

**(2007) 02 DEL CK 0252**  
**In the Delhi High Court**  
**Case No : CA No. : 519 of 2006**

Nitin Gunwant Shah

APPELLANT

Vs

State

RESPONDENT

**Date of Decision :** 22-02-2007

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 311, 313, 340  
Evidence Act, 1872 — Section 10, 114, 27, 32, 32(1)  
Penal Code, 1860 (IPC) — Section 115, 120A, 120B, 194, 195

**Citation :** (2007) 1 ILR Delhi 127

**Hon'ble Judges :** R.S. Sodhi, J;P.K. Bhasin, J

**Bench :** Division Bench

**Advocate :** Ram Jethmalani with Mr. Arvind Nigam, with Mr. Sayaji Nangre, Mr. Arunabh Chowdhary and Mr. Prashant Kumar, for the Appellant; Mukta Gupta, Standing Counsel with Mr. Rajat Katyal and Mr. Ashwini Vaish, for the Respondent

**Final Decision :** Allowed

## Judgement

R.S. Sodhi, J.—Criminal Appeals No. 519 of 2006 and 527 of 2006 have been directed against a common judgment dated 3.7.2006 of the Additional Sessions Judge, Karkardooma, Delhi, in Sessions Case arising out of FIR No. 258 of 1992, Police Station Shakar Pur, whereby the learned Judge has held both the appellants, Nitin Shah and Om Prakash Srivastava @ Babloo, guilty for an offence punishable u/s 120B IPC read with Section 302 IPC. The court acquitted Manjeet Singh while holding that PW-15, Inspector Hanuman Dan, is guilty for clear dereliction of duty and further held that the Register 12 maintained with Police Station Nizamuddin was tampered with and the same was produced before the Court in evidence and that proceedings under Sections 194 and 195 IPC for fabricating false evidence be launched. The learned Judge by his order dated 3.7.2006 sentenced both the convicts to imprisonment for life and a fine of Rs. 20,000/- each, in default of payment of fine, further rigorous imprisonment for six months. The appellants before us have challenged the aforesaid judgment on various grounds. Brief facts of the case, as have been noted by the learned

Judge, are that:

In the morning of 02.08.1992, one Lalit Suneja was returning to his house after offering prayers to God, obviously for his well being, but was shot dead by two unknown persons while nearing to his house. A neighbourer namely Narender Pal Naresh, who happened to pass through that street set the law into motion, by informing the police. FIR 258/1992 was registered in PS Shakarpur about the incident. During investigation, 10 came across a complaint Ex. PW15/A1 lodged in the name of Lalit Suneja in PS Nizamuddin, New Delhi. Police picked up a thread to undrape the mystery of death. After investigation, police came up with following story:-

Accused Nitin Shah, was carrying on his business through a proprietary concern M/s Simnit Enterprises. Same had employed Lalit Kumar Suneja (deceased) as its distributor for the Northern Region. Both the employer and employee (accused Nitin Shah and Lalit Suneja) were at logger head for sometime on account of some payment. When matter could not be settled, accused Nitin Shah requested his friend, accused Om Prakash Srivastava @ Babloo Srivastava to eliminate Lalit Suneja and assured to provide cash likely to be spent in doing the act. Accused Om Prakash Srivastava intrigued with co-accused persons to bring the design to fruition. Accused Manish Dixit was hired to execute the task for Rs. 1,00,000/-. On 02.08.1992, accused Virender Pant @ Choto (since deceased) took accused Manish Dixit to the spot on a motor-bike Yamaha bearing No. DL-1SD-4680. Accused Manjit Singh @ Mangu waited for them in a car bearing No. DL-1CB-7874 at Yamuna Pusta near Bank Enclave. Lalit Suneja was shot dead by accused Manish Dixit. The latter fled away from spot on motor-bike described above being driven by accused Virender Pant and reached to co-accused Manjeet Singh who was waiting for the formers. They exchanged their vehicles and rushed to accused Om Prakash Srivastava and returned to the latter the motor bike and pistol used in the crime. The latter accused paid Rs. 50,000/- to each of accused Virender Pant and Manjeet Singh for driving aforesaid motor bike and car, in order to facilitate accused Manish Dixit in killing the deceased and to escape unhindered.

Police filed challan against accused Manish Dixit and Manjeet Singh on 27.10.1992. Accused persons namely Virender Pant, Om Prakash Srivastava and Manjeet Singh on 27.10.1992. Accused persons namely Virender Pant, Om Prakash Srivastava and Nitin Shah found place in column No. 2. Separate charge sheet was filed against accused Nitin Shah on 23.01.1993, against accused Om Prakash Srivastava on 03.01.1996 and against Accused Virender Pant on 15.03.1995.

After considering the material on record and hearing their counsels accused Om Prakash Srivastava, Nitin Shah & Manjeet Singh were charged for offence punishable U/S /34 and 120B IPC by order of this court dated 06.1.2003. All of accused persons pleaded not guilty and claimed trial, when the charge was read over and explained to them. Accused Virender Pant and Manish Dixit were

reported to have died till then.

