart and at the traffic light at the T-point on the Simon Bolivar Marg.

It is submitted that the electronic evidence was extremely important, some of which stood procured and ought to have been placed by the prosecution on record to establish the truth on record and to prove the guilt, or the innocence, of the accused persons.

The police did not bother to investigate and obtain the call details of the phone recovered from the black Santro.

1000. I find that Inspector Jagat Singh (PW-47) in his cross-examination by counsel for Vishnu (**pg 425**) has stated that the police "*did not inquire into the location of any of the other accused persons or the witnesses through their mobile phones at around the time of incident during the investigation*".

This statement is however, not completely true. I find that Inspector Arun Kumar (PW-48A/49) filed handwritten replies dated 14th December, 2009 setting out ownership of the mobile phone no. 9999010588 in the name of Smt. Shalini Garg wife of Hemant Gart, the call details as well as the location of the cell towers which serviced these calls. This evidence stood collected by the I.O., yet was not produced before the court, clearly because it did not support the prosecution case.

1001. In this regard, I may usefully extract the observations of the Supreme Court in the judgment reported at ***(2015) 7 SCC 178, Tomaso Bruno v. State of U.P.*** wherein the court observed and held as follows :

> ***"25.*** *The* ***production of scientific and electronic evidence*** *in court as contemplated under Section 65-B of the Evidence Act is of* ***great help to the investigating agency and also to the prosecution****. The* ***relevance of electronic evidence*** *is also evident in the light of* ***Mohd. Ajmal Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1 : (2012) 3 SCC (Cri) 481****] , wherein production of* ***transcripts of internet transactions*** *helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in* ***State (NCT of Delhi) v. Navjot Sandhu [(2005) 11 SCC 600 : 2005 SCC (Cri) 1715****] , the* ***links between the slain terrorists and the masterminds*** *of the attack were* ***established only through phone call transcripts*** *obtained from the* ***mobile service providers****.*
>
> ***26.*** *The* ***trial court in its judgment held that non-collection of CCTV footage, incomplete site plan, non-inclusion of all records and sim details of mobile phones seized from the accused are instances of faulty investigation and the same would not affect the prosecution case****. Non-production of CCTV footage,* ***non-collection of call records (details) and sim details of mobile phones seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence. It is not the case of the prosecution that CCTV footage could not be lifted or a CD copy could not be made****.*
>
> ***27.*** *[****Ed.****: Para 27 corrected vide Official Corrigendum No. F.3/Ed.B.J./12/2015 dated 19-3-2015.] . As per Section 114 Illustration (g) of the Evidence Act, if a* ***party in possession of best evidence*** *which will throw light in controversy* ***withholds it****, the court can draw* ***an adverse inference***

against him notwithstanding that the onus of proving does not lie on him. *The presumption under Section 114 Illustration (g) of the Evidence Act is only a permissible inference and not a necessary inference. Unlike presumption under Section 139 of the Negotiable Instruments Act, where the court has no option but to draw a statutory presumption, under Section 114 of the Evidence Act, the court has the option; the court may or may not raise presumption on the proof of certain facts.* ***Drawing of presumption under Section 114 Illustration (g) of the Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party***.

28. *The High Court held that even though the appellants alleged that the footage of CCTV is being concealed by the prosecution for the reasons best known to the prosecution, the accused did not invoke Section 233 CrPC and they did not make any application for production of CCTV camera footage. The High Court further observed that the accused were not able to discredit the testimony of PW 1, PW 12 and PW 13 qua there being no relevant material in the CCTV camera footage.* ***Notwithstanding the fact that the burden lies upon the accused to establish the defence plea of alibi in the facts and circumstances of the case, in our view, the prosecution in possession of the best evidence, CCTV footage ought to have produced the same. In our considered view, it is a fit case to draw an adverse inference against the prosecution under Section 114 Illustration (g) of the Evidence Act that the prosecution withheld the same as it would be unfavourable to them had it been produced***.

29. *Yet another important piece of evidence which was not produced by the prosecution is relevant to be noted. On 4-*

2-2010, second appellant Elisa Betta Bon informed PW 1 Ram Singh, Hotel Manager that the condition of Francesco Montis is very serious. On hearing this, PW 1 immediately went to Room No. 459 where he saw that the appellants were sitting and the deceased was lying unconscious. Thereafter, he immediately came down to the reception and along with the hotel staff went back to the room and then they lifted Francesco Montis by wrapping him in a blanket and took him to the hospital. PW 6, Uma Shankar had driven the car and Francesco Montis was taken to the emergency ward. PW 1 and other witnesses have stated that on examination of Francesco Montis, the doctor declared him "dead". ***The prosecution has neither examined the doctor nor produced the report that was prepared in the emergency ward of the hospital****. Likewise,* ***the death intimation sent to the police was also not produced****. The* ***report prepared by the doctor who examined*** *Francesco Montis and declared him dead* ***would have been yet another important piece of evidence which would have contained earliest version of the accused and other relevant details****."*

(Emphasis by us)

1002. In the judgment reported at ***(1991) 1 SCC 286, Kishore Chand v. State of Himachal Pradesh,*** the Supreme Court had emphasized the need for caution and circumspection on the part of the investigating agency which must be sincere and dispassionate in conducting the investigation. The words of the Supreme Court would be of great significance and deserve to be set out in extenso and read thus :

> ***"12.*** *Before parting with the case, it is necessary to state that from the facts and circumstances of this case it would appear that the* ***investigating officer has taken the appellant, a peon, the driver and the cleaner for a***

ride and trampled upon their fundamental personal liberty and lugged them in the capital offence punishable under Section 302, IPC by freely fabricating evidence against the innocent. *Undoubtedly, heinous crimes are committed under great secrecy and that investigation of a crime is a difficult and tedious task. At the same time the liberty of a citizen is a precious one guaranteed by Article 3 of Universal Declaration of Human Rights and also Article 21 of the Constitution of India and its deprivation shall be only in accordance with law. The accused has the fundamental right to defend himself under Article 10 of Universal Declaration of Human Rights. The right to defence includes right to effective and meaningful defence at the trial. The poor accused cannot defend effectively and adequately. Assigning an experienced defence counsel to an indigent accused is a facet of fair procedure and an inbuilt right to liberty and life envisaged under Articles 14, 19 and 21 of the Constitution.* ***Weaker the person accused of an offence, greater the caution and higher the responsibility of the law enforcement agencies. Before accusing an innocent person of the commission of a grave crime like the one punishable under Section 302, IPC, an honest, sincere and dispassionate investigation has to be made and to feel sure that the person suspected of the crime alone was responsible to commit the offence. Indulging in free fabrication of the record is a deplorable conduct on the part of an investigating officer which undermines the public confidence reposed in the investigating agency. Therefore, greater care and circumspection are needed by the investigating agency in this regard****. It is time that the* ***investigating agencies, evolve new and scientific investigating methods, taking aid of rapid scientific development in the field of investigation****. It is also the duty of the State, i.e. Central or State Governments to organise* ***periodical refresher courses*** *for the investigating officers to keep them abreast of the*

latest scientific development in the art of investigation and the march of law so that the real offender would be brought to book and the innocent would not be exposed to prosecution."

(Emphasis by us)

1003. In para 183 (**pg 701**), the ld. trial court has concluded that there was overwhelming evidence to support the guilt of the accused persons and for this reason non-collection of the CDR of the mobile numbers of the accused persons does not render the prosecution case doubtful.

