
(2011) 10 DEL CK 0142

In the Delhi High Court

Case No : Criminal A. No. 702 of 2007, Criminal A. No. 334 of 2008 and Criminal A. No. 87 of 2009

Manju Kumar

APPELLANT

Vs

State N.C.T. of Delhi
 Smt. Devendri Vs State

Jayant@Amit Vs State Govt. of NCT of Delhi

RESPONDENT

Date of Decision : 17-10-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 160, 311, 313
Evidence Act, 1872 — Section 137, 138
Penal Code, 1860 (IPC) — Section 212, 34, 365, 396, 411
Prevention of Corruption Act, 1947 — Section 5A

Citation : (2012) 1 ILR Delhi 271

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : R.P. Luthra, Criminal A. No. 702/2007, Ms. Nandita Rao, Criminal A. No.334/2008, Mr. Kaushik Dey, Criminal A. No. 87/2009, Mr. A.J. Bhambhani with Ms. Nisha Bhambhani Advocates, Criminal A. No. 395/2009 and Mr. S.K. Sharma and Mr. Ankur Chibber, Criminal A. No. 649/2010, for the Appellant; M.N. Dudeja, APP for the State, Crl. A. No. 702/2007, Mr. M.N. Dudeja, APP for the State, Crl. A. No. 334/2008, Mr. M.N. Dudeja, APP for the State, Crl. A. No. 87/2009 Mr. M.N. Dudeja, APP for the State, Crl. A. No.395/2009 and Mr. M.N. Dudeja, APP for the State, Crl. A. No. 649/2010, for the Respondent

Final Decision : Dismissed

Judgement

G. P. Mittal, J.—Criminal Appeal Nos. 702/2007, 334/2008, 87/2009 and 395/2009 arise out of the judgment dated 18.09.2007 and order on sentence dated 09.10.2007 whereby the Appellants Jayant, Yashpal and Devendri were convicted u/s 365/396 of the Indian Penal Code (IPC); the Appellant Manju Kumar was convicted for the offence punishable u/s 412 IPC. In Criminal Appeal No.649/2010 the Appellant Sanjay Singh Rathi (hereinafter referred to as "Rathi") impugns the judgment dated 09.04.2010 and the order on sentence dated 16.04.2010 whereby he was convicted for the offence punishable u/s

365/396 IPC. All Appellants except Manju Kumar were sentenced to undergo imprisonment for life for the offence punishable u/s 396 IPC. They were sentenced to undergo Rigorous Imprisonment (RI) for five years for the offence punishable u/s 365 IPC. Appellant Manju Kumar was sentenced to undergo RI for four years. Sentence of fine was also imposed on the Appellants.

2. These appeals relates to the abduction of one Ajay (the deceased), his murder and dacoity of the Tata Sumo No.DL-1CG-7774 on 05.11.2002 which he used to ply as a taxi for his living. On 05.11.2002 (Vishwakarma day after Diwali) at about 1:30 PM Naresh (PW-1) was cleaning his vehicle outside his Shop Kanojia Tour & Travels. Gulab Singh (PW-2) was present in his shop in Block No.17, Kalyanpuri. He too was cleaning the counter of his shop. According to the prosecution, the Appellants Rathi and Jayant approached him for hiring his vehicle to go to Khurja whereas the Appellants Yashpal, Devendri and Gajendri (since deceased) waited across the road, at a distance of 10-12 ft. from PWs 1 and 2. PW-1 refused to take them to their destination. Gulab Singh (PW-2) over heard the conversation between Naresh and Rathi and wanted to oblige his friend Ajay, who owned a Tata Sumo vehicle and used to ply it as a taxi. Gulab Singh went to Ajay, whose house was just two minutes walk from his (PW-2's) shop. Ajay reached PW-2's shop and talked to the intending passengers. Gaytri Devi (PW-4) also reached the spot to persuade her son Ajay not to go on that day. Ajay was willing to go and told his mother the he would be back by night. Ajay brought his Tata Sumo. The Appellants Rathi, Jayant, Yashpal, Devendri and co-accused Gajendri sat in the vehicle and left for their destination.

3. Ajay did not return as promised. When PW-3 Devi Prasad (Ajay's father) reached home at night his wife Gaytri Devi told him that although Ajay had not returned, despite his promise to be back by 8:00 PM. It is alleged that after waiting sufficiently long for his son to return, a missing person report was lodged by Devi Prasad with the Kalyanpuri Police Station on 07.11.2002. Information was given by PW-3 to his brother-in-laws PW-10 Khem Chand and PW-11 Mahender on 06.11.2002 that Ajay went to Khurja in his Tata Sumo with the passengers, on 05.11.2002 and did not return to Delhi. A statement Ex.PW-3/A was made to the police on 07.11.2002 regarding the incident. An FIR was registered by the police. PW-10 Khem Chand and PW-11 Mahender were also worried about disappearance of their nephew along with the Tata Sumo. They made a frantic search for him. PW-10 called up his brother Raj Kumar (PW-9) to come to his house in the Tata 407 and they started searching for their nephew. On 07.11.2002 Khem Chand, Mahender and Raj Kumar (PW-9, an employee of PW-11) spotted the Tata Sumo belonging to Ajay near the telephone exchange in village Nehrupur, Khurja. They noticed two mechanics carrying out some repairs. Their nephew Ajay was not present in the Tata Sumo. PW-10 became suspicious and approached the nearby PCO, belonging to Chawi Rajan (PW-14) and made a call to the Police Control Room. The PCR did not bother to attend to the call and in the meanwhile PWs 9,10 and 11 noticed Tata Sumo moving. PW-10 and 11 asked their driver (PW-9) to chase the Tata Sumo. It is alleged that due to heavy

traffic on the road they could not immediately catch up with Tata Sumo and went a little ahead. When they returned to reach the Tata Sumo, they saw it parked on a road near Munda Khera Chauraha. PW-10 made a phone call to PS Khurja Kotwali. The police reached the spot after considerable time. Neither the deceased Ajay nor any passenger came there. During interrogation the police came to know that the two boys from the Tata Sumo had left on a black motorcycle parked near the STD booth. The said motor cycle had the words "Police" and "Mohabatein" written on the number plate.

