

Ravi Kumar @ Sonu vs State on 5 October, 2010

Author: Anil Kumar

Bench: Anil Kumar, Suresh Kait

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Crl.M.B No.553/2010 in Crl. Appeal No. 444/2010

% Date of Decision: 5.10.2010

Ravi Kumar @ Sonu Appellant/Applicant

Through Mr. S.P. Singh Choudhary and Mr. Y.R. Sharma, Advocates

Versus

State Respondent

Through Mr. Lovkesh Sawhney, APP

And

+ Crl.M.B. No. 701/2010 in Crl. Appeal No. 595/2010

Ashwani Dubey @ ChhanwaAppellant/Applicant

Through Mr. V.K. Shukla and Mr. A.K. Tripathi, Advocates

Versus

State Respondent

Through Mr. Lovkesh Sawhney, APP

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SURESH KAIT

1.	Whether reporters of Local papers may be allowed to see the judgment?	YES
2.	To be referred to the reporter or not?	NO
3.	Whether the judgment should be reported in the Digest?	NO

Crl.M.B No.553/2010 in Crl.A.No. 444/2010
& Crl.M.B No.701/2010 in Crl..A No. 595/2010
ANIL KUMAR, J.

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1. The appellants/applicants in above noted appeals, namely, Sh. Ravi Kumar and Sh. Ashwani Dubey were convicted for murdering the deceased Sarvesh Kumar, a TSR/auto driver, having the common intention with the ulterior motive of committing a robbery and murdering him, by a common order dated 24th February, 2010 and were convicted to undergo life imprisonment and a fine of Rs.5,000/- each and in default to further undergo simple imprisonment for six months.

2. The appellants/applicants Ravi Kumar and Ashwani Dubey have sought suspension of their sentences and their release on bail by filing respective applications in their appeals. The appellant Ravi Kumar has filed Crl. Appeal No. 444/2010 in which the application being Crl.M.B.No. 553/2010 has been filed under Section 389 of Crl. Procedure Code whereas the appellant/applicant Sh. Ashwani Dubey has filed Crl. Appeal No. 595/2010 in which Crl. M.B. No. 701/2010 is filed by him under Section 389 of Crl. Procedure Code.

3. Both the applicants were charged with the allegation that on 28th January, 2004 at 7:30 pm at Jharoda Road, near Sangam Vihar, Delhi, they committed robbery by taking the TSR of Sarvesh Kumar and both & Crl.M.B No.701/2010 in Crl..A No. 595/2010 committed murder of TSR driver Sarvesh Kumar by the use of knives in furtherance of their common intention. According to the prosecution, PW 4, constable Hari Shankar was posted at Police Station Welcome Nagar on 29th January, 2004 and while on patrolling duty along with PW10, ASI Ashiq Ali and PW8, constable Bhagat Singh, a secret information was received that two boys had come to Kabari Market to sell a three wheeler scooter. After reaching there, they saw Ashwani Kumar sitting on the driver seat of TSR No. DLIRG-8733 whereas accused Ravi was sitting on the rear seat of said TSR. On demand for the papers of the scooter, they could not produce any paper and on search, a challan bearing No. AG099387 issued in the name of Ram Kishan was recovered along with a permit. A raxine bag bearing blood stains was found lying near Ravi and blood stains were also found on the back seat. The blood stains were detected on the pant of the appellant Ashwani Dubey, which were taken into possession vide memo Ex. PW4/C, and the blood stains were also found on the driver seat. The blood stains and the cloths having blood stains were seized and the three wheeler scooter was also seized vide Seizure Memo Ex. PW 4/A. The initial Rukka in the case was lodged on the statement of constable Sunil Kumar, PW-11, who had deposed that on 29th January, 2004, he was posted at Police Post Jharoda, PS Timar Pur and while on patrolling duty, along with SI Mahavir Singh, at about 10:15 am at Jharoda Pusta opposite Sangam Vihar, Gali No. 3 they saw a dead body soaked with & Crl.M.B No.701/2010 in Crl..A No. 595/2010 blood lying in the bushes near the side of the road. The body had two thumbs in both hands and there were sharp edged injuries on neck and fingers. The driving licence was recovered from the pant of the deceased bearing the name of Sarvesh. Efforts were made to identify the dead body. The driving licence, Ex.PX1 the visiting card, Ex.PX2 blood stained earth, Ex.PX3 and earth control, Ex.PX4 were also lifted and body was shifted to mortuary.