1004. Before us, it has been urged on behalf of the accused persons that given the dubious nature of the testimony of the prosecution witnesses and the doubts on even their presence at the spot, it was the CDR details of the prosecution witnesses which also ought to have been collected. This assumes special relevance in view of the fact that the prosecution witnesses claimed to be in possession of the mobile phones with which they were interacting with each other yet no one made any effort to inform the police.

1005. Ms. Aashaa Tiwari, ld. APP for the State has vehemently urged that the defence can place no reliance on the defects in the investigation and that this court has to evaluate reliability of the prosecution evidence *de hors* such lapses.

1006. In this regard, our attention has been drawn by Ms. Tiwari, ld. APP for the State to the pronouncement of the Supreme Court reported at ***AIR 2013 SC 1000, Hema v. State thr. Inspector of Police, Madras***. I extract hereunder the relevant paras of the

judicial precedents on this subject wherein the law has been authoritatively laid down :

> ***"14.*** *It is also settled law that for* ***certain defects in investigation, the accused cannot be acquitted. This aspect has been considered in various decisions****. In* ***C. Muniappan v. State of T.N. [(2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402****] , the following discussion and conclusions are relevant which are as follows: (SCC p. 589, para 55)*
>
> > *"55. There may be highly defective investigation in a case.* ***However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused****. The law on this issue is well settled that* ***the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.****"*
>
> ***15.*** *In* ***Dayal Singh v. State of Uttaranchal [(2012) 8 SCC 263 : (2012) 4 SCC (Civ) 424 : (2012) 3 SCC (Cri) 838 : (2012) 2 SCC (L&S) 583] , while reiterating the principles rendered in C. Muniappan [(2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402] , this Court held thus: (Dayal Singh case [(2012) 8 SCC 263 : (2012) 4 SCC (Civ) 424 : (2012)***

3 SCC (Cri) 838 : (2012) 2 SCC (L&S) 583] , SCC p. 276, para 18*)*

"18. ... Merely because PW 3 and PW 6 have failed to perform their duties in accordance with the requirements of law, and there has been some defect in the investigation, it will not be to the benefit of the accused persons to the extent that they would be entitled to an order of acquittal on this ground."

16. *In* ***Gajoo v. State of Uttarakhand [(2012) 9 SCC 532 : (2012) 3 SCC (Cri) 1200 : (2012) 2 SCC (L&S) 782****] , while reiterating the same principle again, this Court held that: (SCC p. 540, para 19)*

"19. ... A defective investigation, unless affects the very root of the prosecution case and is prejudicial to the accused, should not be an aspect of material consideration by the court."

17. *Since, the Court has adverted to all the earlier decisions with regard to defective investigation and outcome of the same, it is useful to refer the dictum laid down in those cases: (****Gajoo case [(2012) 9 SCC 532 : (2012) 3 SCC (Cri) 1200 : (2012) 2 SCC (L&S) 782] , SCC pp. 540-44, para 20****)*

"20. In regard to defective investigation, this Court in ***Dayal Singh v. State of Uttaranchal [(2012) 8 SCC 263 : (2012) 4 SCC (Civ) 424 : (2012) 3 SCC (Cri) 838 : (2012) 2 SCC (L&S) 583****] while dealing with the cases of omissions and commissions by the investigating officer, and duty of the court in such cases, held as under: (SCC pp. 280-83, paras 27-36)*

'27. Now, we may advert to the duty of the court in such cases. In ***Sathi Prasad v. State of U.P. [(1972) 3 SCC 613 : 1972 SCC (Cri) 659****] this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in* ***Dhanaj***

Singh v. State of Punjab [(2004) 3 SCC 654 : 2004 SCC (Cri) 851] *, held: (SCC p. 657, para 5)*

> *"5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not* ***be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective****."*

28. Dealing with the cases of omission and commission, the Court in ***Paras Yadav v. State of Bihar [(1999) 2 SCC 126 : 1999 SCC (Cri) 104]*** *enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.*

29. In ***Zahira Habibullah Sheikh (5) v. State of Gujarat [(2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8]*** *, the Court noticed the importance of the role of witnesses in a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of Bentham, who states that* ***witnesses are the eyes and ears of justice****. The Court issued a caution that in such situations, there is a* ***greater responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation****. The Court held that: (SCC p. 398, para 42)*

> *"42. Legislative measures to emphasise prohibition against tampering with witness, victim*

or informant have become the imminent and inevitable need of the day. ***Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with.*** *There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary,* ***efforts should be to ensure a fair trial where the accused and the prosecution both get a fair deal****. Public interest in the proper administration of justice must be given as much importance, if not more, as the interest of the individual accused. In this courts have a vital role to play."*

30. With the passage of time, the law also developed and the dictum of the Court emphasised that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.

xxx xxx xxx

32. In ***State of Karnataka v. K. Yarappa Reddy [(1999) 8 SCC 715 : 2000 SCC (Cri) 61****] this Court occasioned to consider the similar question of defective investigation as to whether any manipulation in the station house diary by the investigating officer could be put against the prosecution case. This Court, in para 19, held as follows: (SCC p. 720)*

"19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the court be influenced by the machinations demonstrated by the investigating officer in conducting investigation or in preparing

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

33. In ***Ram Bali v. State of U.P. [(2004) 10 SCC 598 : 2004 SCC (Cri) 2045****] the judgment in* ***Karnel Singh v. State of M.P. [(1995) 5 SCC 518 : 1995 SCC (Cri) 977****] was reiterated and this Court had observed that: (****Ram Bali case [(2004) 10 SCC 598 : 2004 SCC (Cri) 2045****] , SCC p. 604, para 12)*

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

xxx *xxx* *xxx*

18. *It is clear that merely* ***because of some defect in the investigation, lapse on the part of the investigating officer, it cannot be a ground*** *for acquittal. Further, even if there* ***had been negligence on the part of the investigating***

> ***agency*** *or omissions,* ***etc. it is the obligation on the part of the court to scrutinise the prosecution evidence dehors s****uch lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth.*
>
> ***19.*** *In the light of the above principles, as noticed, we reject the main contention of the learned counsel for the appellant, however, as observed in the above decisions, let us examine the material relied on by the prosecution and find out whether a case has been made out against the appellant."*
>
> *(Emphasis by us)*

1007. It is therefore, trite that there is a legal obligation on the part of the court to examine the prosecution evidence *de hors* such lapses to ascertain as to whether the evidence is reliable or not and to what extent it would be reliable. The same aspect has been discussed in para 33 of ***Ram Bali v. State of U.P. [(2004) 10 SCC 598 : 2004 SCC (Cri) 2045*** which has been relied upon in ***Hema.***

1008. The court in para 34 of ***Ram Bali*** had observed the responsibility of the court to ensure that a guilty man does not escape which has been relied upon in ***Hema.***

1009. It is well settled that the benefit arising from faulty investigation ought to go to the accused and not to go to the prosecution. It is equally established that quality and credibility of the evidence required to bring home the guilt of the accused cannot be different from cases where investigation is satisfactory *vis-a-vis* cases in which it is not. Only one set of rules and standard guides adjudication in all criminal cases unless specific exception stands

statutorily made and provides for anything especially applicable to a particular case or for a particular class of cases.