4. On 11.11.2002 a dead body was recovered from the fields of village Nangla Shekhu by Inspector V.K.Singh of UP Police. While he was making Punchnama in respect of the dead body, Gaytri Devi (PW-4) the deceased's mother too reached there along with some others. The dead body was found in a highly decomposed state. At that time it was found to be clothed in a shirt, a vest, an underwear, a jeans and one shoe, on the right leg. There were two rings in the finger and a thread tied around the right wrist. Although, the face of the dead body was unrecognizable due to decomposition and injuries, yet, PW-4 was able to identify the dead body of her son Ajay from the articles found on the body. The Delhi Police was informed. Autopsy on the dead body was performed on 12.11.2002 by Dr. Sarvodaya Kumar. On examination, the doctor found the dead body to be that of someone, aged about 22 years with average built. Apart from multiple incised wounds in front of the chest and upper half of the abdomen, he noticed an incised wound 18 cms x 6 cms trachea deep just below the hyoid. He gave the cause of death as shock and hemorrhage as a result of ante mortem injuries. The duration of the death was given to be five to seven days before the date of conducting postmortem examination i.e. 12.11.2002.

5. SI Dharambir Gautam (PW-53) took up the investigation. It came to light that motorcycle bearing No.UP-20-0435 was involved in the crime. A search of the motorcycle revealed that it was registered in the name of the Appellant Rathi, a Constable in the U.P. police, posted in District Line Bijnore. He was interrogated and a mobile phone and a chip were recovered from his possession. The registration certificate of the motorcycle was seized.

6. On 26.11.2002, the Appellant Rathi was arrested. The Appellants Yashpal and Devendri were arrested on 07.02.2003 while they were in custody in another case from PS Shahdara. Devendri's disclosure led to recovery of a gold chain (Ex.P-1) from her house. Appellant Manju Kumar was arrested on 09.03.2003 and the deceased's sim card was recovered from him. The Appellant Jayant was arrested on 05.06.2003. Co-accused Gajendri and Raj Kumar were also arrested. Gajendri, however, expired and Raj Kumar was declared a Proclaimed Offender during the trial. Co-accused Deepak and Sunder too died during the trial and proceedings against them were dropped.

7. Appellants Manju Kumar, Devendri, Jayant and Rathi refused to participate in the TIP on the ground that they had been shown to the witnesses. Appellant Yashpal joined the TIP and was identified by Gaytri Devi.

8. By the impugned judgments dated 18.09.2007 and 09.04.2010 the Trial Court found that the prosecution case against the Appellants Rathi, Yashpal, Jayant, Devendri and Manju Kumar had been established beyond reasonable doubt. They were convicted and sentenced in the manner described earlier.

9. Co-accused Meer Singh and Devender were also prosecuted for the offence punishable u/s 212/34 IPC. They were, however, acquitted of the charges on the ground that the prosecution did not lead any evidence to connect them with the offence.

10. To bring home the guilt of the accused, the prosecution examined 53 witnesses during trial. PW-1 Naresh, PW-2 Gulab Singh, PW-4 Smt. Gaytri Devi, PW-5 Sohanpal Singh, PW-9 Raj Kumar, PW-10 Khem Chand, PW-11 Mahender, PW-14 Chawi Rajan, PW-15 Dharmender Kumar, PW-21 Inspector K.P. Singh, PW-39 SI V.K. Sharma, PW-46 Lady Constable Poonam and PW-53 SI Dharambir Gautam are crucial witnesses for disposal of these appeals.

11. PW-1 Naresh testified that he was engaged in the business of hiring out taxis. He ran a shop in the name of "Kanojia Tours and Travel" from his residence. On 05.11.2002 at about 1:00/1:30 PM he was present in front of his shop and was cleaning his vehicle. At that time, two persons came to him and expressed their desire to hire his vehicle to go to Khurja to bring a patient by night. He deposed that two persons approached him whereas three persons were standing across the road. The witness identified the Appellant Rathi (and one associate) as the person who approached him to hire the vehicle whereas the Appellants Yashpal, Devendri and co-accused Gajendri (since deceased) were standing across the road. He deposed to having refused to take his vehicle as it was Vishwakarma day. His neighbour Gulab heard the conversation and told them that one Ajay used to drive his Tata Sumo as a taxi. Gulab called Ajay. Ajay reached there and had conversation with the two persons and thereafter went to bring his vehicle, which he used to park at Phase-III, Kalyanpuri. After 15-20 minutes, Ajay came back with his vehicle. He deposed that Ajay's mother also reached there and pleaded with him not to go. Ajay, however, told his mother that he would return the same night. He deposed that all the five persons (including the two ladies) sat in the vehicle and left.

12. PW-2 Gulab Singh deposed that on 05.11.2002 at about 1:30 PM he was cleaning the counter of his shop. Two persons approached Naresh to hire his vehicle for going to Khurja. They told him that they had to bring a patient and return by night. Naresh refused to ply his vehicle. Since he (PW-2) overheard this conversation, he asked the two persons to wait as he would find out if Ajay was available at his house. He brought Ajay to the spot. He deposed that Yashpal @ Satpal, Devendri and Gajendri (since deceased) were standing across the road while Rathi and Jayant asked Naresh to take his vehicle to Khurja. The Appellants were identified by the witness in Court.

13. PW-4 Gaytri Devi (the deceased's mother) stated that on 05.11.2002 his son

was present in the home at 1:30 PM. Gulab came to her house and told Ajay that there were some passengers for him. At Gulab's instance her son was prepared to take those passengers to their destination. Ajay took four passengers in his vehicle, out of whom two were ladies. She explained that the Appellant Rathi sat next to the driver's seat whereas Gajendri and Devendri sat on the rear seat along with Manju Kumar. She explained that Yashpal @ Satpal was also identified by her as the person who boarded her son's vehicle. The witness was recalled to testify about the facts after arrest of the Appellant Jayant. In her deposition, Gaytri Devi clarified that it were accused Jayant, Yashpal @ Satpal, Devendri @ Sunita, Gajendri (since deceased) and Rathi who boarded her son's vehicle and left for Khurja.

14. PW-5 Sohan Pal Singh is a witness to the recovery of the deceased's gold chain at Appellant Devendri's instance from her house in Rajeev Garden, Loni, Ghaziabad, U.P.

15. PW-10 Khem Chand is the deceased's maternal uncle. He got information about the deceased's not returning home on 05.11.2002 with his Tata Sumo from Ajay's father (PW-3) on 06.11.2002. He deposed to making inquiries about his nephew and the Tata Sumo at the local Police Station and in the surrounding areas but not being able to get any clue. He testified that when he failed to get any information, he summoned his brother Mahender (PW-11) who reached his house in his Tata 407. He along with Mahender and Raju made search for the deceased and the Tata Sumo in their Tata 407. They saw two mechanics repairing the Tata Sumo. He did not find his nephew Ajay in it. He became suspicious and made a call to the PCR from a nearby PCO. The Control Room officials ignored his call and they noticed the Tata Sumo moving. He asked the driver of Tata 407 to reverse the vehicle and chase the Tata Sumo. Due to heavy traffic, they went ahead and when they reversed Tata Sumo was seen parked on the road near Munda Khera Crossing. He made a phone call to Khurja Kotwali. The police arrived there and seized the Tata Sumo and certain articles from it. The testimonies of PW-9 Raj Kumar and PW-11 Mahender, support this version.

