

DELHI HIGH COURT

Present : P.K. Bahri & J.B. Goel, JJ.

DEVI PRASHAD SHARMA & ORS. —Petitioners

versus

STATE —Respondent

Cr. Appeal No. 143 of 1990—Decided on 14.12.1995

Indian Penal Code, 1860 — Sections 302/34 — Murder — Case of prosecution is that deceased working in MTNL detected fraud being committed by accused, LDC, working under him — Wrongful rebate given to telephone subscribers for consideration — This was motive for the crime — No explanation for inordinate delay in sending incriminating articles to CFSL by Investigating Agency — Contradictions in statements of witnesses of recoveries — Lack of evidence on weapon of offence — Serious doubts in genuineness of recoveries and *bonafides* of Investigating Agency — Motive and conduct of accused before occurrence not sufficient to bring home the guilt of accused persons — Judgment of conviction and sentence not valid and justified — Set aside.

Held : The case of the prosecution is that the deceased while working as Junior Accounts Officer at Nehru Place Telephone Exchange had detected fraud being committed by the accused Devi Prasad who was working under him as L.D.C. whereby wrongful rebate had been given to some telephone subscribers for consideration and further probe was being made in the matter and this was the motive for the crime. (Para 14)

Held further : Blood stained incriminating articles as well as blood stained clothes and other articles belonging to the deceased were available on 23.11.87 but very strangely these articles were sent to CFSL after 25 days as on 18.12.87 and there is no explanation for this inordinate delay on the part of the Investigating Agency. (Para 43)

Held further : However, the post mortem Doctor (PW 18) in cross-examination has stated that he could not say whether the injuries on the person of the deceased were caused by single edged or double edged weapon. On our query learned Counsel for the State has replied that in view of this statement of the doctor non-inviting of his opinion about possibility of this razor being the weapon of offence is of no consequence. This means that according to her this razor is not the weapon of offence. If so, its recovery is also of no help. But we are surprised to find that opinion had been given by this doctor during investigation about it being the possible weapon of offence which fact has not been brought to his notice. This shows lack of diligence on the part of the prosecution as well as of the Trial Court. (Para 53)

Held further : All these circumstances, create serious doubts in the genuineness of these recoveries as well as in the *bonafides* of the Investigating Agency and, in the circumstances, it would not be safe to sustain conviction on the basis of these recoveries. (Para 55)

Held further : The only two circumstances left are motive and conduct of the accused Devi Prashad in extending threat to the deceased sometime before the occurrence. But these circumstances alone are not sufficient to bring home the guilt to the accused persons. The result is that the judgment of conviction and sentence are not valid or justified and are liable to be set aside. **(Para 56)**

Result : Appeal allowed.

Counsel for the Parties :

For the Petitioners : Mr. Jitender Sethi, Advocate.

For the Respondent : Ms. Mukta Gupta, Advocate.

JUDGMENT

J.B. Goel, J.—The three appellants Devi Prasad, Dwarka Prasad and Lalji have been convicted by the Court of an Additional Sessions Judge, New Delhi for offence under Sections 302/34 IPC and all the three have been sentenced to imprisonment for life and a fine of Rs. 5,000/- each and in default of payment of fine further RI for six months each *vide* judgment of conviction and separate order of sentence dated the 10th October, 1990.

2. Briefly the prosecution case is that deceased R.N. Krishnan was working as Junior Accounts Officer at Nehru Place Telephone Exchange of Mahanagar Telephone Nigam Ltd. On the 17th November, 1987 at about 6.15 p.m. Inspector Nirajan Singh then SHO Police Station, Kalkaji who was returning from the office of the Deputy Commissioner of Police and was going to Police Station, Kalkaji on the way opposite Hemkunt Tower, near Private Bus Stand, Nehru Place on Outer Ring Road noticed that one person was lying on road in injured condition and profusely bleeding. Some persons were also present. He got down from his vehicle and noticed three stab wounds one each on his neck, chin and abdomen. On his inquiry the injured pointed out towards Telephone Exchange building and on further inquiry he uttered the words "Bus Chali Gai". The said SHO put the injured in his vehicle and took him to the All India Institute of Medical Sciences (AIIMS). On the way one Virender Bhasin who was operating chartered buses under the name of Asia Travel Buses met him and told that the deceased was a resident of Pushp Vihar and used to travel in his bus. The injured was admitted in the AIIMS. He was examined by Dr. S. Bal (PW 23) and was declared as brought dead.