1010. The judicial precedents noted in this judgment lay down the well settled principle that defective investigation by itself cannot be a ground for acquittal. The negligence on the part of the investigating agency or omissions etc. would not *ipso facto* lead to the court disbelieving a prosecution case. It is in discharge of the legal obligation on the part of this court that a careful examination of the prosecution evidence, *de hors* such lapses, negligence and omissions has been undertaken in order to ascertain whether the evidence is credible and reliable. The circumstances sought to be proved have been examined from every aspect.

1011. As a result, a detailed examination has been undertaken herein of the several witnesses who have been examined as eye-witnesses and a holistic examination of the testimony of each witness has been undertaken against the backdrop of the factual position which existed at the relevant time and the manner in which the events unfolded, as disclosed in the testimony of the witnesses.

1012. Each piece of evidence led by the prosecution has been discussed in the present case and found to be either insufficient or incapable of being relied upon.

1013. So far as the omissions on the part of the investigating agency are concerned, the above narration sets out that in the present case, the same are not *bonafide* or innocent omissions but are deliberate and conscious ones, suggesting that if the evidence which has been omitted was placed before the court, the same

would have not supported the prosecution. In the present case, thus, there is not merely faulty or defective investigation but the omissions and negligence are deliberate. The padding in the case stands established from the fact that glaring improvements in evidence through multiple statements under Section 161 of the Cr.P.C. have been placed on record.

XXXIII. Site plan not matching ocular testimony

1014. The prosecution has proved on record a rough site plan (Ex.PW26/B) (**pg757**) prepared by the Inspector S.S. Rana (PW-26) on the pointing out of Sunil (PW-1). The site plan displays location of the black Santro and the Indica vehicles as well as both the spots of shooting wherefrom recoveries of cartridges were effected.

1015. As per the unfolding of the two episodes of shooting, the assailants were shooting from the Indica which, on both the occasions, was placed on the right side of the Santro. It is therefore, obvious that as the shooting was from the left side of the Indica aimed towards the right side of the Santro, the cartridges would, therefore, expectedly fall only on the right side of the Santro or behind it. Interestingly, in the site plan, the cartridges have been depicted as having been recovered from points 'D' and 'J' which are on the left of the Santro. There is no explanation forthcoming on the record as to how these cartridges reached the left side of the Santro.

1016. The site plan (Ex.PW26/B) also does not show the location of either Manveer Singh (PW-2) or Ranjeet Singh (PW-4) who claim to have been present at that time.

Clearly, the site plan does not match the ocular evidence.

XXXIV. Non recovery of weapon by which injuries caused – effect of

1017. It has been submitted by Ms. Aashaa Tiwari, ld. APP for the State that the fact that the weapon allegedly used by Vishnu could not be recovered, would be of no consequence inasmuch as the prosecution has led ample unimpeachable ocular evidence of the appellants completely supported by medical evidence. Ms. Tiwari has placed reliance on the pronouncement of the Supreme Court reported at ***(2013) 12 SCC 796, Mritunjoy Biswas v. Pranab @ Kuti Biswas*** wherein the court held as follows:

> ***"33.*** *The learned counsel for the respondent has urged before us that there has been no recovery of weapon from the accused and hence, the prosecution case deserves to be thrown overboard and, therefore, the judgment of acquittal does not warrant interference.*
>
> ***34.*** *In* ***Lakshmi v. State of U.P. [(2002) 7 SCC 198 : 2002 SCC (Cri) 1647****] this Court has ruled that: (SCC p. 205, para 16)*
>
> > *"16. Undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased* ***are some of the important factors*** *to be established by the prosecution in an ordinary given case to bring home the charge of offence under Section 302 IPC. This, however,* ***is not an inflexible rule****. It* ***cannot be***

held as a general and broad proposition of law that where these aspects are not established, it would be fatal to the case of *the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder."*

35. *In* ***Lakhan Sao v. State of Bihar [(2000) 9 SCC 82 : 2000 SCC (Cri) 1163****] it has been opined that: (SCC p. 87, para 18)*

"18. The non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is acceptable."

36. *In State of Rajasthan v. Arjun Singh [(2011) 9 SCC 115 : (2011) 3 SCC (Cri) 647] this Court has expressed that: (SCC p. 122, para 18)*

"18. ... mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place."

Thus, when there is ***ample unimpeachable ocular evidence*** *and the same has* ***been corroborated by the medical evidence, non-recovery of the weapon does*** *not affect the prosecution case.*

37. *In view of the aforesaid analysis, the appeal is allowed, the judgment of acquittal passed by the High Court being wholly unsustainable is set aside and the judgment of conviction of the trial court is restored. The respondent is directed to surrender to custody to serve out the sentence."*

(Emphasis by us)

1018. On the same aspect our attention has been drawn to yet another pronouncement of the Supreme Court reported at ***(2016) 3 SCC 317, Nankaunoo v. State of U.P.*** wherein a challenge was led to the appellant's conviction *inter alia* on the ground that the alleged weapon, "*country made pistol*", was never recovered by the investigating officer and in the absence of any clear connection between the weapon used for the crime and the Ballistic report and resulted injury, the prosecution cannot be said to have established the guilt of the appellant. In this regard, the court had observed as follows :

> ***"9.*** *... In the light of unimpeachable oral evidence which is amply corroborated by the medical evidence, non-recovery of "country-made pistol" does not materially affect the case of the prosecution. In a case of this nature, any omission on the part of the investigating officer cannot go against the prosecution case. Story of the prosecution is to be examined dehors such omission by the investigating agency. Otherwise, it would shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice."*

I therefore, have to evaluate the proven facts and circumstances to ascertain whether they establish the guilt of the appellant.

1019. The prosecution sought to establish that Vishnu was seated in the front of the Indica next to the driver and was firing from the front left side window. In fact, the prosecution witnesses have attributed the fatal shots fired at Ankit to Vishnu's gun. Only one

pistol has surfaced during trial and as per the ballistic reports, the bullets recovered from Ankit's body could not be linked to this weapon. Therefore, the weapon from which bullets were fired at Ankit is concerned, the same could not be recovered.

1020. It is well settled therefore, that where there is ample unimpeachable ocular evidence, which has also been corroborated by critical evidence, non recovery of the weapon does not affect the prosecution case. There can be no dispute at all with this well settled legal principle. However, in the present case, several circumstances have been noted by me which lend considerable doubt to the ocular evidence placed before the court. In view of these circumstances, the principles laid down in ***Mritunjoy Biswas*** on this issue would be of no consequence.

Similarly, Sonveer (arrested on 27th August, 2009) refused the TIP on 4th September, 2009 contending that he was shown to the witnesses in the police station **(TCR pg 3411).**

1021. The prosecution has led evidence that Sonveer was identified by Varun (PW-6) in the office of Inspector Arun Kumar (PW48A/49), Special Staff/NDD in Parliament Street on 9th of September 2009. But this was almost seven months after the incident (**TCR pg 3543**). He also identifies Sonveer as one of the four persons in the brawl in the parking lot during his court testimony recorded on 21st April, 2010 but Varun did not even participate in the TIPs held in August.

XXXV. Contradictions, inconsistencies, exaggeration or embellishment by witnesses – effect of hypertechnical approach to be avoided by court

1022. The above narration on the conduct of the witnesses and their testimony has thrown up variations, discrepancies, improvements and contradictions not only between different parts of the testimony of one witness but also between narrations of different witnesses about the same fact or circumstances. The question therefore, arises as to how such testimonies has to be evaluated.