4. On 30th January, 2004, the legal heirs of the deceased identified the dead body as of Sarvesh Kumar and the post mortem was conducted on 30th January, 2004 at about 1.15 p.m. and it was opined that the deceased had died about 40 hours ago and in the circumstances, the time of death was stated to be about 8:00 p.m. on 28th January, 2004. On the basis of the statement of Azad Singh that he had seen the deceased Sarvesh Kumar last time with the accused at 7:30 p.m. on 28th January, 2004 and other materials, the appellants were arrested and were charged of committing robbery on 28th January, 2004 at 7:30 pm by using deadly weapon, i.e., knives and committing an offence under Section 392/397 of IPC and also committing murder of Sarvesh Kumar, S/o Sunder Lal, A TSR driver and thus committing an offence under Section 302/34 of IPC. The appellants/accused pleaded not guilty and claimed trial. An extensive trial was conducted where the prosecution examined 23 witnesses and the statements of the & Crl.M.B No.701/2010 in Crl..A No. 595/2010 accused persons were recorded under Section-313 of the Criminal Procedure Code and thereafter, by impugned orders they have been convicted of offence of robbery and murder and have been awarded life sentence and fine of Rs.5,000/- each and in default of which, to undergo six months simple imprisonment.

5. Both the accused, in their respective applications for suspension of sentence have primarily emphasised similar pleas and contentions and their counsel have argued and raised similar pleas. The applicant Ravi is alleged to be in custody since 2004 and it is contended that his conviction and sentence is without any evidence and is based on surmises and conjectures and he has been acquitted in this case under Section 392/397 of IPC and in the circumstances, it is asserted that he is entitled for suspension of sentence and for his release on bail. The applicant/Ashwani Dubey has sought suspension of sentence on the ground that there is every likelihood of his appeal being allowed and as per the present roster, the appellant Sh. Ashwani Dubey, who is in jail for the last six years, his appeal is not likely to be heard in the next ten years and in the circumstances, he will suffer irreparable loss and the prime time of his youth will be ruined due to confinement in jail. The appellants also contended that they do not have any criminal history and in case, they are released on bail, they shall not misuse liberty granted to them after suspending their sentence.

& Crl.M.B No.701/2010 in Crl..A No. 595/2010

6. The learned counsel for the appellants/applicants Mr. S.P. Singh Choudhary Advocate and Mr. V.K. Shukla Advocate have argued elaborately on a number of days and have taken us through substantial evidence and documents on record. They emphasised that the statement of PW-9 Sh. Azad Singh is not reliable at all and that the recoveries have also been manipulated pursuant to alleged disclosure statement. Mr. Choudhary, learned counsel also contended that the disclosure statement of Sh. Ravi Kumar does not bear any date reflecting unequivocally that the disclosure statements and other evidence against the applicants had been fabricated and manufactured to implicate them. The learned counsel contended that PW-9 Sh. Azad Singh, in his statement under Section 161 of Criminal Procedure Code recorded on 29th January, 2004, had not named the appellants/applicants. Referring to the statement of PW-9, it is asserted that he came to know about the names of the accused persons only while coming to the Court and also from the summons received by him, where the name of the accused had been mentioned. Counsel for both the accused greatly emphasised on the fact that PW-9 had deposed that he had seen the scooter of Sarvesh at

Police Station Welcome at about 11.00 am whereas according to the version of the prosecution, the scooter was seized in the evening of 29th January, 2004 at about 5:30 pm. Referring to the statement of PW-5, Rajender, also the plea was augmented that if the scooter was outside the police station & Crl.M.B No.701/2010 in Crl..A No. 595/2010 Welcome at 11:00 am, the same could not be recovered nor the accused could be arrested at 5:30 pm or thereafter on the same date. According to them this is reflective of the unreliable recoveries and in the circumstances they cannot be convicted of the offenses alleged against them.