3. The SHO on the way on wireless had given information to his Police Station about this occurrence and instructed his staff to depute the Incharge Police Post, Nehru Place to reach the spot. The D.D. Entry No. 18 was recorded at the Police Post at 6.35 p.m. A copy of the D.D. Entry was given to the In-charge, S.I. Dhir Singh Chaudhary who alongwith Head Constable Balbir Singh and Constable Satpal Singh reached the spot. Head Constable Balbir Singh was deputed to guard the scene of occurrence and he alongwith Constable Satpal Singh went to AIIMS Hospital and from the MLC of the injured, he found that the injured had already died. No eye witness met him there. He made his endorsement and sent the Rukka through Constable Satpal Singh for registration of the case under Section 302 IPC. FIR No. 492/87 was registered at Kalkaji Police Station at 8.40 p.m. The investigation was entrusted to S.I. Dhir Singh. From AIIMS S.I. Dhir Singh reached the spot but no eye-witness met him there also. He took usual steps, picked up blood stained

earth, got photographed the scene of the occurrence, prepared site plan and recorded statements of some witnesses.

4. Later on at about 9.45 p.m., one Amir Chand Gupta met him who stated that he had seen two persons having caught the injured person while one person having stabbed him and on seeing him the three assailants had run away. He had chased them but could not catch them and when he returned back he found that the injured had already been removed to the hospital. He went to see a movie at nearby Paras Cinema Hall and after the show was over he had reached the spot and he had made statement to the Police. Inquest report was recorded on 18.11.87 and post mortem was conducted on 18.11.87 by Dr. S.C. Mehta *vide* his post mortem report Ex. PW 18/A.

5. On the same evening the S.H.O. had visited the house of deceased and informed his wife. Her neighbour K. Palani Appan (PW 1) alongwith the S.H.O. visited the AIIMS and he identified the deceased R.N. Krishnan who was working as Junior Accounts Officer in his office at Nehru Place Telephone Exchange. During investigation it came to notice that certain very serious irregularities involving unauthorised cancellation of telephone bills causing loss of revenue to the department and also pilferage and loss of records had been found by the deceased for which accused Devi Prasad who was working as LDC under the deceased was suspected to be responsible. During investigation it was also revealed that the deceased had told his colleague Shri K. Palani Appan, PW 1 that accused Devi Prasad had earlier threatened him for having detected fraud committed by the accused and for his making further probe in the matter.

6. It appears that the accused Devi Prasad was interrogated by the SI on 18.11.87 and he was asked to join the investigation on the following day but thereafter he remained absconded and later on search during investigation on the 23rd November, 1987 the said accused Devi Prasad was arrested from near his Mayur Vihar house by S.I. Dheer Singh Chaudhary in the presence of one K. S. Varshney (PW 4), Inspector Bir Singh (PW 8) and other police staff and on interrogation he made a disclosure statement about the occurrence and from his house at Mayur Vihar he got recovered his blood stained shirt and Pant and one register which were seized. On the basis of his disclosure statement his brother Dwarka Prasad was also arrested from the same house and on interrogation he had also made a disclosure statement; he also got recovered from his house his blood stained Pant and shirt and some exercise books and a razor was also got recovered from its concealed place from near Jhuggis at Nehru Place Hotel. These were taken into possession after converting into sealed parcels. Thereafter the two accused had led this police party to the shop-cum-house of Lalji situated at H.S. 17, Kailash Colony Market where he was also arrested. On interrogation he had also made a disclosure statement and then got recovered from his house his blood stained bushirt and Pant which were also seized after converting into sealed parcels.

7. On 17th November, 1987 Constable Siromani who was working as Duty Constable at AIIMS had handed over to S.I. Dheer Singh personal belongings of the deceased i.e. (1) one sealed parcel containing blood stained clothes, (2) one sealed parcel containing a pair of shoes and socks, (3) one sealed parcel containing the wrist watch and golden ring, (4) Rs. 297/- in cash, (5) one blood stained brief case

containing a diary and some other papers, (7) one Identity Card No. P.H. 229, and (8) one sample seal of C.M.O., AIIMS. They were taken into possession *vide* Seizure Memo Ex. 10/A. One sealed parcel containing blood stained underwear of the deceased, one sealed bottle containing sample blood of the deceased and one sample seal of the Forensic Medicines AIIMS preserved by the post mortem doctor were also seized *vide* Memo Ex. 24/F. Some departmental papers pertaining to departmental inquiry being held about wrongful cancellation of telephone bills were also seized. Seized articles had been duly deposited in the Malkhana and were sent to the CFSL. In CFSL reports Exs. 24/H, 24/J and 24/K, human blood of B group was found on the sample blood of the deceased as well as on his clothes and the blood picked up from the spot. Human blood of B group was also found on razor, three shirts seized from the three accused and also on the Pant of one of the accused.