1023. In ***(2008) 16 SCC 73 State of Uttar Pradesh v. Kishanpal & Ors.*** placing reliance on previous precedents, the court reiterated the well settled position on evaluating evidence of witnesses in the following terms :

> *"12. To the same effect is the decision in* ***State of Punjab v. Jagir Singh[(1974) 3 SCC 277 : 1973 SCC (Cri) 886], Lehna v. State of Haryana [(2002) 3 SCC 76 : 2002 SCC (Cri) 526] …. As observed by this Court in State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593] normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person****. Courts have to label the category to which a discrepancy may be categorised. While* ***normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so****. These aspects were highlighted recently in* ***Krishna Mochi v. State of Bihar [(2002) 6***

SCC 81 : 2002 SCC (Cri) 1220] .' [Ed.: As observed in Bhargavan v. State of Kerala, (2004) 12 SCC 414, at pp. 420-21, paras 10-12*.]"*

(Emphasis supplied)

1024. Ms. Aashaa Tiwari, ld. APP for the State has staunchly urged that this court must not discard all witnesses merely because of a contradiction or inconsistencies in a matter of detail. It is submitted that some exaggeration or embellishment in testimony is also evidence of the witness being natural witness.

1025. On the aspect of omissions and discrepencies, Ms. Aashaa Tiwari has placed the pronouncement of the Supreme Court reported at ***(2013) 12 SCC 796, Mritunjoy Biswas v. Pranab @ Kuti Biswas*** is placed wherein the court has observed as follows :

*"**28.** As is evincible, the **High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies**. It is worthy to note that the High Court has referred to the some discrepancies which we find are absolutely in the realm of minor discrepancies. It is well settled in law that the **minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court.** If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an **omission** or **discrepancy goes to the root of the matter and ushers in incongruities**, the **defence can take advantage of such inconsistencies. It needs no special** emphasis to state that **every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant***

embellishments do not affect the core of the prosecution case *and should not be taken to be a ground to reject the prosecution evidence. The* ***omission*** *should* ***create a serious doubt about the truthfulness or creditworthiness of a witness****. It is* ***only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission*** *(see* ***Leela Ram v. State of Haryana [(1999) 9 SCC 525 : 2000 SCC (Cri) 222] , Rammi v. State of M.P. [(1999) 8 SCC 649 : 2000 SCC (Cri) 26] and Shyamal Ghosh v. State of W.B. [(2012) 7 SCC 646 : (2012) 3 SCC (Cri) 685****]).*

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31. *The High Court, as we find, has* ***read the evidence not as a whole but in utter fragmentation and appreciated the same in total out of context****. It is to be kept in mind that while appreciating the evidence of a witness, the approach must be* ***whether the evidence of the witness read as a whole appears to have a ring of truth.*** *Once that impression is formed, it is undoubtedly necessary for the court to* ***scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.*** *(See* ***State of U.P. v. M.K. Anthony[(1985) 1 SCC 505 : 1985 SCC (Cri) 105****]) Tested on the anvil of the aforesaid principle, we have no shadow of doubt that the High*

Court has erroneously discarded the credible evidence by paving the path of totally hypertechnical approach."
(Emphasis by us)

1026. On the aspect of credibility of witnesses, our attention is drawn to the pronouncement of the Supreme Court reported at ***(1971) 3 SCC 436, Yudhishtir v. The State of Madhya Pradesh.*** It has been observed that when the court is not inclined to reject the evidence of witness as false, corroboration of the evidence may be found necessary, however, when the evidence of a witness is rejected as completely unacceptable, there is no scope for attempting to find corroboration by other independent evidence or circumstances. It has been observed thus :

> "***11. The evidence given by PWs 1 and 6 before the Court was substantially in variance with the version given by them in the statements given to the police at the earliest occasion. Before the Court they have considerably improved their statements. Omissions in the statements to the police were of a very serious nature making their evidence before the Court false and unacceptable.***
>
> *xxx* *xxx* *xxx*
>
> ***26. Normally on the basis of the above finding recorded by the learned Sessions Judge, one would expect the Court to hold the appellants not guilty of murder. But curiously the learned Sessions Judge proceeds on the basis that though the evidence of PWs 1 and 6 by itself would not be sufficient to convict the appellants, some corroboration will have to be found in other independent evidence. We are unable to appreciate this reasoning of the learned Sessions Judge. Corroboration for any evidence given by a***

witness may be found necessary when a Court is not inclined to reject the evidence of the witness to be false. A court may be willing to act on the evidence of a witness but it may be of the view that the witness is an interested one and it may not be safe to act on that evidence alone. In such circumstances, in order to enable the court to act on that evidence, it may seek corroboration from other independent evidence or circumstances. .....

(Emphasis by us)

1027. In a decision dated 2nd April, 2014 in ***Crl.A.No.741/2008, Vishal Yadav v. State of U.P.,*** the consideration on this issue sheds light on this aspect, relevant portion whereof reads thus :

"1235. ...In this regard, para 11 of the judgment reported at ***(1999) 9 SCC 595 Leela Ram (Dead) through Duli chand v. State of Haryana*** *wherein reference is made to several judicial precedents, is material and read as follows :-*

"9. Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. ***There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefore should not***

render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence....”

(Emphasis by us)

1028. In para 10 of ***State of U.P. v. M.K. Anthony [(1985) 1 SCC 505 : 1985 SCC (Cri) 105 : AIR 1985 SC 48]***, the Supreme Court set out the following principles :

“10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. ***Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole****. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and*

formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

(Emphasis by us)

1029. I find that in ***Rammi v. State M.P.*** *[**(1999) 8 SCC 649**]* *with* ***Bhura v. State of M.P.*** *[**(1999) 8 SCC 649**]*, on the same aspect, it was observed thus :

"24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. ***No true witness can possibly escape from making some discrepant details.*** *Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that* ***it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.*** *But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an* ***unrealistic approach for judicial scrutiny****."*

25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. ***Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness****.*

No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness.

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26. ***A former*** *statement* ***though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be 'contradicted' would affect the credit of the witness***.

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27. ***To contradict a*** *witness****, therefore, must be to discredit the particular version of the witness***. *Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness (vide Tahsildar Singh v.State of U.P. [AIR 1959 SC 1012:1959 Supp (2) SCR 875]).''*

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11. ***The Court shall have to bear in mind that different witnesses react differently under different situations****: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.*

12. It is indeed ***necessary to note that one hardly comes across a witness whose evidence does not***

> ***contain some exaggeration or embellishment — sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their overanxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness****. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same."*
>
> *(Emphasis by us)*

1030. The judgment of the Supreme Court in ***Leela Ram*** was followed in another judgment reported at ***(2011) 9 SCC 698, Rakesh & Anr. v. State of M.P.***

1031. The following observations of the Supreme Court in the judgment reported at ***1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696 Appabhai v. State of Gujarat*** in para 11 of the report (SCC pp. 245-46) and para 13 (SCC page 245-247) on the variation in the reactions of different people to the same occurrence and appreciation of evidence are also topical and read as follows :

> *"Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the*

investigating agency has to discharge its duties. ***The court therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused. The court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly****. The horror-stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner."*

(Emphasis supplied)

1032. In ***AIR 2012 SC 3539, Shyamal Ghosh v. State of West Bengal***, on this aspect, the court has laid down the binding principles which have to guide the present adjudication thus:

"46. …Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution. The variations pointed out as regards the time of commission of the crime are quite possible in the facts of the present case. Firstly, these witnesses are rickshaw pullers or illiterate or not highly educated persons whose statements had been recorded by the police. Their statements in the court were recorded after more than two years from the date of the incident. It will be unreasonable to attach motive to the witnesses or term the variations of 15-20 minutes in the timing of a particular event as a

material contradiction. It probably may not even be expected of these witnesses to state these events with the relevant timing with great exactitude, in view of the attendant circumstances and the manner in which the incident took place."