7. According to them, the prosecution version that the accused had tried to sell the three wheeler scooter at Kabari Market is also a cooked up story. Their assertion is that there are major contradictions in recording of the time and recording of statement of witnesses by the prosecution. Non participation of accused in test identification parade by the applicants has also been justified on the ground that the faces of the accused were not muffled and their photographs were taken and therefore, they were justified in not participating in the test identification parade and no adverse inference can be taken against them. Mr. V.K. Shukla Advocate learned counsel for the applicant/Ashwani also emphasised that the prosecution has failed to disclose the injury on the body of Ravi and placed reliance on Ex. PW- 23/G. According to him, if there were injuries on the body of the accused, which have not been explained, then disclosure statement could not be considered. According to him, the allegation of robbing the scooter has not been accepted as the applicants have not been convicted under Section 392/397 of IPC. It is contended that all these & Crl.M.B No.701/2010 in Crl..A No. 595/2010 contradictions and points have not been considered by the Trial Court and the plea of the prosecution has not been corroborated from the statement of PW-10, ASI Aashiq Ali. Referring to contradictions, it is contended that PW-23 Investigating Officer, Bir Singh has deposed that he had recorded the statement of Azad Singh, PW9 on 29th January, 2004 at about 6:00 p.m. whereas Azad Singh, PW-9 has deposed that his statement was recorded at 7:00 pm in the presence of SHO by some other police official. Castigating the theory of recovery of scooter in the evening of 29th January, 2004, reliance has been placed on the statement of PW-5 Rajender, who is alleged to have deposed in his examination-in-chief that at 12:00 to 12:30 a.m. some driver had informed him that his auto was in police station Welcome. The credibility of PW-9 has also been challenged on the ground that despite meeting the wife of the deceased and others, PW-9 had not informed for several hours at different places that he had seen deceased going with the applicants at 7:30 p.m. on 28th January, 2005. According to them, the wife of the deceased, Mala PW6, Sarvesh Kumar had admitted that Azad Singh had informed her that her husband's TSR was lying at the police station and when she went to the police station, the TSR was there. Reference was also made to the testimony of PW-7 Usha, wife of PW-5 Rajender who deposed that she was called by wife of the deceased at 6 a.m. and she had come to know that TSR was lying at Police Station Welcome through the witness Azad Singh, who knew the & Crl.M.B No.701/2010 in Crl..A No. 595/2010 number of TSR which was lying at the police station Welcome. In the circumstances, it is asserted that PW-9 is a planted witness and no reliance should be placed on his deposition for any purpose.

8. The counsel for the appellants/applicants has also sought suspension of sentence on the ground that the conviction of both the appellants/applicants is based on the testimony of Sh.Azad Singh PW-9 who was allowed to be re-examined by the Court after the cross- examination of the said

witness was concluded on 18.8.2006. The said witnesses was allowed to be re-examined illegally, however, the appellants/applicants have not been allowed to cross-examine Sh.Azad Singh again after his re-examination despite an application filed for his cross-examination. Sh.Azad Singh PW-9 was not produced by the prosecution after his re-examination was recorded illegally and in the circumstances, the entire testimony of the PW-9 Sh.Azad Singh has to be discarded and in the absence of his testimony, there is no deposition inculcating the appellants/applicants, as he is the only person who has deposed about the deceased being last seen with the accused at 7.30 p.m. on 28th January, 2004. The learned counsel for the appellant/applicant Sh.Ravi Kumar, has also relied on an application dated 27th August, 2008 filed under Section 311 of the Criminal Procedure Code contending, inter-alia that the request of the prosecution to re-examine the witness PW-9 on 28th August, 2006 was & Crl.M.B No.701/2010 in Crl..A No. 595/2010 without assigning any reason and such re-examination was illegal, however, even after allowing the re-examination, the accused should have been granted an opportunity to cross-examine the witness after his re-examination. It was further asserted that on 15th April, 2008, Investigating Officer PW-23 Inspector Bir Singh, was partly cross- examined and the case was adjourned but later on due to non- availability of the counsel for the accused his further cross-examination had been closed and consequently, the further cross-examination of PW-23 be also allowed to the accused. In the circumstances, by the said application further cross-examination of PW-9 and PW-23 Sh.Azad Singh and Sh.Bir Singh was prayed. The said application was allowed by the trial court by order dated 3rd January, 2009, however, only further cross-examination of PW-9 was permitted by defence counsel on behalf of the accused to the extent of re-examination permitted on 18th August, 2006. The other plea on which, the learned counsel for the applicants have sought suspension of sentence is that from the statements of the witnesses, it is apparent that uncovered faces of the accused were shown, and therefore, the accused were justified in denying the TIP and no adverse inferences could be taken for refusal to participate in identification parade.