16. PW-14 Chawi Rajan is the PCO's owner from where PW-10 made a call to the PCR. He corroborated PW-10's testimony on this count but did not support the prosecution about noticing a Hero Honda Splendor with three occupants going near the Tata Sumo on 07.11.2002 at 08:30 AM. He was cross-examined on this aspect by the learned APP. PW-15 Dharmender Kumar corroborated PW-14's testimony regarding the making of a call by PW-10 from the PCO.

17. On 07.11.2002 PW-21 Inspector K.P. Singh was posted as SHO PS Khurja. On receipt of information from Khem Chand (PW-10) regarding parking of the Tata Sumo in front of LIC office, GT Road, Khurja, Bulandshahar, he reached there and waited for the occupants for seven hours. He deposed that nobody went there. The Tata Sumo was searched. He was told that the Tata Sumo was involved in a criminal case registered in PS Kalyanpuri. He sent an intimation to Kalyanpuri Police Station and the Tata Sumo along with the articles recovered

from it were seized by the Delhi Police official by memo Ex.PW-21/B.

18. PW-39 SI V.K. Sharma was posted as a Sub Inspector in PS Kalyanpuri at the time of the incident. At the instance of SI Dharambir Gautam (PW-53) he obtained call details in respect of certain numbers.

19. PW-52 SI B.D. Sharma (Retired) was posted at PS Khurja Dehat on 11.11.2002. He deposed that on receipt of information from Narender Kumar, resident of village Nangla Shekhu that a dead body was lying in Arhar fields he reached the spot and found a highly decomposed body lying there. Maggots were crawling over it. Most of the face was missing either on account of decomposition or on account of the maggots. The body was clothed in a striped shirt and blue jeans. There was one black shoe on right leg. There were two iron rings in the ring finger and the little finger. There was one gold ring in the ring finger with the words "AK". He conducted the inquest proceedings. During this time, Gaytri Devi (PW-4) with three-four persons reached the spot. On seeing the ring, shoe and clothes Gaytri Devi and other persons identified the dead body to be of her son Ajay Kumar. He sent the dead body along with the clothes, rings and the shoe worn by it to the Govt. Hospital Bulandshahar for autopsy. The IO from the Delhi Police also reached the spot and requested him to get a DNA test to be done on the dead body. He got photographs Ex.PW-52/1-6 of the dead body.

20. PW-53 SI Dharambir Gautam is the IO of the case. He testified that on 08.11.2002 the case was registered on the statement Ex.PW-3/A (of the complainant Devi Prasad). He, along with the complainant and ASI Aftab Ahmed went to Khurja pursuant to information that Tata Sumo No.DL-1CG-7774 was seized by the police of PS Khurja Kotwali. He seized the articles consisting of two bags full of clothes, one hot case and one mobile phone. There was no trace of the deceased Ajay. Since the vehicle was wanted in the case, it was taken into possession by memo Ex.PW-20/B. He contacted PWs Chawi Rajan and Dr. Dharmender of Nehrupur village and recorded their statements. He came to know about involvement of motor cycle No.UP-20F-0435 black colour Splendor in the case. During investigation it was discovered that the motorcycle was registered in the name of one Sanjay Singh Rathi, a Constable in the UP police and posted at Police line Bijnore. He testified that on 11.11.2002 on receipt of information from PS Khurja (Dehat) regarding recovery of a dead body, he reached there and saw police officials and the deceased's family members, namely, Gaytri Devi and Khem Chand, present there. The dead body was identified by Gaytri Devi on the basis of the clothes, rings, Kalava (thread on the wrist), gold ring and a shoe worn by the deceased to be of her son Ajay. On 12.11.2002 he collected call details of Ajay's mobile phone number 9811676042 and came to know that SIM card of this number was used on 08.11.2002 on a mobile set having IEMI number 32308351753730 and the handset was earlier under operation, on mobile phone number 9811732971. On receiving the details, it was found that the number was continuously connected with mobile phone numbers 9837370253 and 9837158882. He obtained the call details of mobile

phone number 9837370253 from Escotel Meerut through Constable Surender. (Though, in the disclosure statement the Appellant Rathi gave details how the mobile phones which were in various names were being used by him yet the same is inadmissible in evidence as no discovery was effected in pursuance of the said disclosure statement. The evidence of the call details, therefore, is not of much relevance.)

21. PW-53 SI Dharambir Gautam testified that on 23.11.2002 he, with other police officials reached Bijnore police lines to interrogate the Appellant Rathi. He met Reserve Inspector Yogender Pratap Singh of the police lines and obtained the attendance sheet of the Appellant Rathi. It was revealed that he (Rathi) was on leave from 04.11.2002 to 06.11.2002. He obtained his mobile SIM card with connection number 9837370253 and seized the registration certificate of his motor cycle number UP-20F-0435. The Appellant refused to join the investigation further due to sickness he therefore, served a notice u/s 160 Cr.P.C. to join investigation on 25.11.2002 at Delhi.

22. PW-53 deposed that on 25.11.2002 the Appellant Rathi did not join the investigation. He contacted Bijnore police lines and came to know that Rathi was on leave. On 26.11.2002 he, and SI V.K Sharma and other police officials went to village Nangla Ibrahimpur and arrested the Appellant. He made disclosure statement Ex.PW-6/C which led to recovery of a shoe belonging to the deceased from the fields in Village Nangla Shekhu. He testified that the Appellant Rathi's face was muffled and an application for conducting Test Identification Parade (TIP) was moved before the Magistrate. The Appellant refused to join the TIP. During police remand (on 01.12.2002) he was identified by PWs Gaytri Devi, Naresh and Gulab to be the man who got the vehicle booked on 05.11.2002. On analysis of the call details of the Appellant Rathi it was revealed that he used the SIM card of mobile number 9811732971 in his handset (bearing IMEI number 350019347205649). It revealed the location of the user was at Khora (Delhi) between 09:11 to 09:15 on 05.11.2002.