(Underlining by us)

1033. It is thus well settled that every contradiction or discrepancy would not render unacceptable the entire evidence of a witness (**Ref.:** ***(2011) 8 SCC 65, State of Rajasthan v. Abdul Menon; (2011) 7 SCC 295, Wamman and Ors. v. State of Maharashtra*** and ***(1990) 1 SCC 445 : 1990 SCC (Cri) 151, Gurbachan Singh v. Satpal Singh*****)**

1034. Apart from contradictions or discrepancies, our attention is drawn to the several embellishments and improvements made by the witnesses in the witness box. This has also been noted and commented upon in the judgment dated 2nd April, 2014 in ***Crl.A.No.741/2008, Vishal Yadav v. State of U.P.*** in the following terms :

"1241. It is often found that in the witness box, witnesses make statements of matters not stated by them before to the investigating officer. Such witnesses render themselves open to criticism, and there evidence to challenge, by the other side on the ground that it is an improvement or a concoction whereas it may only be the reaction of the witness to the importance he is receiving as a witness in the court. The statement may contain additional matters which may not be material, or, which in any case make no impact on the core evidence. Do such additions and improvements impact the substantive evidence of

the witness? The answer to this question is to be found in the observations of the Supreme Court in para 13 of the judgment reported at ***(1988) Supp. SCC 241, Appabhai v. State of Gujarat.*** *On the issue of appreciation of evidence in such eventuality, the court ruled thus:*

> *"13. The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy."*
>
> *(Underlining by us)*

1242. In the judgment reported at ***(2001) 8 SCC 86 para 3 Sukhdev Yadav v. State of Bihar,*** *the Supreme Court has noted that "there would hardly be a witness whose evidence does not contain some amount of*

exaggeration or embellishement sometimes there would be a deliberated attempt to offer the same and sometimes the witnesses in their over anxiety to do better from the witness box detail out an exaggerated account".

1243. These principles were reiterated by the Supreme Court in a recent judgment reprted at ***(2012) 5 SCC 777 Ramesh Harijan v. State of U.P.*** *The court also authoritatively ruled that the maxium 'falsus in uno, falsus in ombnibus' is not a recognized principle in administration of criminal justice and the court is to give paramount importance to ensure that there is no miscarriage of justice. The court has also noted that witnesses can not help embroidering a story in the witness box and that the court must appraise the evidence to assess the extent to which the testimony is creditworthy. To sum up, the evidence of a witness ought not to be discarded as a whole, but the embroidered or embellished portion only would be left out of consideration. These observations of the court bind us in considering the objection of the appellants to the testimony of Ajay Kumar. Several precedents find reference and we therefore are extracting the relevant portion thereof which reads thus:*

> *"25. Undoubtedly, there may be some exaggeration in the evidence of the prosecution witnesses, particularly that of Kunwar Dhruv Narain Singh (PW 1), Jata Shankar Singh (PW 7) and Shitla Prasad Verma (PW 8). However, it is the duty of the court to unravel the truth under all circumstances.*
>
> *26. In Balaka Singh v. State of Punjab [(1975) 4 SCC 511 : 1975 SCC (Cri) 601 : AIR 1975 SC 1962] , this Court considered a similar issue, placing reliance upon its earlier judgment in Zwinglee*

Ariel v. State of M.P. [AIR 1954 SC 15 : 1954 Cri LJ 230] and held as under: (Balaka Singh case [(1975) 4 SCC 511 : 1975 SCC (Cri) 601 : AIR 1975 SC 1962] , SCC p. 517, para 8)

> *"8. ... the court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation, the court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."*

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29. In Sucha Singh v. State of Punjab [(2003) 7 SCC 643 : 2003 SCC (Cri) 1697 : AIR 2003 SC 3617] (SCC pp. 113-14, para 51) this Court had taken note of its various earlier judgments and held that even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno, falsus in omnibus has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. ***Witnesses just cannot help in giving embroidery to a***

story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well*."*

(Emphasis supplied)

1244. In para 31 of ***Ramesh Harijan v. State of U.P.*** *(supra), this court concluded thus:*

> *"Therefore, in such a case the paramount importance of the court is to ensure that miscarriage of justice is avoided. The benefit of doubt particularly in every case may not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. A reasonable doubt is not an imaginary trivial or merely possible doubt, but a fair doubt based upon reason and common sense."*

1245. On the aspect of effect of contradictions, inconsistencies, embellishments, improvements and omissions in evidence, our attention is also drawn to the pronouncement reported at ***(2010) 13 SCC 657, Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra*** *wherein the court made the following important observations:*

> *"30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground*

to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide State v. Saravanan [(2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580 : AIR 2009 SC 152] .)

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34. In State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593 : AIR 1981 SC 1390], while dealing with this issue, this Court observed as under: (SCC p. 754, para 8)

> *"8. ... In the depositions of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person."*

35. The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (See Syed Ibrahim v. State of A.P. [(2006) 10 SCC 601 : (2007) 1 SCC (Cri) 34 : AIR 2006 SC 2908] and Arumugam v. State[(2008) 15 SCC 590 : (2009) 3 SCC (Cri) 1130 : AIR 2009 SC 331] .)

36. In Bihari Nath Goswami v. Shiv Kumar Singh [(2004) 9 SCC 186 : 2004 SCC (Cri)

1435] this Court examined the issue and held: (SCC p. 192, para 9)

> *"9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.*

37. While deciding such a case, the court has to apply the aforesaid tests. Mere marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited."

(Emphasis supplied)

1246. It is therefore trite that the conduct of a person in the witness box various from person to person and a solemn duty is attached to the role of the judge in appreciating the evidence which has been led. The judicial pronouncements emphasise that witness testimony has to be examined keeping in mind that exaggerations or embellishments on the part of human beings appearing in the witness box are in fact natural. It is well settled that it is only contradiction in material particulars and not in matters of detail which would render the testimony of witnesses unacceptable.

1247. It is equally well settled that embellishments in testimony would also by themselves not detract from a truthfulness of the testimony of a witness and that the

court has to separate embellishments from the factual narration.

1248. Variations in testimony in minor details thus are immaterial so far as appreciation of evidence is concerned. It is contradictions and variations in material particulars which would require the court to evaluate the extent of the witness to be considered credible.

1249. Mr. P.K. Dey, learned counsel for the complainant has drawn our attention to the pronouncement of the Supreme Court reported at ***1988 (Supp) SCC 686, State of U.P. v. Anil Singh*** *wherein also the court considered the aspect of rejection of the prosecution version for various reasons including improvements in the court testimony. The court has again made observations with regard to the conduct of persons in the witness box, especially with regard to the embellishments to the prosecution story in the witness box. These observations deserve to be considered in extenso and read as follows:*

> *"15. Of late this Court has been receiving a large number of appeals against acquittals and in the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood stated or embroidery added by witnesses. In some cases, the entire prosecution case is doubted for not examining all witnesses to the occurrence. We have recently pointed out the indifferent attitude of the public in the investigation of crimes. The public are generally reluctant to come forward to depose before the court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. Nor it is proper to reject the case for want of corroboration by independent witnesses*

if the case made out is otherwise true and acceptable. 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 Bihari Maiti v. Matangini Dasi [AIR 1919 PC 157 : 24 Cal WN 626] the Privy Council had this to say (at p. 628):

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

16. In Abdul Gani v. State of Madhya Pradesh [AIR 1954 SC 31 : 1954 Cri LJ 323] 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.