8. After completing investigation all the three accused were charged for offences under Section 302 read with Section 120-B IPC and Section 341 read with Section 120-B IPC. In all, 25 witnesses were examined by the prosecution including Mr. K. Palani Appan, PW 1, an Assistant Accounts Officer in Nehru Place Telephone Exchange who deposed that the deceased had told him about his having detected the fraud committed by accused Devi Prasad and the accused having given threat to him. PW 2 Amir Chand Gupta had deposed that he had seen three assailants, two having caught the deceased and one giving the knife blows at the spot but he did not support the prosecution about identity of the accused. PW 3 Surinder Kumar, PW 5 Sardar Jaspal Singh and PW 6 Satish Kumar Gupta are the subscribers of telephone Nos. 6433024, 6433016 and No. 6447040. Though they deposed about short charging in their bills first and then their having made payments of balance dues on further demand by the department. They, however, did not support the prosecution case that the accused had made demand of illegal gratification from them for showing favour in their telephone bills. PW 7 Hans Raj Mandhan, Accounts Officer in the same office had deposed that the deceased had detected fraud committed by accused Devi Prasad LDC and the matter having been brought to his notice by the deceased and then his having taken up the matter with the higher authorities and at their instance effected the transfer of the accused and gave instructions for making further probe in the matter. PW 21 K.R. Murguaswamy, a relation of the deceased had not supported the prosecution case that the deceased after last Diwali had told him about the threat given by the accused to the deceased. Dr. S. Bal PW 23 had examined the injured on being admitted in AIIMS whereas PW 18 Dr. S.C. Mehta had conducted post mortem. PW 4 K.S. Varshney and PW 8 Inspector Bir Singh are witnesses of the arrest of three accused, their having made disclosure statements and then all having got recovered their shirts and pants and also accused Dwarka Prasad having got recovered blood stained razor concealed below a stone near Jhuggis at Nehur Place Hotel on the 23rd November, 1987. Shri N.K. Kaushik, PW 25, Metropolitan Magistrate has proved that the three accused were produced before him on the 24th November, 1987 but they declined to participate in the TIP and proved his reports Exs. 25/B, 25/C and 25/D. PW 9 Balbir Singh prepared the scaled site plan. PW 10 Shiromani Duty Constable at AIIMS had handed over to Investigating Officer certain articles of the deceased from the AIIMS. PW 13, Constable Satpal Singh and PW 14 Head Constable Balbir Singh had accompanied the Investigating Officer on the 17th November, 1987 to the spot on

receipt of the information of the occurrence. PW 15 Constable Kishan Lal was posted at Police Post, Nehru Place and recorded D.D. entry on telephonic information and proved copy of the D.D. No. 18. PW 16 S.I. Satish Kumar had also reached the spot and guarded the place. PW 17 Niranjan Singh, S.H.O. had removed the injured and got him admitted in the AIIMS. Head Constable Harbhajan Singh, Police Photographer, had taken two photographs of the place of occurrence. PW 20 Constable Mohd. Israil had taken sealed parcels to CFSL on the 18th December, 1987 and also some departmental papers were seized in his presence. PW 22 Head Constable Maman Lal has proved deposit of case property in the Malkhana duly sealed and then having been sent to the CFSL. PW 24 D.S. Chaudhary is the Investigating Officer.

9. All the three accused persons have denied their involvement in the crime. They also denied that any incriminating article was recovered and pleaded that they have been falsely involved. Accused Devi Prasad admitted that he was working as LDC at Nehru Place Telephone Exchange Office of MTNL and also that the deceased R.N. Krishnan was working as Junior Accounts Officer in that office. He has taken the specific plea to the effect "I have been falsely implicated in this case particularly at the instance of Hans Raj Madan (Mandhan) PW and other persons of department who are jealous of me as my promotion was due. I am innocent." Accused Lal Ji took the plea that a telegram mark X way sent by his father to the Metropolitan Magistrate and the Additional Sessions Judge, New Delhi complaining that a razor was picked up from his shop.

10. Accused Devi Prasad had examined three witnesses in defence DW 1, Shiv Dutt Sharma who is working as technician in the Nehru Place Telephone Exchange, has deposed that the accused was kept detained by the police right from 18th November, 1987 onwards. D.W. 2 B.K. Kalia was working as Public Relation Officer at Nehru Place has deposed that the accused was on leave on 17th November, 1987 and thereafter remained absent from 18th November, 1987 to 24th November, 1987 and he was placed under suspension on 25th November, 1987. DW 3 Head Constable Megha Ram has proved that PW Amir Chand Gupta had been witness in FIR No. 80/87 under Sections 279/337/304-A and FIR and 90/89 under Sections 3/4/9/55 of the Gambling Act of Police Station, Kalkaji.