23. PW-53 stated that on 30.01.2003 the TIP of the shoe recovered at Rathi's instance was conducted. Gaytri Devi correctly identified the shoe. The witness deposed that on 05.02.2003 he came to know of the arrest of Yashpal and Devendri in case FIR No.27/2003 of PS Shahdara. They were produced before the Court pursuant to a production warrant. He interrogated and arrested them in the case. The Appellant Devendri refused to join the TIP whereas Yashpal agreed to participate in it. Gaytri Devi correctly identified Yashpal in the TIP. Thereafter Yashpal refused to join TIP by the other witnesses. On 08.02.2003 Devendri made a disclosure statement Ex.PW-18/A leading to recovery of a gold chain of deceased Ajay from her room in Rajeev Garden, Loni in the presence of public witnesses Sohanpal Singh and Subhash. She pointed out the place of hiring the Tata Sumo i.e. Kanojia Tours & Travels where Gaytri Devi identified Devendri. He deposed that on 18.02.2003 PWs Gulab and Naresh went to the Police Station and identified Yashpal. He recorded their statements in this regard.

On 24.02.2003 the gold chain was correctly identified by Gaytri Devi (PW-4). The witness deposed about the arrest of the Appellant Manju Kumar and recovery of the SIM card of mobile number 9811676042 (belonging to the deceased).

24. In their statements u/s 313 Cr.P.C. the Appellants denied the evidence appearing against them on the record and pleaded false implication. The Appellant Rathi took the plea that on 05.11.2002 he was away to Bijnore along with his family. His wife was 7 1/2 months pregnant. His wife and son were not well. He spent the whole of the Diwali day with his family. On 23.11.2002 at about 5:00 PM SI Dharambir Gautam met him and wanted his help as the mobile in his name was being used in the case and involvement of his brother Sunder Rathi was suspected. He took five day's leave and accompanied SI Dharambir Gautam to Delhi. He was brought to PS Kalyanpuri and was not allowed to go anywhere. He was shown to the deceased's mother and other public witnesses. He stated that he was implicated in the case falsely as his brother Sunder Rathi (since dead) was a gangster in UP. The Appellant Rathi examined his wife Geeta Devi (DW-1) in his defence to prove the defence version.

25. Appellants Yashpal, Jayant and Devendri merely denied the prosecution's allegations and pleaded false implication. Appellant Manju Kumar took the plea that co-accused Yashpal was a tenant in PW Smt. Pinkesh's house. There was a dispute between them regarding payment of rent and vacation of the rented room. He being neighbour sided with her as a result of which Yashpal got annoyed with him and implicated in the case falsely.

26. We have heard Mr.R.P. Luthra, learned counsel for the Appellant Manju Kumar, Ms. Nandita Rao, Advocate for the Appellant Devendri, Mr.P.K. Dey, Advocate for the Appellant Jayant, Mr. A.J. Bhambhani, Advocate for the Appellant Yashpal, Mr. S.K. Sharma, Advocate for the Appellant Sanjay Singh Rathi and Mr.M.N.Dudeja learned APP for the State and have perused the record.

27. There is no dispute about Ajay having been taken away by some people in his Tata Sumo to go to Khurja on 05.11.2002 on the pretext of bringing a patient. The testimonies of the three witnesses i.e. PWs 1, 2 and 4 on this count was not challenged during their cross-examination. There is ample evidence on record to prove hiring of the Tata Sumo from Ajay on 05.11.2002, its chase by PWs 9, 10 and 11 and its recovery at Khurja on 07.11.2002. There is serious dispute raised by the Appellants with regard to Ajay's death i.e. identification of the dead body and identification of the culprits.

28. First, we would deal with identification of the dead body. The DNA report dated 28.04.2004 given by D.S. Negi, Technical Examiner, DNA fingerprinting Laboratory, Govt. of India, Hyderabad is inconclusive. It is argued by the learned counsel for the Appellants that the femur bone is one of the longest bone in a human body which was taken from the body for DNA fingerprinting. If the femur bone really belonged to Ajay, there was no difficulty in DNA matching with the blood sample of the deceased's parents (PWs 3 and 4). The result of DNA

examination is extracted hereunder: -

The source of the above exhibits were subjected to DNA isolation. The source of exhibit C (femur bone) yielded partial DNA profile. DNA profiles were prepared from the sources of exhibits A and B (blood samples of Smt. Gayatri Devi and Shri Devi Prasad). Since complete DNA profile from the source of exhibit C (femur bone) is essential for analysis, the result is inconclusive.

29. The Hyderabad DNA fingerprinting Laboratory is the most prestigious institute in the Science of DNA fingerprinting. The report by D.S. Negi extracted above, indicates that the source "C" i.e. femur bone of the dead body yielded partial DNA profile and thus the result was inconclusive. The prosecution did not rely on the report as it was not positive. The witness was not called for cross-examination to challenge the conclusion. Thus, the defence cannot be allowed to say that the report dated 28.04.2004 of D.S. Negi was inconclusive only on account of the fact that source "C" did not belong to the source "A" and "B" and therefore, the DNA did not match. In our view, since the DNA report is inconclusive, the Court has to consider the other evidence to find out if the identity of the dead body was established. From the report it cannot be concluded that it was not Ajay's dead body.

30. PW-52 SI B.D. Verma got the information from Narender Kumar resident of Village Nangla Shekhu regarding presence of a dead body in the Arhar fields. When the SI along with the two Constables reached the Arhar fields, he found the dead body in a highly decomposed state and that maggots were crawling over it. He deposed that it was difficult to decipher where were injuries on the dead body. Most of the face was missing due to decomposition or on account of maggots. He deposed about a thread tied around the right wrist; there were two iron rings in the ring finger as well as in the littler finger; there was one gold ring in the ring finger containing the word "AK". When he was going ahead with the inquest proceedings, the deceased's mother Gaytri (PW-4) reached there along with three-four people. On seeing the gold ring, the shoe and the clothes Gaytri Devi identified the dead body as that of Ajay.

31. It is important to note that Gaytri Devi (PW-4) identified the dead body from the articles found on the dead body i.e. the rings, clothes and the shoe.

32. It is urged by the learned counsel for the Appellants that Gaytri Devi was unsure on seeing the dead body if it was that of Ajay. The identification of articles found on the dead body is discrepant, since in the rukka (Ex.PW-3/A) it was stated by the deceased's father that the Ajay was wearing an ACTION brand sport shoe at the time he left whereas a black shoe was allegedly found on the right foot of the dead body. It is contended that as the prosecution alleged the motive for commission of the crime to be robbery, it is highly improbable that the culprits would not remove the three rings from the dead body. It is argued that the description of the clothes did not match with the one given in Ex.PW-3/A and in the absence of any positive finding by DNA fingerprinting it cannot be said that

the body recovered was Ajay's dead body.