17. 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. <u>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.</u> One is as important as the other. <u>Both are public duties which the Judge has to perform</u>."

(Underlining by us)"

It is in the light of the above well established principles that I have examined the evidence of the claimed eye-witnesses.

1035. In the present case, I am concerned with the testimony of witnesses who have claimed that they were co-passengers with the deceased in the very vehicle which was shot at resulting in the death of Ankit and the identification of the assailants by these witnesses. A realistic assessment of the testimony of these witnesses has been effected keeping in view the entire scenario which emerges bearing in mind the tensions which would have been generated at the time and the limitations on the capacities of individuals to view, comprehend, absorb and assess the situations at such time. Allowances would require to be made for the passage of time between the date of the incident and the date on which the statements were made as well as the natural behaviour of exhibitionism, with the tendencies to embellish on the part of every human being when placed in the witness box.

1036. I have also closely scrutinised the evidence of the two persons claiming to be eye-witnesses on the spot, and evaluated

their conduct from the aspect of probability, rationality and possibility before arriving at our conclusions.

1037. I now examine some material contradictions in the evidence which have been pointed out before us in the light of these well settled principles under the following headings :

(i) *Conflict about the number of boys outside the Chintoo Car Point*

(ii) *Conflict between the testimony of Paramjeet Singh (PW-5) vis-a-vis that of the other witnesses regarding the vehicles and persons present and involved in the altercation outside the Chintoo Car Point*

(iii) *Whether payment made for the drinks at Buddha Garden*

(iv) *Conflict about the number of occupants and their identities in the Indica*

I propose to consider the above sub-headings in *seriatim* :

(i) *Conflict about the number of boys outside the Chintoo Car Point*

1038. I have carefully been taken through the record of the case by learned counsels for the appellants as well as by Ms. Aashaa Tiwari, learned APP for the State. I find that the witnesses are not sure even about the number of persons who were standing outside the Chintoo Car Point.

1039. The first statement in point of time is the one made by Sunil Kumar (PW-1), recorded by Inspector S.S. Rana (PW-26) between 4:30 and 6:15 pm on the 22nd of February 2009 at the AIIMS Trauma Centre which has been treated as the *rukka* (Ex.PW1/A)

(**pg 748**). In this statement, Sunil Kumar (PW-1) states that three to four boys were standing outside the Chintoo Car Point. In his testimony in court (**pg 20**), Sunil Kumar (PW-1) on the 8th of March 2010 has stated that "*there were 2-3 boys standing outside the office of Sushil Arora*".

1040. Paramjeet Singh (PW-5) (**pg 92**) does not refer to any person standing there but puts up a completely new story that while they were standing outside Sushil Arora's office, one Indica car bearing no.2192 arrived and three persons got down from that car. It is noteworthy that PW-5 is the only witness in this manner attempted to link Hemant Garg as having brought the Indica to the Chintoo Car Point and connect him to the crime. No other witness supports this testimony. Paramjeet is also categorical that Tikla (PW-9) was there in his Verna, whereas there is evidence that he was in an Esteem vehicle. I have dealt with the veracity of his statement later in this judgment.

1041. Varun (PW-6) refers to a brawl with "*four accused persons*" (pointing out towards Rajesh Pandey, Sonveer, Vishnu and Hemant Garg) which happened for the taking out of vehicles.

1042. Surender (PW-8), an associate of Sunil Kumar (PW-1) has stated that three/four other persons were standing there.

1043. While Tikla (PW-9) refers to (**pg 172**) four boys who were standing outside the office, his associate Hemant (PW-10) refers to three or four boys standing outside the Chintoo Car Point office. In a later part of the statement, he refers to Vishnu and Sonveer being "*amongst those 4/5 boys present outside the office of Chintoo Car*

Point" (**pg 186**). Similarly Gajender Singh (PW-11) who had accompanied Tikla (PW-9) to the Chintoo Car Point refers to four or five boys standing outside the office (**pg 202**).

1044. It is the case of the prosecution that on the 22nd of February 2009, Sunil Kumar (PW-1), Varun (PW-6), Paramjeet Singh (PW-5), Surender (PW-8) and deceased Ankit were hanging around in the parking area outside Chintoo Car Point waiting for Tikla's discussions with Sushil Arora to end and had ample opportunity to see the number of persons who were present there. It has been suggested to us that the conflict appears because no such persons were present and that the witnesses have just created a story for the appellant's false implication.

1045. In this regard, I find that even the trial court was not sure of the number of associates of Sushil Arora who were present outside his office and were involved in the brawl with Ankit and Varun. In para 92, it is noted that there were 3-4 persons.

1046. By itself, the question as to who and how many persons were present outside the Chintoo Car Point, may seem insignificant. But in the present case, as per the prosecution, it is the main linkage between the accused persons as attempt has been made to prove that the persons standing outside were goons of Sushil Arora and Rajesh Pandey, all of whom were responsible for the shooting. For instance, the unsupported evidence of Paramjeet Singh (PW-5) attempting to place the Indica involved in the shooting at the Chintoo Car Point as well as testifying that Hemant Garg brought it there, is not only an improvement in his evidence, but a very

important contradiction vis-a-vis the evidence of other prosecution witnesses. Therefore, certainly regarding the presence of the appellants at the Chintoo Car Point as well as their identification are material pieces of evidence. The lack of certainty and the contradictions with regard to the persons who were actually standing outside the Chintoo Car Point assume importance and are material, not a simple matter of detail which ought to be ignored. As noted above, the contradictions are within the statements of the same witness recorded at different points of time even and cannot be brushed aside as bluring of memory. When contrasted against the graphic description of the shooting episodes, given by these witnesses, it definitely suggests false implication and certainly lends suspicion to the truthfulness of these witnesses to correctly recount the happenings of the fateful day.

(ii) *Conflict between the testimony of Paramjeet Singh (PW-5) vis-a-vis that of the other witnesses regarding the vehicles and persons present and involved in the altercation outside the Chintoo Car Point*

1047. Sunil Kumar (PW-1) has referred to a motorcycle parked in front of the Santro car and an altercation over the issue of removal of this motorcycle (**pg 15-20**). Surender (PW-8) also refers to a motorbike having been parked in front of the Santro. (**pg 136**).

1048. In his evidence, Tikla (PW-9) (**pg 172**) refers to a *´motobike'* found parked and the car belonging to Sunil Kumar (PW-1). Gajender Singh (PW-11) (**pg 202**) has also referred to the tiff/quarrel between Ankit Minocha and Varun (PW-6) on the one

hand and 4/5 boys who were standing outside the Chintoo Car Point for removal of a "*motorbike*" on the other.

1049. I find that even the trial court has noted the testimony of Pushkar Raj (DW-6) in para 86 (**pg 662**) about the altercation between the occupants of the Santro car and motorcycle rider.