11. The learned Additional Sessions Judge, has held all the three accused persons guilty for offence under Sections 302/34 IPC convicted and sentenced all the three accused persons as aforesaid. All the three accused persons have filed this common appeal.

12. It is not disputed that the deceased had died a homicidal death due to injuries caused to him. PW 17 SHO Niranjan Singh had removed the deceased in injured condition from near Nehru Place Outer Ring and admitted him in AIIMS. He was examined by Dr. S. Bal PW 23, he had prepared MLC Ex. P.W. 23/A and had found that the injured R.N. Krishnan was brought dead to the Casualty at 6.40 p.m. PW 18 Dr. S.C. Mehta who had conducted post mortem examination on 18th November, 1987 *vide* report Ex. PW 18/A had noticed the following ante mortem injuries :—

1. Incised wound on right side of neck going antero posteriorly and

horizontally placed starting from the pomu Madani in midline (6 cms. below chin and 11 cms. above sternal notch).

2. Incised wound of size 2 x .5 x 0.5 cms. on chin starting from midline going with the direction of lower border of mandible.
3. Abrasion 2 x 1 cms. on right zygoma.
4. Incised wound with clean out margins on right lateral side of abdomen in mid axillary line 25 cms. below axilla and 7 cms. above iliac crest. The wound is placed Antero posteriorly, (10x2x1.5 cms.) cutting skin, subcutaneous tissues of abdomen muscle only.

13. He has opined that the cause of death was shock as a result of ante-mortem injury No. 1 caused by sharp edged weapon and this injury was sufficient to cause death in the ordinary course of nature.

14. The case of the prosecution is that the deceased while working as Junior Accounts Officer at Nehru Place Telephone Exchange had detected fraud being committed by the accused Devi Prasad who was working under him as L.D.C. whereby wrongful rebate had been given to some telephone subscribers for consideration and further probe was being made in the matter and this was the motive for the crime.

15. PW 7 Shri Hans Raj Mandhan has deposed that he was working as Accounts Officer at Nehru Place in Maha Nagar Telephone Nigam. In the last week of October, 1987, Mr. R. Krishnan, working as Junior Accounts Officer under him had pointed out certain very serious irregularities involving cancellation of telephone bills/revenue and pilferage and loss of records. Since the irregularities were of very serious nature, he had called accused Devi Parshad who was a dealing clerk and asked him to produce the missing records. Despite repeated requests, he denied that missing record was with him. He put up the case alongwith his report with his own remarks to the Chief Accounts Officer for taking necessary action. He and the Chief Accounts Officer went to the Area Manager and verbally asked him to place Devi Prashad under suspension as the irregularities were of very serious nature. Area Manager told the Chief Accounts Officer to make further investigations and in the meantime, he would transfer him to some other place. The cancellation of bills made by the accused Devi Prashad, which were pointed out by R.N. Krishnan were found to be wrong: He proved the report submitted by R.N. Krishnan before him Ex. PW 7/A (four pages), his remarks on this report as Ex. PW 7/B; the report of the Chief Accounts Officer Mark X and the order of Area Manager for transferring the accused Mark Y. He has identified the handwriting and signatures of all those persons including that of the deceased as he had seen them writing and signing.

16. He denied the suggestions that the accused had been coming in his way in the malpractices adopted by him and that he had falsely involved the accused in this case by suspecting him before the police. However, it is not challenged that certain irregularities about wrongful cancellations made in telephone bills were noticed and highlighted by the deceased in his report Ex. PW 7/A and accused Devi Prashad was called and confronted by senior officers about these irregularities and relevant cancellation register of bills were found missing. It is also not disputed that the

accused Devi Prashad was working as dealing clerk (L.D.C.) and was concerned about dealing of the telephones in question. It is also not suggested that the deceased had made any manipulations to make wrongful gain for himself or in collusion with higher officers or the subscribers. He has also not come with the plea that he had ever pointed out any such irregularities/malpractices as noticed by the deceased. Suggestion put to PW 7 that the accused had been coming in his way in the malpractices adopted by him and he had falsely involved the accused in this case by suspecting him before the police has not been substantiated by any material. Such plea has also not been taken by any of the accused in their statement under Section 313 Cr.P.C. This suggestion/plea in the circumstances is not *bonafide* and has no merit.

17. PW 7 has been corroborated by PW 3, PW 5 and PW 6 to some extent.

18. PW 3 Surinder Kumar has deposed that he had been provided telephone number 6433024 at his residence at 208, Kailash Hills; that one day he was informed on telephone from the Exchange that the bill of Rs. 8981/- was pending and he was asked to deposit by 1.00 p.m. otherwise telephone would be disconnected. Then he had immediately made the payment of the balance amount of Rs. 8,000/-.