9. The other plea regarding the suspension of sentence is that the owner of the scooter Sh.Vishwanath has not been examined and the & Crl.M.B No.701/2010 in Crl..A No. 595/2010 court has itself doubted the statement of the Sh.Azad Singh PW-9. It is also pleaded that the motive of looting his TSR has not been established. Learned counsel for the applicant/ Ashwani Dubey has also emphasized that the applicants have not been convicted under Section 392 and 397 of Indian Penal Code although the charge was framed against them. Learned counsel for the applicant, Mr Shukla, has also relied on the decision of the Supreme Court in Special Leave to Appeal (Criminal) No.2356 of 2010 dated 1st October, 2010, titled as Kushaal Singh v. State of UP in support of his contention that since the appeal is not likely to be taken up for hearing in near future, the sentence of the appellant/Ashwani Dubey is liable to be suspended and he is entitled to be released on bail.

10. Per contra, the learned APP in his laconic submission contended that Sh.Azad Singh PW-9 in his deposition on 18th January, 2006 categorically deposed that both the appellants/applicants who were present in the court were the persons who had boarded the TSR of the deceased when he left Delhi main railway station last time. He has also pointed out that without any justification, the said witness was not cross-examined on that date, entailing imposition of cost of Rs.1000/- and thereafter, he was cross-examined after 8 months on 18th August, 2006. According to him, during this time, the said witness was influenced by the appellants/applicants. However, even on 18th

August, & Crl.M.B No.701/2010 in Crl..A No. 595/2010 2006 in cross-examination by Sh.R.K.Srivastava, learned counsel for the accused Ashwani Dubey, he reiterated that he has seen the accused Ashwani Dubey along with his associates boarding the TSR from a distance of 5/6 step. He specifically denied the suggestion on behalf of the accused Ashwani Dubey that he was not present at the place or had not seen Ashwani Dubey and his associates boarding the TSR of Sarvesh (deceased). In his cross-examination by learned counsel for Sh.Ravi Kumar, he deposed that he did not tell the Investigation Officer in his initial statement that the accused persons had boarded the TSR of Sarvesh, deceased when he left Delhi main railway station. This fact was, however, disclosed in the supplementary statement, which was recorded on 12th March, 2004 after the accused had declined test identification parade on the ground that their photos were taken.

11. From the perusal of the testimonies of different witnesses by this Court, it is apparent that PW 9 though deposed that the TSR was parked out, at the Police Station, Welcome at 11.00 am, however, this portion of the deposition is contrary to the cogent evidence of other witnesses. The learned APP has also contended that this was incorrectly deposed deliberately by the witness under the influence of the accused. From the perusal of the testimonies of police witnesses on the record produced by the prosecution, it is inevitable to infer that on the basis of oral testimony of PW 9, it cannot be inferred that the TSR of the & Crl.M.B No.701/2010 in Crl..A No. 595/2010 deceased was standing outside the PS Welcome at 11.00 am and this has been deposed wrongly by the said witness.

12. The learned APP has contended that perusal of the re- examination reflects that the said witness was not re-examined on that day, however, PW-9 Sh.Azad Singh was allowed to be cross-examined by the prosecution as only suggestions were given to the said witness which were denied by him. It is admitted by the learned APP that before allowing the cross examination of PW 9, he was not declared hostile. It is also contended that in the circumstances, even if the said witness could not be produced pursuant to order dated 3rd January, 2009 for cross examination by accused, then at the best his cross-examination by the prosecution recorded on 18th August, 2006 be ignored and not the entire statement. According to the learned APP even after ignoring the cross-examination by the prosecution recorded on 18th August, 2006 under the garb of re-examination without declaring him hostile, the remaining testimony of PW-9 is sufficient to inculcate the appellants/applicants.