1050. Hemant Kumar (PW-10) simply referred to *"a quarrel between the boys who were there standing outside the office with Sunil and his boys."* He doesn't specify at all as to over what issue the parties were quarrelling (**pg 185**)

1051. On the other hand, Paramjeet Singh (PW-5) is the sole person who introduces the Indica as having arrived outside the Chintoo Car Point and the altercation with its occupants over its removal. Paramjeet Singh (PW-5) is also the only witness who says that Tikla (PW-9) left the Chintoo Car Point in a "*Verna*" instead of an Esteem. Clearly, his testimony regarding arrival of the Indica in question carrying three of the appellants including Hemant Garg and the altercation over its removal is a concoction which is contradicted by the other evidence on record and has to be disbelieved.

(iii) Whether payment made for the drinks at Buddha Garden

1052. While Sunil (PW-1) stated that they had already paid for the cold drink and water bottle, in the cross-examination, Paramjeet Singh (PW-5) (**pg 106**) has stated that the incident began to happen at the moment when they had yet to pay for the cold drink and water bottle. Varun (PW-6) on the other hand is quite clear that the

payment of the bottles was made by Paramjeet (PW-5) through him. By itself, this contradiction may not be of significance. However, it is a manifestation of the anxiety and the distraught state of mind of the witnesses at that time. It certainly illustrates that the witnesses could not recount even the activities in which they were directly involved when the shooting occurred. Certainly, their ability to note the features of the assailants in those critical moments would have been severely impaired. The identification by these witnesses of the assailants more than a year after the incident is not believable at all.

1053. I find that when the black Santro was seized, the police has recovered a cold drink bottle (Pepsi 600 ml) from it (as per memo Exh. PW 24/B).

(iv) *Conflict about the number of occupants and their identities in the Indica*

1054. It is further contended that the prosecution witnesses for the same reasons of panic and anxiety are not even on the same page even with regard to the number of occupants of the Indica.

1055. Varun (PW-6) was cross-examined by the Prosecutor for the State when he had categorically stated that he had seen four accused persons present in the Indica (**pg 114-115**) and pointed out towards the accused Vishnu, Rajesh Pandey, Sonveer and Hemant. The witness categorically stated that he had not seen the fifth accused (i.e. Sushil Arora), present in the court in this case, there on the spot. He also denied that he had named Sushil Arora as the

person in the Indica car in his statement under Section 161 of the Cr.P.C.

1056. I find that Surender (PW-8) (**pg 137**) has stated that "*in all there were around 4-5 occupants in that Indica car*". He has stated that he did not know their names but identified Sonveer and Vishnu in court by pointing out towards them that they were holding the firearms and firing at the Santro. He also identifies Hemant Garg by pointing him out as the driver of the Indica. Surender (PW-8) is not clear as to whether there were one or two more boys in the Indica since he had not been able to see them and could not identify them with confirmation. Thus Surender (PW-8) also does not identify Sushil Arora and Rajesh Pandey as present in the Indica during the shooting. Surender testifies that "*one or two more boys were there in Indica car and since I had not been able to see those others one or two boys I cannot identify them with confirmation*" (**pg 137**).

1057. The evidence led by the prosecution has been scrutinized in its entirety. Given the testimony of Surender (PW-8); embellishments and improvements by Paramjeet Singh (PW-5) creating doubt over the veracity of his evidence; failure of all these witnesses (PWs-1, 5, 6 and 8) to inform the police about the incidents; the delay in the first narration of events by Sunil (PW-1) as well as the categorical statement by Varun (PW-6) to the effect that Sushil Arora was not present in the Indica (**pg 114**), the benefit of doubt must enure to the benefit of the accused persons.

XXXVI. Real doubts in the reliability of the prosecution evidence which would enure to the appellants

1058. It is trite that in a criminal trial, the prosecution has to prove its case beyond reasonable doubt, that is to say, that the doubts must be actual and substantive, should not be mere vague apprehensions or an overemotional judicial response.

1059. I extract hereunder paras 39 and 43 of the judgment reported at ***(2012) 2 SCC 34, Kailash Gour & Ors. v. State of Assam*** which must bind the consideration by a court in a criminal prosecution which read as follows :

> ***"39.*** *It is one of the fundamental principles of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty.* ***It is equally well settled that suspicion howsoever strong can never take the place of proof. There is indeed a long distance between the accused "may have committed the offence" and "must have committed the offence" which must be traversed by the prosecution by adducing reliable and cogent evidence. Presumption of innocence has been recognised as a human right which cannot be wished away****. (See Narendra Singh v. State of M.P. [(2004) 10 SCC 699 : 2004 SCC (Cri) 1893] and Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra [(2005) 5 SCC 294 : 2005 SCC (Cri) 1057] .*
>
> *xxx xxx xxx*
>
> ***43.*** *At any rate, the legal proposition formulated by Bedi, J. based on the past failures does not appear to us to be the solution to the problem. We say with utmost respect to the erudition of our Brother that we do not share his view that the reports of the Commissions of Inquiry set up in the past can justify a departure from the rules of evidence or the fundamental tenets of the*

criminal justice system. ***That an accused is presumed to be innocent till he is proved guilty beyond a reasonable doubt is a principle that cannot be sacrificed on the altar of inefficiency, inadequacy or inept handling of the investigation by the police****.* ***The benefit arising from any such faulty investigation ought to go to the accused and not to the prosecution.*** *So also, the* ***quality and creditability of the evidence required to bring home the guilt of the accused cannot be different in cases where the investigation is satisfactory vis-à-vis cases in which it is not****.* ***The rules of evidence and the standards by which the same has to be evaluated also cannot be different in cases depending upon whether the case has any communal overtones or in an ordinary crime for passion, gain or avarice****."*

(Emphasis by us)

1060. So far as the standard of proof and burden of proof of prosecution are concerned, I extract hereunder the authoritative and binding principles laid down by the Supreme Court in **(2013) 12 SCC 796** ***Mritunjoy Biswas v. Pranab,*** where it was held thus**:**

"26.1. *In this context, we may profitably refer to what has been stated by Sabyasachi Mukharji, J. (as His Lordship then was) in* ***Gurbachan Singh v. Satpal Singh [(1990) 1 SCC 445 : 1990 SCC (Cri) 151 : AIR 1990 SC 209]*** *: (SCC p. 449, paras 4-5)*

"4. ... The ***standard adopted*** *must be the* ***standard adopted by a prudent man*** *which, of course, may vary from case to case, circumstances to circumstances.* ***Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence****. Justice cannot be made sterile on the plea that it is better to let*

hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law.