19. He has, however, not supported the prosecution that the accused Devi Prashad had given him rebate of Rs. 8,000/- in this bill for consideration. But he has not disputed that against bill amount of Rs. 8,981/- he had made payment of balance amount of Rs. 8,000/- on subsequent demand made. He has not claimed that this amount of Rs. 8,000/- was wrongly demanded or was not due from him or was paid by him under protest. No explanation has been given by him for this earlier short recovery from him.

20. PW 5 Jaspal Singh has deposed that telephone number 6433016 was installed at his residence at S-129, Greater Kailash Part II, New Delhi in the name of his brother who was living in Germany for the last 8-10 years and in his absence he or his mother used to make payment of the telephone bills through their servant; that one day suddenly their telephone was disconnected by the telephone department and it was not restored despite 8-10 complaints. Then he went to the Telephone Exchange and made inquiries about disconnection when he was told that less amount had been deposited towards telephone bills. He also did not support the prosecution case that he had agreed to pay Rs. 1,000/- to the accused for getting rebate of Rs. 5,000/- in the bill. However, he has stated that on being demanded by telephone department he had deposited an amount of Rs. 5,000/- which was earlier less paid by him. He was not cross-examined by the accused on this aspect. Obviously short payment of Rs. 5,000/- in earlier bill was collected from him. He has not stated that this amount of Rs. 5,000/- was wrongly demanded or recovered or was paid under protest.

21. PW 6 Mr. S.K. Gupta has deposed that telephone No. 6447040 was installed in his name at F-10, East of Kailash, New Dhlhi, that in the bill for the period 16.4.87 to 1.6.87, a credit/rebate of Rs. 24,000/- had been given but in the bill dated 16.8.87 the Telephone Authorities had demanded Rs. 24,000/- which was paid by him. He has also not supported the prosecution case that the accused had contacted him and given this rebate of Rs. 24,000/- for consideration. He has also not claimed that this amount of Rs. 24,000/- was not legally due from him or a dispute was raised

by him before a Competent Authority about this. On behalf of the accused Devi Prashad no explanation has been given for these irregularities.

22. Who was responsible for these irregularities? Accused Devi Prashad who was the dealing clerk in the branch concerned must be aware about these irregularities or mistakes in the telephone bills.

23. The three aforesaid witnesses PW 3, PW 5 and PW 6 were the beneficiaries by making less payments and obviously they have not deposed against the accused which would be against their own interest. These rebates had not been given by the department for any lawful reasons and *prima facie* these would have been given to these three customers, to cause wrongful gain to them and that could have been done only in collusion with someone handling bills in the branch concerned. As already noticed Devi Prashad was the dealing clerk working under the deceased and the deceased had detected these irregularities causing loss of revenue. For good reasons the deceased had suspected the involvement of accused Devi Prashad for these irregularities and brought out the irregularities to the notice of his higher authorities in his report Ex. PW 7/A on 23rd October, 1987 and PW 7 Mr. Hans Raj Mandhan his immediate boss had confronted the accused and endorsed his report in his note Ex. PW 7/B, it was approved by Chief Accounts Officer *vide* his report Mark x. This resulted in transfer of accused by the Area Manager *vide* his order Mark Y. Not only this, the matter did not stand closed at this stage but further investigation/probe had been initiated involving these irregularities and perhaps more other similar irregularities might have come to light. Even the relevant cancellation register which possibly would have established the authorship of these irregularities was found missing/removed from the custody of the deceased. This shows that there was strong motive on the part of the accused Devi Prashad to do away with the deceased.

24. Learned Counsel for the appellants has contended that there is no reliable evidence that the appellant had committed any defalcation or irregularities in telephone bills and it is not proved that there was any motive on the part of the appellant to commit such an offence. But the matter had not been closed and probe was being made by the deceased.

25. Further PW 1 Shri K. Palani Appan who was working as Assistant Accounts Officer in the same department has deposed that the deceased was his colleague and both were living in Pushp Vihar and about a month before this occurrence the deceased had detected the fraud and wrong cancellation of the bills by the accused Devi Prashad who was working as LDC at that time and that the deceased had told him a week before this occurrence that Devi Prashad had been threatening him as he had detected the fraud committed by Devi Prashad and he had advised him that if he was afraid of the threat, he should inform the higher authorities as well as the police but the deceased had told him that he was not afraid of his life. He was also cross examined on behalf of the State but he stated that he did not remember if he had told the police that on 25.10.87 the deceased at his house had told him that accused Devi Prashad alongwith two persons out of whom one appeared to be his brother had come outside the office and had caught hold of him and had threatened that if the deceased did make a case against him then he would have to lose his life.