13. Learned APP has also pointed out that though the description of both the accused was given by PW-9 Sh.Azad Singh in his statement under Section 161 of Criminal Procedure Code on 29th January, 2004, however, their names were not given. Their test identification parade & Crl.M.B No.701/2010 in Crl..A No. 595/2010 was sought in February, 2004 in less than a month however, they refused to participate in the test identification parade on the ground that their photographs had been taken. Therefore, prosecution recorded the supplementary statement of PW-9 Sh.Azad Singh under Section 161 of Criminal Procedure Code on 12th March, 2004 where relevant facts were detailed. From the statement of PW 9 it is apparent that the accused had boarded the TSR of the deceased Sarvesh on 28th January, 2004 at 7.30 p.m. According to the post mortem conducted on 30th January, 2004 at about 1.15 p.m. the time of the death was estimated to be 40 hours before post mortem which would be about 8.00 p.m. on 28th January, 2004 reflecting proximity between the last seen evidence and perpetration of crime by the accused. The learned APP has also contended that on the basis of the secret information received at PS Sheelam Pur that the accused

were trying to sell the three wheeler in the Kabadi market on 29th January, 2004, they were apprehended and a bag containing clothes having blood stains was also recovered. PW-10 Investigating Officer ASI Ashiq Ali had informed Police Station Timar Pur which recorded the Rozanamacha and thereafter on the basis of disclosure statement of the accused the blood stained knives were recovered. According to the learned counsel for the prosecution witnesses, police officers have stated that they had arrested the accused at 5.30 p.m. on 29th January, 2004 and their testimonies are reliable. On the testimony of PW-9 Sh.Azad Singh which was recorded after a & Crl.M.B No.701/2010 in Crl..A No. 595/2010 gap of 8 months after he deposed that the deceased was last seen with the accused, it cannot be held that the scooter was standing outside the police station Welcome at 11.00 a.m. Regarding the statement of the PW-1, Sh.Mahendra Singh deposing that Rozanamacha entries were made in Malkhana Register at around 10.00 a.m, the contents of Malkhana Register which were produced before the Court could not be disbelieved or doubted. The said witness had deposed orally that the entries were made at 10.00 am whereas time is not given in the malkhana register. In the circumstances, the recoveries made cannot be doubted on the basis of oral assertions made by the witness. The malkhana register only has the column for date on which the articles are deposited and not time. It is not the case that in respect of recovered article in the present case the time is not mentioned and other articles deposited in the malkhana register had entries about the time. In the circumstances the plea of the learned counsel for the accused cannot be accepted that the recoveries were made prior to 5.30 a.m and hence cannot be relied on.

14. The plea of the learned counsel for the appellants/applicants that for every entry made in the Malkhana Register there is correspondence DD entry is also refuted by the learned APP contending that in the daily diary entries are made when a police officer leaves for some place and & Crl.M.B No.701/2010 in Crl..A No. 595/2010 whenever he comes back. In case entry is to be made in Malkhana Register, it is not necessary that a corresponding DD entry will have to be made in daily diary. In any case after seeing the malkhana register, this Court does not find any manipulation in the same so as to disbelieve the recoveries made by the prosecution on this ground.

15. The learned APP has also contended that the testimony of Mahavir Singh PW-17 would show that two knives were recovered pursuant to disclosure statement of the appellants/applicants from the bushes on 30th January, 2004. The two knives recovered were not lying in a common area unhidden from the public view and in the circumstances, the recovery cannot be doubted on this ground.

16. Regarding not participating in the TIP, the learned APP has referred to the deposition of PW-21 Mrs. Archana Sinha who deposed that the appellants/applicants refused to participate in the test identification parade on the ground that their photographs had been taken in the police station. In her cross-examination, it was not suggested on behalf of either of the accused that the test identification parade was declined by them because they were not muffled as is sought to be argued now by the learned counsel for the accused. & Crl.M.B No.701/2010 in Crl..A No. 595/2010

17. The learned APP has also relied on the statement of Deepak Uppal, PW-22 to assert that TSR was purchased by Vishwanath in the replacement scheme whereby TSR DL 1-RG 8733 was acquired but him remained in the name of Vishwanath who had given it to him, by a sale letter and other related

documents. The certificate in the name of Vishwanath Ex.P-2, RC P-3, Insurance policy Ex. P-1 of the said TSR were also produced. He has deposed that the said TSR was given in 2003 to Sh.Shakeel Ahmed who also executed the transfer related documents however, the registration remained in the name of Vishwanath. The learned APP has contended that no suggestion was given to the said witness that the sale letter and other related documents in respect of the said TSR were not executed and in the circumstances, the plea of the applicants that ownership of the TSR has not been established conclusively is not correct, nor any benefit on account of it can be drawn by the applicants.