33. We do not agree with the arguments advanced on the Appellants' behalf. The motive for the offence indubitably was to rob the deceased's Tata Sumo. It was the culprits' ill-luck that they could not remove the vehicle beyond Khurja as the deceased's maternal uncle and their relations (PWs 9, 10 and 11) were informed about Ajay's disappearance with Tata Sumo on 06.11.2002. Initially, PW-10 made inquiries in PS Khurja and adjoining areas. Finding no clue, PWs 9,10 and 11 immediately started to search for the Tata Sumo's in their vehicle i.e. Tata 407. They combed the entire area (in Khurja) and the adjoining areas in their bigger vehicle with discerning eyes, all around as they were Ajay's close relatives and residents of Khurja. They were able to spot the vehicle as it was parked near telephone exchange Nehrupur (in Khurja) and two mechanics were carrying out repairs. Since Ajay was not found, they suspected something foul and called up the police from a nearby PCO. In the meanwhile, the Tata Sumo started moving and was ultimately seized by the Khurja Police when it was chased and information was given to the police by PWs 10 and 11. There is no reason for PWs 10 and 11 to invent any story regarding the Tata Sumo's seizure. Moreover, these were corroborated by PW-21 Inspector K.P. Singh, he belonged to UP police and had no motive or reason to plant the articles found on the dead body. The non removal of the two iron rings and one gold/golden ring is not material as the culprits might have found it to be of not much value or there might be something else in their minds. The rings were found on the dead body in the natural course and were sufficient to identify the dead body; one of the rings bore Ajay's initial i.e. "AK".

34. Similarly, we do not find any material discrepancy in the shoe and the clothes on the dead body. A black shoe could also be a sport shoe manufactured by "the Action" brand or any other manufacturer. In fact, the Court can take judicial notice that the sports shoes are manufactured in all colours including in black.

35. Gaytri Devi was frank enough to admit that the body was unidentifiable. As the face was chopped off with a cutting instrument the height of the body appeared to be less (than the height of Ajay). She was specific to having identified the dead body by the clothes and the ring. Gaytri Devi had no reason to falsely identify a dead body, claim it for last rites and abandon the search for her son. It was only because she was sure of herself that she positively identified it. We see no reason to disbelieve Gaytri Devi (PW-4) about identification of the dead body. It is clear that the motive for the deceased's abduction was to rob him of the vehicle which the culprits did accomplish by doing him (the deceased) to death and robbery of the articles worn by the deceased was not the motive for commission of the offence.

36. The death of Ajay being homicidal on account of multiple stab injuries was proved by PW-33 Dr. Sarvodaya Kumar. His testimony was not seriously challenged in cross-examination. The postmortem on the dead body was performed on 12.11.2002 and the time since death was given as "five to seven

days" which coincide with the deceased's abduction on 05.11.2002. It is proved beyond doubt that Ajay's death was homicidal.

37. This case solely rests on circumstantial evidence. The circumstances relied on by the Trial Court in returning the finding of the Appellants as guilty are:-

(A) Deceased was last seen alive with the Appellants.

(B) Recovery of a gold chain at the instance of Appellant Devendri in pursuance of her disclosure statement Ex.PW-18/A.

(C) Recovery of deceased's black shoe at Appellant's Rathi's instance in pursuance of his disclosure statement Ex.PW-6/C.

(D) Recovery of Ajay's sim card from Appellant Manju Kumar in pursuance of Yashpal's disclosure statement.

38. The standard of proof in case of circumstantial evidence is well settled. The circumstances from which conclusion of guilt is to be drawn must, in the first instance, be fully established; the circumstances should be of definite tendency unerringly pointing out towards the guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probabilities the offence was committed by the accused and none else and that the circumstances established must be incapable of explanation of any other hypothesis other than the guilt of the accused. (Hanumant Vs. The State of Madhya Pradesh, and Padala Veera Reddy Vs. State of Andhra Pradesh and others,).

39. We would deal with the circumstances one by one.

CIRCUMSTANCE (A)

40. PWs 1, 2 and 4 were examined by the prosecution to prove this circumstance. PW-1 deposed that on 05.11.2002 at about 1:00/1:30 PM he was cleaning his vehicle in front of his residence. At that time two persons came to him and told him that they wanted to go to Khurja. He deposed about his inability to drive them to Khurja. He stated about the presence of Appellants Yashpal and Devendri (and Gajendri since deceased) across the road. He testified to the fact that Gulab Singh (PW-2) over heard the talks and wanted to oblige his friend Ajay who also plied his Tata Sumo as a taxi. This witness did not specifically depose about Appellant Jayant's presence at the spot though he did testify that there was one more person with the Appellant Rathi. All the Appellants except Jayant were identified by this witness. (It seems that the Appellant Jayant did not prefer to recall PW-1 for his examination and cross-examination advisedly as PW-1 did not name him and there was no question of his identification as Jayant was not facing trial at that time.)

41. PW-2 Gulab Singh deposed about Rathi's presence and in his subsequent examination (after Appellant Jayant was arrested and tried with the other accused) about his presence too with Rathi for negotiations to hire the taxi and

about presence of Yashpal, Devendri and Gajendri across the road. All the five accused i.e. the four appellants and deceased Gajendri were duly identified by this witness.

42. PW-4 Gaytri Devi did create some confusion about presence of the Appellant Jayant. She correctly identified Appellants Rathi, Yashpal, Devendri and deceased Gajendri. Initially, the Appellant Manju Kumar was identified as one of the persons who had accompanied others at the time of hiring Tata Sumo but in her cross-examination dated 13.10.2005 she clarified that in fact she had identified the persons standing behind Manju Kumar i.e. Appellant Yashpal as one of those and not Manju Kumar. PW-4 was further examined after framing of the charge against the Appellant Jayant and identified Jayant as one of the persons who was standing with the two ladies across the road.

43. It is urged by the learned counsel for the Appellants that PWs 1 and 2 are unreliable whereas PW-4 Gaytri Devi is interested being the deceased's mother. All of them had admitted having seen the Appellants in the Police Station. This was the reason the Appellants (except Yashpal) refused to join the TIP. The investigation carried out by the IO by showing the Appellants to the witnesses becomes tainted and in view of this and the contradictions in their testimonies it would be unsafe to place reliance on their testimonies to uphold the finding of guilt against the Appellants.