26. Learned Counsel for the appellants has pointed out that this witness in his statement under Section 161 Cr.P.C. had not stated that a week before this occurrence accused Devi Prashad had so threatened him. But attention of the witness has not been drawn to this fact when he appeared and deposed in the Court. May be that after such a long time he might not be recollecting the date/time of the threat but one fact is clear that in statement under Section 161 Cr.P.C. fact of threat having been given by the accused to the deceased is mentioned though in that statement the threat given was about a month earlier and now in the Court he has stated that the threat was given about one week earlier. If his attention had been invited to this fact, he might have explained the discrepancy, if any. This witness had no reason to falsely depose against the accused and there is no reason to disbelieve him that the deceased had told him that some time before the occurrence after the fraud of wrongful cancellation of telephone bills was detected by the deceased on or about 23.10.87, the accused Devi Prashad had given threats of life to him. This statement of the deceased is relevant under Section 8 of the Indian Evidence Act showing conduct of accused Devi Prashad.

27. PW 2 Amir Chand Gupta though he has stated that he was a witness to the occurrence but he has not identified any of the three appellants/accused persons.

28. However, the prosecution has relied on circumstantial evidence of recovery of the blood stained clothes from the possession of the three accused persons and also a blood stained razor from accused Dwarka Prashad in pursuance of their disclosure statements. The Trial Court has believed the prosecution case on these recoveries.

29. Learned Counsel for the appellants has contended that the recovery of these articles is fake and false; witnesses from neighbourhood or from the locality or independent witnesses have not been joined through available and the witnesses of the recovery are not independent but are interested witnesses and even otherwise their testimony suffers from infirmity, is contradictory *inter se* and is not reliable and that the learned Trial Court has wrongly believed their testimony. This is disputed by the learned Counsel for the State.

30. PW 4 K.S. Varshney, PW 8 S.I. Bir Singh and PW 24 S.I. Dheer Singh (I.O.) are the three witnesses of these recoveries from the three appellants/accused persons who have deposed that the three accused persons had made disclosure statements and then got recovered their blood stained clothes from their houses and Dwarka Prashad had also got recovered a blood stained razor from a place of concealment.

31. The first contention of learned Counsel for the appellants is that no independent witness from the neighbourhood or locality or other independent witness has been joined at the time of effecting recoveries and as such these recoveries ought not to have been relied upon by the Trial Court. Learned Counsel for the State has contended that no such witnesses are required to be joined in recoveries under Section 27 of the Evidence Act and such recoveries cannot be rejected for not joining such witnesses. She has relied upon *H.P. Administration v. Om Parkash*, AIR 1972 SC 975 and *State of Punjab v. Wasan Singh*, AIR 1981 SC 697.

32. Learned Counsel for the appellants has relied on some authorities which pertain to searches which attract Section 100(4) of the Criminal Procedure Code or the witnesses were not otherwise found reliable and these do not relate to recoveries made during investigation under Section 27 of the Evidence Act. The fact that no public witness was joined by the Investigating Agency at the time of recovery in itself would not render the testimony of Police Officials for this reason alone unreliable.

33. In *HP Administration v. Om Parkash*, AIR 1972 SC 975, it was held that the evidence relating to such recoveries under Section 27 of the Evidence Act is not similar to that contemplated under Section 103 of the Criminal Procedure Code where searches are required to be made in the presence of two or more inhabitants of the locality in which place to be searched is situate. In an investigation under Section 157 the recoveries could be proved even by the solitary evidence of the Investigating Officer if his evidence could otherwise be believed. In *State of Punjab v. Wasan Singh* (supra), it has been held that omission on the part of the Investigating Officer to join with him some independent persons or respectables of the locality to witness the recovery devalues that evidence but does not render it inadmissible.

34. It is thus clear that though it is not in law necessary to join independent witnesses from the locality, however, it is desirable that independent witnesses, if available, should be joined at the time of effecting such recoveries to lend credence to such recoveries especially in heinous crimes. Ultimately, what reliance is to be placed on a witness who is a Police official or a public witness has to be determined on appreciation and evaluation of their testimony taking into consideration the totality of circumstances and also the probability factor.

35. In the present case, witnesses of recoveries are PW 4 K.S. Varshney, a Special Police Officer, otherwise a Draftsman in Central Water Commission, SI Bir Singh (PW 8) and SI Dhir Singh, I.O. (PW 24). PW 4 who is a Special Police Officer would have been appointed by the Commissioner of Police in pursuance of power vested in him under Section 17 of the Delhi Police Act, 1978; "to assist the Delhi Police on any occasion, when he has reason to apprehend the occurrence of any riot or grave disturbance of the peace in any area and he is of the opinion that the ordinary police force is not sufficient for the protection of persons residing, and for the security of property, with such area" and under Sub-clause (b) of Sub-section (4) thereof such Special Police Officer shall "have the same powers, privileges and immunities and perform the same duties and be subject to the same authorities as an ordinary Police Officer."