5. The conscience of the court can never be bound by any rule but that is coming itself dictates the consciousness and prudent exercise of the judgment. ***Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated****.*

26.2. *In State of U.P. v. Krishna Gopal [(1988) 4 SCC 302 : 1988 SCC (Cri) 928] Venkatachaliah, J. (as His Lordship then was) has opined thus: (SCC pp. 313-14, paras 25-26)*

25. ... Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. ***To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions.*** *A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.*

26. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge. ***While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimisation of trivialities would make a mockery of administration of criminal justice.****"*

(Emphasis by us)

1061. The above principles stand reiterated by the Supreme Court in the judgment reported at ***(2003) 7 SCC 56, Krishnan v. State***; ***(2008) 12 SCC 241, Valson v. State of Kerala*** and ***(2009) 11 SCC 690, Bhaskar Ramappa Madar v. State of Karnataka.***

1062. I had an occasion to examine the principles of criminal justice administration in ***Crl.A.No.121/2008, Virender v. The State of NCT of Delhi*** decided on 29th September, 2009 wherein reliance was placed on judicial precedents from the Supreme Court and had noted thus :

> *"39. The principles which are required to and weigh with the courts in the administration of the criminal law and the justice delivery system have been laid down in* ***AIR 2002 SC 3206 : MANU/SC/0757/202 Ashish Batham vs. State of Madhya Pradesh****, the Apex Court had observed thus :-*
>
> > *"Realities or truth apart, the fundamental and 19 basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise....."*
>
> *40. The evaluation or assessment of evidence which is brought on record by the prosecution would be guided by well settled principles best stated in the words of Justice V.R. Krishna Iyer in* ***(1978) 4 SCC 161 (page 162 para 2) : MANU/SC/0093/1978 Inder Singh & Anr. vs. The State (Delhi Administration)*** *thus :-*
>
> > *"2. Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated*

scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many, guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction. Why fake up ? Because the court asks for manufacture to make truth look true? No, we must be realistic."

(Emphasis by us)

1063. In ***AIR 1985 SC 48 State of U.P. v. M.K. Anthony***, the Supreme Court held as follows :

"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of of truth……. Cross examination is an unequal dual between a rustic and refined lawyer."

1064. In ***JT 2003 (6) SC 248 Sucha Singh and Anr. v. State of Punjab***, it has been held that exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape

than punish an innocent. Letting guilty escape is not doing justice according to law.

The above principal was reiterated in ***AIR 1990 SC 209 Gurbachan Singh v. Satpal Singh and Ors .***

1065. In ***AIR 1992 SC 840, State of U.P v. Ashok Kumar Srivastava***, it was held that prosecution is not required to meet any and every hypothesis put forward by the accused.

1066. I find in the judgment reported at ***AIR 1959 (Patna) 362 : 1959 SCC OnLine Pat 114, Chhotan Mahton & Ors. v. State of Bihar,*** it was held as follows :

> ***"26.*** *That case does not touch the fundamental basis of the criminal law that the burden of* ***proving the case*** *lies always on the prosecution and if, from the* ***circumstances appearing from the evidence, there arises any doubt in the case, it must be held that the prosecution case has not been proved, irrespective of the fact whether the defence taken up by the accused is true or not****. And this principle applies both to the corpus delicti as well as to the guilt of the persons who are alleged to have committed the crime."*
>
> *(Emphasis by us)*

1067. Our attention has also been drawn to the pronouncement reported at ***1993 JCC 490, State v. Khem Chand,*** wherein it was held thus :

> *"17. Mr. Sharma relying upon the observation of Justice Venkataraman Ayyar in His Lordship's minority opinion in* ***A her Raja Khima vs. State of Saurashtra, Air 1956 SC 217*** *that the presumption that a person acts*

honestly applies as much in favour of a police officer as all other persons and it is not a judicial approach to distrust and suspect than without good grounds, contends that in absence of any finding about animosity between police witnesses and the accused, the learned Additional Sessions Judge should not have disbelieved the police witnesses and relying upon their testimony, the accused should have been convicted. We have noticed hereinbefore ***various circumstances which cast serious doubts about the prosecution cases and various discrepancies which have remained unexplained. We may have adopted a different approach about the non-mention*** *of the names of the eye witnesses in the inquest report and brief facts* ***if the testimonies of eye witnesses was otherwise credible*** *but as noticed hereinabefore,* ***there are vital flaws in 'their testimonies'. In view thereof the non recording of the substance on information in the Daily Diary register and non sending the special report to the Metropolitan Magistrate with almost despatch and delay in sending the inquest papers assumes vital importance****. In the facts and circumstances of the present case the accused cannot be convicted only on the basis of the testimony of police witnesses, as contended by Mr. Sharma. The question is not about absence of finding of animosity between police witnesses and the accused.* ***The question is when there are serious doubts about the truthfulness of eye witnesses, and there are vital discrepancies in the investigation and in the evidence of police witnesses, should the accused be convicted by holding that there is nothing on record to show animosity between the police witnesses and the accused. The answer to the question has to be 'No'****. ...."*

(Emphasis by us)

1068. The above discussion casts grave doubt on the testimony of prosecution witnesses. The present case is not a case of mere

insufficiency or inadequacy in the investigation by the police. It is also not merely inept handling of the investigation by the police. On the contrary, the present case manifests the manner in which innocent persons can be implicated for commission of heinous crimes and incarcerated for years.

XXXVII. <u>Conclusion</u>

1069. The above discussion establishes that the prosecution has failed to establish any common intention between the appellants towards commission of the offence of murder. The prosecution has failed to establish by credible evidence its case that the appellants were occupying the vehicle from which firearms were used, resulting in death of the victim. There is gross unexplained delay in registration of the first information report by the police station which was located barely a couple of kilometres from the place of incident despite evidence of eye-witnesses being available at the spot when the police reached the place within minutes of the incident. The prosecution has also failed to establish compliance with the mandatory requirement of sub-section 1 of Section 157 of the Cr.P.C. The eye-witnesses, who were close associates with the deceased and co-passengers in his vehicle at the time of the incident, failed to lodge any report with the police which creates doubt on their subsequent testimony. The statements were made to the police by these witnesses after admitted and established confabulation.

1070. The propounded public and other eye-witnesses were complete strangers to the accused persons. Even if the prosecution case is accepted in its totality, the witnesses would have best had only a fleeting glance at the vehicle occupied by the assailants. The circumstances which obtained at the scene of the crime were such as to render identification of its occupants impossible.

1071. The prosecution either failed to conduct test identification parade of the arrested appellants or did not conduct the test identification parades with expedition and promptitude after the arrests of the appellants. The dock identification of such complete strangers by the witnesses more than a year after the occurrence are not credible.

1072. The prosecution has failed to establish that the appellants made any disclosure statements leading to recoveries which would become admissible by virtue of Section 27 of the Evidence Act.

1073. The accused persons led strong defence evidence which creates a strong doubt in the prosecution evidence.

1074. The prosecution was unable to establish linkage of the weapon recovered in FIR No.150/09 to the accused person.

1075. The testimony of the prosecution witnesses suffers from grave contradictions, inconsistencies, exaggerations and embellishments in material particulars creating real doubts in its reliability.

1076. The investigation in the case was biased and material witnesses have not been deliberately examined. The manner in which the investigation has been conducted and the testimonies of

the witnesses concocted manifest that the investigators first decided the motive and the main accused person and proceeded with the investigation backwards. It also suggests that if it had been possible to sit six persons in the Indica, the prosecution would have arrayed Pushkar Raj as well as an accused person.

1077. Any one of the reasons discussed above and highlighted herein would be sufficient to grant acquittal to these accused persons.

1078. The prosecution has failed to establish the charges against the appellants beyond requisite standard of proof beyond reasonable doubt.

XXXVIII. Result

1079. In view of the above, the appeals are allowed and the judgment dated 2nd July, 2015 whereby the appellants stand convicted in S.C. No.07/2009 arising out of FIR No.35/09 registered by the police station Chanakya Puri is hereby set aside and quashed. As a result, the consequential order on sentence dated 26th August, 2015 imposed upon the appellants would also stand set aside and quashed. The appellants are in custody and consequently, they shall be released forthwith, if not required in any other case.

GITA MITTAL, J

FEBRUARY 08, 2017
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