44. Of course, PWs 1, 2 and 4 admitted in their cross-examination having seen the Appellants either in the Police Station or at the shop of Kanojia Tours & Travels (in case of PW-4). This admission on PWs 1, 2 and 4's part has to be seen in terms of the prosecution case and PW-53 SI Dharambir's (the IO) testimony. The IO gave the details as to how each one of the Appellants was arrested, how the application was immediately moved for their TIP and they refused to participate therein except in the case of Yashpal who was identified by PW-4 and refused to join TIP vis-à-vis PWs 1 and 2. The IO gave specific dates when the witnesses were summoned (after refusal of the TIP) to identify the accused simply for his satisfaction that the persons arrested were the real culprits. PWs 1, 2 and 4's admission that they had seen the Appellants in the Police Station, gives credence to their testimonies and shows that the witnesses were not tutored and had deposed in a natural manner. Otherwise the witnesses could have simply denied having seen the accused persons in the Police Station on different dates. Of course, the witnesses were not very exact about the dates when they saw each of the Appellants in the Police Station.

45. For instance, PW-4 Gaytri Devi deposed to having identified the Appellant Rathi in the Police Station after 15/20 days of the incident. This time of 15/20 days was given by this witness only by approximation. The testimony of this witness on this aspect was recorded on 02.09.2004 and the incident took place on 05.11.2002.

After a gap of two years a witness is not expected to recall exactly as to when he/

she saw an accused in the Police Station. PW-53 SI Dharambir Gautam was very specific when he gave the dates that on 27.11.2002 the Appellant Rathi was produced in the Court with his face muffled. He refused to join the TIP before the Magistrate. He was identified by the witnesses in PS Kalyanpuri on 01.12.2002. We have extracted earlier PW-53's testimony when he deposed about each of the dates, when the witnesses were shown the accused after their refusal to join TIP. As discussed earlier, the Appellant Yashpal was identified by PW-4 in the TIP and thereafter he refused to participate in the TIP to be conducted in respect of PWs 1 and 2. In the circumstances, we are not convinced that the Appellants were shown to the witnesses in the Police Station before they had refused to join the TIP. Rather, this exercise was done by the IO (PW-53) after the Appellants refused to participate in TIP.

46. It is well settled that identification by a witness in the Court is substantive evidence and identification in the TIP conducted during investigation can be used only as a corroborative piece of evidence. Normally, TIP is conducted during investigation to test the memory of a witness who has seen an accused committing the crime for the first time and to be an assured that the investigation proceeded in the right direction.

47. In this case, the deceased was enticed by the Appellants (except the Appellant Manju Kumar) in the broad day light (the time was 1:00/1:30 PM). There were negotiations between the two Appellants and PW-1 for hiring PW-1's vehicle in front of PWs 1 and 2's shop. PW-1 was not inclined to accompany the Appellants. Therefore, PW-2 wanted to see if the deceased would go and earn something for himself. According to the prosecution, PW-2 went to call Ajay whose house was just two minutes walk from his (PW-2) shop. The deceased accompanied PW-2 to his shop, had negotiations with two of the Appellants and thereafter went to fetch his Tata Sumo. It is not a case where the culprits fled after committing the crime or that the witnesses just had their fleeting glimpse. The witnesses, particularly, PWs 1 and 2 would have seen them for at least 15/20 minutes. Thus, there was sufficient opportunity and time to imprint the culprits' facial features in the memories of PWs 1, 2 and 3. In these circumstances, it was not really necessary to have a TIP. We are supported in this view by the Supreme Court report in Malkhansingh and Others Vs. State of Madhya Pradesh, .

48. A technical objection was raised by Mr. P.K. Dey, learned counsel for the Appellant Jayant regarding admissibility of PW-4's examination dated 01.05.2007. The learned counsel pointed out that Shri Ved Pal Singh Advocate counsel for Appellant Jayant had given his consent for admitting PW-4's examination-in-chief recorded before the start of Jayant's trial (statement of the counsel was recorded on 29.08.2005). The learned counsel referred to Section 137 and 138 of the Evidence Act to emphasize that there has to be first examination-in-chief followed by the cross-examination of the witness. There could be re-examination thereafter, if need be. The examination-in-chief recorded

on 01.05.2007, argued the learned counsel for Appellant Jayant, is illegal and cannot be admitted in evidence being violative of Section 137 and 138 of the Evidence Act. The learned counsel placed reliance on A.R. Antulay Vs. Ramdas Srinivas Nayak and Another, . Para 22 of the report which was specifically referred to is extracted hereunder:-

22. Once the contention on behalf of the appellant that investigation u/s 5-A is a condition precedent to the initiation of proceedings before a Special Judge and therefore cognizance of an offence cannot be taken except upon a police report, does not commend to us and has no foundation in law, it is unnecessary to refer to the long line of decisions commencing from Taylor v. Taylor (1876) 1 Ch D 426 , AIR 1936 253 (Privy Council) (2) and ending with Chettian Veetil Ammad and Another Vs. Taluk Land Board and Others, , laying down hitherto uncontroverted legal principle that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

49. In this case, the investigation revealed the involvement of several accused persons. There was a large time gap between Rathi's apprehension (who was the first one to be arrested) and the other Appellants. The trial commenced while some of the accused had not been arrested. (In fact, some were not apprehended at all. Sunder and Deepak passed away during trial). Obviously, after another accused was made to join the same trial it was necessary to examine the witness/witnesses already examined afresh. Of course, an accused could give an option that any particular witness need not be recalled for examination provided the prosecution did not want to prove any particular fact against the additional accused who joined the trial later on. Obviously, an accused who was earlier not facing trial the same could not be identified by a witness because of his absence. The examination-in-chief of a witness of the incident would be necessary to identify the culprit. It seems that this lost sight of the Court and the Public Prosecutor and this is why statement dated 29.08.2005 of Shri Ved Pal Singh, Counsel for Jayant was recorded. It is true that the proper course in such a situation was to move an application u/s 311 Cr.P.C. to recall a witness for further examination. No such application seems to be on record. At least, none has been pointed out to us. But, then the question is whether there is any prejudice to the Appellant Jayant. He did have the opportunity to cross-examine PW-4. A.R. Antulay (supra) is not attracted to the facts of this case. In that case the question before the Supreme Court was whether it was necessary to have investigation u/s 5-A of the Prevention of Corruption Act, 1947. It was held that a Special Judge was entitled to entertain a private complaint without directing an investigation u/s 5-A of the P.C. Act 1947. Thus, the contention raised that Section 5-A of the P.C. Act 1947 has to be followed in the case of even a private complaint did not find favour with the Supreme Court. Antulay (supra) thus does not help the Appellant. Section 137 and 138 lays down the procedure for examination of the witnesses. In the case of Banwari v. State of U.P. 1962 (Sup. 3) SCR 180 it was held that a trial is not vitiated by any

procedural error when no prejudice is caused to the accused. Since the Appellant has not been able to show any prejudice, he cannot be permitted to make a grievance that PW-4 could not have been re-examined after his counsel had given a consent to read the examination-in-chief previously recorded (before Appellant Jayant was sent up to face trial).