36. This witness is obviously connected with the police and cannot be said to be that independent a person who may be free from the control of the police. He owes his appointment mostly on account of the recommendation of the local police. He is resident of Govindpuri and was not resident of the locality wherefrom recoveries have been effected. He was employed in the Central Water Commission and it is not known how he happened to be present at the Police Station at about 11.30 a.m. on a working day. There is nothing to show that he had reported at the Police Station on prior notice and had the permission of his department. His presence at the time of effecting these recoveries has not been satisfactorily explained. As a Special Police Officer, it was not a part of his duty to be a witness

of arrest and recovery from the accused. It appears that he is at the back and call of the police and is not an independent witness.

37. PW 4 and PW 8 have stated that though neighbours had collected at the time of making these recoveries but they did not know if the I.O. had asked anyone of them to join at such recoveries. If the I.O. had made efforts to join public witnesses PW 4 and PW 8 would have known this fact. In the circumstances the statement of PW 24 I.O. that he made such efforts to join those persons but they had not agreed does not inspire confidence. Thus it cannot be said that any person from the locality though available was asked to join them at the time of search.

38. The it is contended that it is improbable that when one of the accused, i.e., Devi Parshad was suspected for this crime from the evening of 17.11.87 itself the accused persons would have preserved any incriminating article like their clothes at their houses for 5/6 days when they were seized.

39. The occurrence had taken place on 17.11.87 whereas these articles have been recovered on 23.11.87 i.e. after 5/6 days. According to the three witnesses of recovery blood stained shirt and Pant alongwith missing telephone bills cancellation register was lying in a bag at the house of accused Devi Prashad, blood stained shirt and Pant alongwith two books and one exercise book were lying in another bag in the same house which were recovered from accused Dwarka Prashad and one blood stained Pant and Bushirt belonging to Lalji accused were recovered from his house. It is not the case of the prosecution that these clothes had been washed when recovered. Accused Devi Prashad was suspected to be involved in the crime as would appear from the statement of K. Palana Appan, Assistant Accounts Officer (PW 1), who was working in the same department where the deceased was working and both were residing in Pushap Vihar. He had made statement to the police same evening and also PW 7 Hans Raj Mandhan on 18.11.87 had stated in his statement to the Police about the irregularities in telephone bills having been discovered by the deceased for which Devi Parshad who was working under the deceased was suspected. It is also stated by the I.O. that accused Devi Prashad was absconding from his house after 18.11.87. In the circumstances, no person with little commonsense would have kept or preserved any incriminating articles like blood stained clothes with him and so concealed in bags. This circumstance casts serious doubt about this recovery.

40. Learned Counsel has also pointed out that PW 8 and other police staff were deputed on special emergency duty on the day of recovery and in that case those Police Officers would not have gone for investigation of the case after leaving such duty.

41. PW 8 has deposed that on that day at about 11/11.30 a.m. he was present at the office of N.P.C.C. at Nehru Place "for law and order problem as the strike was going on. S.I. Dhir Singh (and) one Constable Israil were present at NPCC and from there I accompanied them to the Police Station in the investigation of this case".

42. If this Police Officer and perhaps SI Dhir Singh and Constable Israil also had been deputed for such special duty it is very doubtful that they would have left that place and had gone for investigation of this case at 11.30 a.m. or so and remained away from there thereafter till about midnight especially when no sudden urgency had arisen for proceeding for the arrest of the accused person(s) and also

the I.O. had no secret information that the accused would be available at his house at that hour. This is also suspicious circumstance casting doubt this recovery.

43. Blood stained incriminating articles as well as blood stained clothes and other articles belonging to the deceased were available on 23.11.87 but very strangely these articles were sent to CFSL after 25 day as on 18.12.87 and there is no explanation for this inordinate delay on the part of the Investigating Agency. It has been held in *Santa Singh v. State of Punjab*, AIR 1956 SC 526, that delay in sending the sealed parcels to the expert was a suspicious feature which threw doubts on the *bonafides* of the investigation. Investigation should not only be fair but appear to be fair. This circumstance also creates doubt on the *bonafides* in the investigation and the recoveries alleged to have been made from the accused.