18. This Court has heard the learned counsel for the applicants in extenso on various dates as the learned counsel insisted on detailed arguments. The plea of the learned counsel for the applicants that the appeal is not likely to be taken up in near future cannot be accepted as the appeals of 2010 where the accused are under custody are listed in regular matters and therefore, the plea that the appeal is not likely to be taken up in near future and the applicants have already undergone & Crl.M.B No.701/2010 in Crl..A No. 595/2010 about 4 to 5 years of incarceration would not be a ground to suspend their sentence and to release them on bail. Learned counsel for the applicants has also relied on the decision of the Supreme Court in Special Leave to Appeal (Criminal) No.2356 of 2010 dated 1st October, 2010, titled as Kushaal Singh v. State of UP, where the sentence of the accused was suspended who had remained in jail for 8 years and there was no likelihood of an early hearing of the appeal. The facts of the case relied on by learned counsel are distinguishable. In the said case despite the order of the High Court of Allahabad to list the appeal for hearing, the same was not listed and the accused/appellant had been in jail for more than 8 years and in those circumstances, the Supreme Court had suspended the sentence of the accused.

19. In Kishori Lal v. Rupa, (2004) 7 SCC 638, the Supreme Court has indicated the factors that require to be considered by the courts while granting benefit under Section 389 in cases involving serious offences like murder, etc.. It will be relevant to refer to the observations made there at 639-40, (paras 4-6) "4. Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. There is a distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the appellate court to record reasons in writing for ordering suspension of execution of the sentence or order appealed against. If he is in confinement, the said court can direct that he be released on bail or on his own bond. The requirement of & Crl.M.B No.701/2010 in Crl..A No. 595/2010 recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.

5. The appellate court is duty-bound to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension of execution of sentence and grant of bail. In the instant case, the only factor which seems to have weighed with the High Court for directing suspension of sentence and grant of bail is the absence of allegation of misuse of liberty during the earlier period when the respondent-accused were on bail.

6. The mere fact that during the trial, they were granted bail and there was no allegation of misuse of liberty, is really not of much significance. The effect of bail granted during trial loses significance when on completion of trial, the accused persons have been found guilty. The mere fact that during the period when the accused persons were on bail during trial there was no misuse of liberties, does not per se warrant suspension of execution of sentence and grant of bail. What really was necessary to be considered by the High Court is whether reasons existed to suspend the execution of sentence and thereafter grant bail. The High Court does not seem to have kept the correct principle in view."

The aforesaid view is reiterated by the Supreme Court in Vasant Tukaram Pawar v. State of Maharashtra (2005) 5 SCC 281 SCC p.283, para 7 and Gomti v. Thakurdas (2007) 11 SCC 160. In (2008) 2 SCC 571, Sidhartha Vasisht alias Manu Sharma Vs State(NCT of Delhi) it was held that when a person is convicted by a Court, he cannot be said to be an innocent person until the final decision is recorded by the Superior Court or appellate Court in his favour. The Supreme Court rather held that the mere fact that during the period of trial, the accused was on bail and there was no misuse of liberty, does not per se warrant suspension of sentence and grant of bail. What is really & Crl.M.B No.701/2010 in Crl..A No. 595/2010 necessary is to consider whether reasons exist to suspend execution of sentence and grant of bail. It was further held in para 32 of the said judgment that the expression within 'measurable distance of time' the appeal is likely to be heard is to be considered keeping in view the seriousness of offence, the manner in which the crime was said to have been committed and the gravity of offence and not to suspend the sentence merely on the ground that the accused has undergone a number of years of sentence.

20. Prima facie perusal of the testimonies of PW-9 and PW-10 and other evidence also reveal that the last seen evidence of PW-9 cannot be discarded. PW-9 had categorically admitted that he had seen the deceased with the accused at 7.30 p.m. and on the basis of medical evidence the time of death has been established to be about 8.00 p.m which is within half an hour of victim being last seen with the accused. Last seen evidence reflects a proximity to the murder of the deceased and in the circumstances, it cannot be inferred that the deceased could be with someone else.