50. The learned counsel for Appellant Jayant argued that further examination-in-chief of PW-4 was recorded on 01.05.2007 and 02.05.2007. A few lines of cross-examination of PW-4 was recorded on 02.05.2007 till 1:35 PM and further cross-examination of the witness was deferred for 2:00 PM. The opportunity to cross-examine the witness was closed by the trial Court at 2:00 PM without waiting for the Appellant's counsel who had to suddenly go to the High Court and returned at 2:30 PM. It is argued that an application u/s 311 Cr.P.C. was moved by the Appellant Jayant on 30.05.2007. The said application, however, remained undecided. We have perused the record. The application was put up before the learned Additional Sessions Judge on 30.05.2007 who made an endorsement "keep on file". We do not know as to what was in the mind of the Trial Court and why the application was not disposed of. There is nothing on record to show that the Appellant Jayant in any way placed any obstacle in examination of this or any other witness. The Appellant Jayant's counsel was present on 01.05.2007 when part of examination-in-chief was recorded. He was present on 02.05.2007 in the pre-lunch session when chief-examination was completed and part of cross-examination was recorded. Thus, there could not be any malafide on the part of the Appellant or his counsel in not appearing before the Court at 2:00 PM. The explanation given by the Appellant's counsel, in the circumstances, cannot be easily brushed aside. The application u/s 311 Cr.P.C. for recalling PW-4 ought to have been allowed.

51. So, in all fairness PW-4's testimony as against the Appellant Jayant has to be ignored as full opportunity was not given to him to cross-examine this witness. But, there is PW-1's testimony who clearly identified Jayant as the man who accompanied the Appellant Rathi and had negotiations with PW-1 and then the deceased for hiring Tata Sumo. Of course, PW-1 did not identify Jayant but his testimony was recorded when Jayant was not facing trial. He did say that there was one more person with the Appellant Rathi. Thus, PW-1 corroborates PW-2's testimony regarding Jayant's presence without naming him.

52. In view of foregoing discussion, it is established that Appellants Rathi, Yashpal @ Satpal, Devendri, deceased Gajendri and one more person took away deceased Ajay in his Tata Sumo No. DL-1CG-7774 and Ajay was not seen alive thereafter.

53. In the case of State of Rajasthan Vs. Kashi Ram, death of the Respondent's wife and his two daughters was proved to be homicidal caused by strangulation. It was established on record that the deceased was last seen alive in the Respondent's company on 03.02.1998 at her house. The prosecution also established that the house was found locked on the morning of 04.02.1998 and

continued to remain locked till it was opened after removing the door on 06.02.1998. Throughout this period the Respondent was not to be seen and he was arrested only on 17.02.1998. It was observed that the Respondent did not give any explanation as to how he parted company with the deceased or where he was either at the time of his arrest or in the course of investigation. The Supreme Court held as under:-

23.. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Re. Naina Mohd.* AIR 1960 Mad 218.

54. A similar view was taken by a three Judges Bench of the Supreme Court in *Subramani Vs. State by Inspector of Police*, .

55. In *Sahadevan @ Sagadevan Vs. State rep. by Inspector of Police*, the Supreme Court held that if the prosecution on the basis of reliable evidence establishes that the missing person was last seen in the company of the accused and was never seen thereafter it was obligatory on the accused to explain as to how the missing person and the accused parted company.

56. The Appellants have failed to render any explanation as to how they parted company with the deceased. Rather, the prosecution has established additional links against some of the accused which we would advert to a little later. Suffice it to say that in the facts of the case, the circumstance of the deceased being last seen alive in Appellants Rathi, Devendri, Yashpal, deceased Gajendri and another person's company coupled with the removal of Tata Sumo and attempt to its removal from Khurja is sufficient to draw an inference that these were the earlier stated Appellants who or anyone of them caused deceased's murder in order to rob the deceased of his Tata Sumo.

57. The learned counsel for the Appellant pointed out the discrepancy about the age of the child who was in Devendri's lap as deposed by PW-1 and Pw-2. The testimony of the witnesses was recorded after considerable lapse of time. It does not make the prosecution version false which is corroborated by two independent witnesses. Such discrepancies regarding minute details are bound to occur in the testimony of truthful witnesses who have not been tutored. We are not inclined to attach any importance to it.

CIRCUMSTANCE (B)

58. According to the prosecution, Appellant Devendri made a disclosure

statement Ex.PW-18/A and in pursuance of the said statement led the police party headed by PW-53 to her house in Saraswati Vihar, Loni Ghaziabad, U.P. Sohan Pal Singh (PW-5) and Subhash were joined in the investigation by the IO. The Appellant took out the key lying beneath a brick and unlocked a room and took out a chain wrapped in a plain white paper from an iron box. PW-5 Sohan Pal Singh deposed that the iron box was lying on a slab. ASI Santosh Sharma (PW-18) corroborated PW-5's testimony. The IO (PW-53) corroborated PW-5's version and deposed about the seizure of the chain Ex.P-1. The chain Ex.P-1 was identified in the TIP conducted by PW-28 Sanjeev Kumar, Metropolitan Magistrate. A contention before the Trial Court was that nobody would keep the key of his/her house beneath a brick was repelled by the Trial Court holding:-

..... In countryside people generally keep keys of their house at such places. They generally do not keep keys with them since possibility of its use by other members of family would be nil. If keys are kept at a particular place, where ordinarily outsiders would not suspect, other members of family can easily use it as and when necessity arises. Consequently, it is concluded that facts projected by Sohan Pal Singh satisfies standards of ordinary human behaviour. I do not find any abnormality in his testimony. ASI Santosh Sharma gives confirmation to facts testified by Sohan Pal Singh. Dharambir Gautam SI also speaks that Devendri led to her tenanted accommodation in Loni. She picked up a key lying underneath a brick and opened her room. Chain Ex.P1 was recovered from a box, wrapped in a paper piece. As detailed above, these facts are not in contradiction of human behaviour.....

59. It is not only in the urban areas but a practice prevalent even in the rural areas to keep the keys at a particular place outside the house so that other family members can easily open the lock and enter the house. We do not find any reason to disbelieve PW-5's testimony regarding recovery of gold chain Ex.P-1 belonging to the deceased at Appellant Devendri's instance.