44. PW 8 had stated that the seal used was given to him which he had returned after 2/3 days whereas PW 24 S.I. Dhir Singh has deposed that it remained with PW 8 till these articles were sent to CFSL on 18.12.87 but there is no material to this effect available. We do not find any valid reason why PW 8 would have kept the seal for 25 days. There is no reason to disbelieve PW 8. Obviously, the seal was with the I.O. before he had sent the incriminating articles to CFSL. There is no explanation why the seal was not given to PW 4 if he was joined as an independent witness. This is another circumstance casting doubt on the *bonafides* of the Investigating Agency.

45. There are also some contradictions in the statements of the witnesses of recoveries. According to PW 4 Police Party consisted of S.I. Dhir Singh, one H.C. and one Constable besides himself and that they had travelled by a private car driven by S.I. Dhir Singh. He has also stated that after effecting all the recoveries from the three accused persons they had returned to Police Station at about 3/3.30 p.m. He has excluded the presence for S.I. Bir Singh PW 8 and of Vinod Kumar owner/driver of the car.

46. PW 8 has not stated that one H.C. and Vinod Kumar owner/driver were with them.

47. PW 24 S.I. Dhir Singh, on the other hand, has deposed that Police Party included S.I. Bir Singh, H.C. Jaswant Singh, Constable Insrail, PW 4 Varshney and his friend Vindo Kumar who was owner of the car in which they had travelled.

48. PW 8 had deposed that they had gone to the house of accused Lalji after it was dark and not by 5.00 p.m. He is thus very specific about it. Whereas PW 24 has deposed that the had reached the house of Lalji at 3.00 pm. Both PW 8 and PW 24 have also deposed that they remained at the house of Lalji till about 10/10.30 p.m. and returned to the Police Station at 11.45/11.30 p.m. dropping PW 4 on the way after 10 p.m. The three witnesses have made contradictory statements about the persons included in the search party and in the timings of their effecting recoveries and also about their return to the Police Station. There is no reason why they would have remained at the house of accused Lalji for about 7 hours for effecting single reovery from his house if he had voluntarily made a disclosure statement and got his clothes recovered soon after police party had reached there at about 3.00 p.m. according to the I.O.

49. These contradictions, in the circumstances, create, doubt if at all this Police party had gone to and made recoveries from the houses of the accused persons.

50. There also seems to be no valid reason why a private car should have been used for about 12 hours alongwith its owner Vinod Kumar for such official purpose and if Vinod Kumar was with them why he had not been joined as a witness of recoveries.

51. In view of these circumstances, recovery of the razor at the instance of accused Devi Parshad also cannot be said to be beyond suspicion.

52. It is noticed that opinion of the doctor about razor in question being the possible weapon of offence has not be elicited when he was examined in Court. It was held by the Supreme Court in *Kartarey v. State of U.P.*, AIR 1976 SC 76 which was reiterated in *Ishwar Singh v. The State of U.P.*, AIR 1976 SC 2423 that it is the duty of the prosecution and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may sometimes cause aberration in the course of justice.

53. However, the post mortem Doctor (PW 18) in cross-examination has stated that he could not say whether the injuries on the person of the deceased were caused by single edged or double edged weapon. On our query learned Counsel for the State has replied that in view of this statement of the Doctor non-inviting of his opinion about possibility of this razor being the weapon of offence is of no consequence. This means that according to her this razor is not the weapon of offence. If so, its recovery is also of no help. But we are surprised to find that opinion had been given by this doctor during investigation about it being the possible weapon of offence which fact has not been brought to his notice. This shows lack of diligence on the part of the prosecution as well as of the Trial Court.

54. Besides the shirt and Pant, a register (Ex. P-13) was also recovered from the appellant Devi Parshad. No witness has been examined by the prosecution to prove how it connects him with the crime or is an incriminating circumstance against him. Mere recovery of it will not prove its contents or its authorship. This recovery is also of no help.

55. All these circumstances, create serious doubts in the genuineness of these recoveries as well as in the *bonafides* of the Investigating Agency and, in the circumstances, it would not be safe to sustain conviction on the basis of these recoveries. In our view, the learned Trial Court had not taken into consideration these material circumstances before relying on these recoveries. The findings of the Trial Court to this effect are not reasonable and justified.

56. The only two circumstances left are motive and conduct of the accused Devi Prashad in extending threat to the deceased sometime before the occurrence. But these circumstances alone are not sufficient to bring home the guilt to the accused persons. The result is that the judgment of conviction and sentence are not valid or justified and are liable to be set aside. We accordingly accept this appeal and set aside the impugned judgment of conviction and order of sentence both dated 10.10.90 and acquit all the three appellants of the charge under Sections 302/ 34 I.P.C. under which they were convicted.

57. The accused persons are on bail. Their bail bonds are discharged.

Appeal allowed.