21. The other factor which inculcates the accused is their attempt to sell three wheeler scooter which used to be plied by the deceased, in the Kabadi market where on secret information the scooter was seized and & Crl.M.B No.701/2010 in Crl..A No. 595/2010 the applicants were arrested. Though repeated submissions were made by the learned counsel for the appellants/applicants that the TSR was already standing at 11.00 am outside the police station Welcome but on perusal of the testimonies of the witnesses, the only conclusion which can be drawn is that the applicants were apprehended in the evening of 29th January, 2004 and recoveries were made. The plea raised by the applicants that the TSR was standing at 11.00 a.m. outside the police station Welcome cannot be accepted, nor on the said ground the applicants shall be entitled for suspension of their sentence.

22. The applicants cannot be absolved of not participating in the TIP on the plea raised by them. The Magistrate PW-22 Mrs. Archana Sinha stated that they had refused to participate in the TIP on the ground that their photographs were taken, however, no other suggestion was given to her that their faces were also not muffled and therefore they had not participated in TIP. The testimony of the PW-17 Sh.Mahavir Singh who has categorically deposed that their faces were covered after their

formal arrest and when they were produced in Karkardooma Court before the concerned Magistrate cannot be ignored. The said witness has categorically deposed that throughout the custody of police remand both the applicants were kept in muffled faces. The deposition of the said witness PW-17 Sh. Mahavir Singh could not be impeached by the accused rather another suggestion was given to him that at the time of & Crl.M.B No.701/2010 in Crl..A No. 595/2010 muffling of the faces and before PW-9 Sh.Azad Singh was present at police station Welcome and he had been shown the applicants. Apparently this plea that their faces were seen by PW9 before they were muffled is different from the plea that they were not muffled. If their faces had been seen by PW 9 then there was no need to muffle their faces and the applicants should have raised a plea regarding this. They rather raised a plea that their photographs had been taken. PW-15 ASI Sh.Ramesh Kumar in his statement recorded on 16th May, 2006 also categorically deposed that both the accused were kept in muffled faces. Even to this witness the suggestion was only given on behalf of the counsel for Ravi Kumar that he was not in muffled face and on behalf of the Ashwani Dubey, it was not suggested that he was not muffled. The accused have taken different pleas which are also mutually sustainable and in the circumstances the effect of not participating in TIP by the accused cannot be diluted.

23. Learned counsel for the applicants has also emphasized that the applicants have not been convicted under Section 392 and 397 of Indian Penal Code although the charge was framed against them. Perusal of the order of conviction dated 24th February, 2010 however, reveals that the said contentions of the accused is not correct as the Session Court has held as under:-

& Crl.M.B No.701/2010 in Crl..A No. 595/2010 "Definitely and positively, it draws the guilt of the accused persons beyond of reasonable doubts that the accused persons are the only persons who are the real culprits to commit the murder of Sarvesh with their common intention with the anterior motive to commit a robbery." Merely because while convicting them for robbery, Section 392 and 397 have not been mentioned categorically would not mean that they have not been convicted for robbery. In the circumstances, even on this count the applicants shall not be entitled for suspension of their sentence and for their release on bail.

24. In the entirety of the facts and circumstances, and on perusal of the testimonies of various witnesses, the pleas and contentions of the applicants for suspension of their sentence and to release them on bail cannot be accepted. There is cogent evidence about the deceased being last seen with the accused in proximity to the time when he has been murdered. The recoveries of TSR from the accused also cannot be ignored on the plea that it was standing outside the police station Welcome much before when it was seized by the police in the evening after 5.35 p.m. on 29th January, 2004. The statement of the PW-9 also cannot be ignored completely on the ground that after additional cross- examination of PW-9 in the garb of re-examination, opportunity to cross-examine the said witness could not be availed by the applicants as later on PW-9 could not be produced by the prosecution. In the & Crl.M.B No.701/2010 in Crl..A No. 595/2010 circumstances, this Court does not find sufficient ground to suspend the sentence of the applicants and to release them on bail.

25. For the foregoing reasons, we are not inclined to suspend the sentence of the applicants Ravi Kumar @ Sonu and Ashwani Dubey. Their respective application for suspension of their sentence

and to release them on bail are therefore, dismissed.

ANIL KUMAR, J.

SURESH KAIT, J.

OCTOBER 05, 2010 rs/vk & CrI.M.B No.701/2010 in CrI..A No. 595/2010