CIRCUMSTANCE (C)

60. According to the prosecution, the Appellant Rathi, after his arrest on 26.11.2002 made a disclosure statement Ex.PW-6/C and pursuant to the disclosure statement led the police party headed by SI Dharambir Gautam (PW-53) and other police officials near the place of incident which led to recovery of a shoe Ex.P-6 which was identified by PW-4 Gaytri Devi in the judicial TIP. The recovery of the shoe is criticized by the learned counsel for the Appellant on the ground that the recovery is alleged to be from an open place which was at a distance of 30-40 ft. from the place of the recovery of the dead body. It is urged that it is highly improbable that the entire area near the dead body was not combed by the police officers from UP police and Delhi police at the time of recovery of the dead body. It is urged that the absence of an independent witness at the time of alleged recovery of the shoe would indicate that the same is planted by the IO. The Trial Court dealt with the contention as under:-

31. There is another important piece of evidence which has come on record to link this accused with this crime is recovery of one shoe of the deceased at his instance on 26.11.02. As per PW-53, accused Sanjay Singh Rathi was apprehended on 26.11.02 from outside the fields of Nangla Ibrahimpur and he was interrogated and was arrested and during interrogation he made disclosure statement. Accused led them to the fields of Nangla Sekhu from where he got recovered one shoe and the said shoe was of left foot. The said shoe was sealed in a pullanda with seal of DVG and was taken into possession vide seizure memo Ex.PW-6/D. PW-39 SI V.K.Sharma and PW-6 Ct. Pramod are other police officials who were accompanying IO PW-53 on 26.11.02 and they have supported IO regarding recovery of the shoe of left foot of deceased at the instance of deceased. IO/PW-53 was cross examined at length by accused regarding alleged recovery of shoe of the deceased at his instance. During his cross, PW-53 has stated that no receipt of shoe purchased by the deceased was given by the parents of the deceased and he does not know from where it was purchased and he did not make any inquiry in this regard from the parents of the deceased. The distance between place of recovery of shoe and of dead body is about 30-40 feet. No independent witness was available at the time of recovery of that shoe and nearby village from that spot is at a distance of about 1 kilometer. No intimation was given to the concerned PS mentioning the details of recovery. Ld. Defence counsel has assailed recovery contending that it was planted to implicate accused in this case and due to that very reason no public witness was joined at the time of alleged recovery. PW-53 has specifically stated that at the time of recovery no person was available and nearby village was around one kilometer from the spot. Law is settled that merely on the point of non joining of the public witnesses, at the time of recovery the testimony of police officials cannot be disbelieved. There is no presumption that police officials are liars. The evidence of police officials cannot be rejected merely because of his designation in the absence of evidence of malice against the accused. Reliance is placed upon State of Assam Vs. Muhim Barkataki and Another, . Statements of PW6, PW-39 and IO PW-53 are consistent and trustworthy regarding recovery of the shoe of deceased and at the instance of accused Sanjay Singh Rathi and Ld. Defence counsel has failed to discredit their statements on this point in any manner. In view of the above proposition of law, testimony of IO PW-53 regarding recovery of shoe of deceased Ajay at the instance of accused Sanjay Singh Rathi cannot be disbelieved.

61. It is true that a shoe was not a valuable property to have been concealed anywhere by the Appellant. It must have been just flung away by the Appellant on noticing that a shoe had fallen on the ground a little away from the dead body. The same must have been thrown away not with the purpose to conceal it. Since the facts were still fresh in the Appellant's memory the shoe was recovered pursuant to his disclosure statement by the Appellant Rathi. We find no reason to differ with the reasoning given by the Trial Court and believe that the shoe Ex.P-6 was recovered by the Appellant.

CIRCUMSTANCE (D)

62. According to the IO (PW-53) Appellant Yashpal was arrested on 12.02.2003. He disclosed that the deceased's SIM card was in possession of the Appellant Manju Kumar. In cross-examination the IO admitted that there was no mention in the disclosure statement Ex.PW-22/A that the SIM card was in possession of Manju Kumar. The IO admitted that on 11.11.2002 about coming to know that the deceased's SIM card was being used in another mobile phone. Obviously, the IO could have tried and must have tried to dial Ajay's number to find out who was in possession of the SIM card to know the complicity of the culprits in the crime. It is unbelievable that the IO would wait for the Appellant Yashpal's arrest on 07.02.2003 i.e. three months after the incident and would only then go for the recovery of the SIM card. Otherwise also since the alleged recovery was not in pursuance of the disclosure statement Ex.PW-22/A (there being no mention of Appellant Manju Kumar in Ex.PW-22/A) the same cannot be used against the Appellant Yashpal.

63. Moreover, mere possession of a stolen property or a property belonging to a gang of dacoits is not sufficient to hold a person guilty of the offence punishable u/s 411/412 IPC. Section 411 and 412 are extracted hereunder:-

411. Dishonestly receiving stolen property

Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[Emphasis supplied]

412. Dishonestly receiving property stolen in the commission of a dacoity

Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoity, property which he knows or has reason to believe to have been stolen, shall be punished with [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

[Emphasis supplied]

64. Thus, to bring the case within the four corners of Section 411 the person who retains the stolen property must have knowledge or there must be reason to believe the same to be a stolen property. Similarly, to hold a person guilty u/s 412 IPC, the prosecution must prove that the person concerned knew or had reason to believe that the property was transferred by commission of dacoity or was received from a person whom he knew or had reason to believe to belong to a gang of dacoits. SIM card is not a valuable property. It can be bought for a

mere Rs.50/- now. It might have been available for Rs.100/- or Rs.200/- in the year 2002 or 2003. There is every possibility that someone from the Appellants might have given the SIM card to be used by Manju Kumar either without any motive or malafide. In the absence of any evidence how and under what circumstances such property of insignificant value came to the possession of Appellant Manju Kumar, no inference can be drawn that he knew or had reason to believe that the card was property obtained by dacoity or was a stolen property. Appellant Manju Kumar who had already remained in custody for one year three months, in our view, is entitled to the benefit of doubt.

65. In view of the above discussion, the Criminal Appeal No.702/2007 preferred by the Appellant Manju Kumar is entitled to be allowed. The order of conviction and sentence concerning him is hereby set aside and he is accordingly acquitted. He is ordered to be set at liberty if not in detention in any other case. His personal bond and surety bond are discharged.

66. Criminal Appeal No.334/2008 preferred by Devendri, Criminal Appeal No.395/2009 preferred by Yashpal @ Satpal, Criminal Appeal No.649/2010 preferred by the Appellant Rathi and Criminal Appeal No.87/2009 preferred by the Appellant Jayant @ Amit respectively are without any merit. They are liable to be dismissed.

67. The appeals are disposed of in above terms.