2. The Prosecution, in order to substantiate its case, examined as many as 32 witnesses. PW-1, Veena, wife of the deceased, Lalit Suneja, has deposed that her husband used to do business of Kothali. He was working as an employee but the witness does not know the name of the employer. She states that on 2.8.1992 while she was in her house someone came inside the house and told that her husband had been injured. The witness went out but did not find anyone there except her husband lying in an unconscious and injured condition on the ground with the blood oozing from his injuries. At that time, the witness noticed a head injury. Neighbours collected and removed the injured to the hospital. In the hospital he was declared "dead". The witness had accompanied her husband to the hospital. The dead body was kept in the mortuary. Thereafter, the witness did not go to the hospital and the dead body of her husband was brought to the house by some persons. The witness does not remember any action taken by the Police as she was emotionally disturbed. The witness goes on to state that her husband had no dispute of any kind including money with anybody. She also states that her husband never made a complaint against anybody. She also states that she did not know any of the accused persons present in court nor can she identify them.

3. The witness was cross-examined by the Public Prosecutor. In cross-examination she states that she made no statement before the Police. She denies the alleged statement dated 4.8.1992. She denies that her husband was working with Nitin Shah. She denies having told the Police anything in this respect. She denies that she told the Police that there was any dispute between her husband and Nitin Shah over money or that when her husband and Nitin Shah were on friendly terms, she had gone to Oberoi Hotel to see Nitin Shah nor met him many times. She also denies having met Om Prakash @ Babloo @ Bhai, Vimal, Virender @ Chhotu, Manish @ Baccha at any time let alone again and again nor she knew them by name or face. She denies having stated any such fact to the Police. She denies that her husband had received any threat from Nitin Shah and Babloo on telephone and denies that they had threatened her husband for doing business against the interest of Nitin Shah. She also denies having stated such a fact to the Police. She denies that on 23.7.1992 her husband had made written complaint to Police Station Nizamuddin and Police Station Daryaganj on account of any threats made out by Nitin Shah or Babloo. She also denies that the deceased demanded security from the Police. The witness further denies that on 2.8.1992, Manoj had come to her house along with Virender sitting in a black colour Yamaha motor cycle. Nor did she state such a fact to the Police. She denies that Manish had asked the whereabouts of Mr. Lalit Suneja or that the witness had directed him towards the temple. She also denies that she knew the boys previously or that she had asked them to come inside. In other words, this witness completely denies her having made any statement to the Police nor is prepared to support the Prosecution's case on any account.

4. PW-2, Dr. S.K. Verma, Professor of Forensic Medicine, GTB Hospital, Delhi, deposes that on 3.8.1992 he was working as Senior Lecturer in GTB Hospital on which date he conducted postmortem on the dead body of Lalit Suneja. He found the following ante mortem injuries:

No. 1: A Circular firearm entry wound of size 0.7 cm in diameter surrounded by a abrasion collar of 0.2 cm thickness, the margins were regular and inverted. No blackening, tatooing seen around the wound. The wound was placed 5 cm above the left mastoid process at 8.5 cm above the occiput in left temporal region and entering into cranial cavity after producing a circular hole in the skull under the wound. After passing through and left and right cerebral hemispheres, it produces an eliptrical exit wound of size 3.5 x 1 cm with everted and ragged margins over right forehead 2 cm above the right superior orbital margins and 2 cm to the right of midline. No. 2: Circular entry wound of a firearm of size 0.7 cm diameter surrounded by abrasion collar of 0.2 cm placed on right temporal region 2 cm below the right mastoid and 1.5 cm posterior to the right ear lobule entering into cranial cavity through the base of the skull and passing through brain substance. It produced an exit wound in the right frontal region of size 1.5 x 0.5 cm with everted margins placed 7 cm above the left superior orbital margin and 7 cm to the left of midline. No. 3: A circular firearm entry wound with enverted regular margins of size 0.7 cm surrounded by an abrasion collar of 0.2 cm placed on left side back 8 cm below and lateral to posterior axillary fold and 2 cm outer to inferior angle of scapula going into chest cavity through 6 inter costal space and fracturing the rib and then entering into left lung, right lung, right axilla and upper region of shaft of humerous on right side with an impacted bullet was recovered from the medulla of right humerous in which it has produced fracture of the bone with effusion of side. No. 4: A lacerated wound of size 1.5 x 0.5 cm present on left occipital region placed 3 cm above the occiput.

Internal examination: Brain was having lacerations in both cerebral hemispheres with subdural and intra cerebral haemorrhage. Both forensic cavities left and right contained fluid and clotted blood amount approximately one litre on each side. Less of the internal organs were plla. The time since death was about 26 hours. Cause of death was shock due to ante mortem fire arms injuries which are sufficient to cause death in ordinary course of nature both independently and collectively. The post mortem report is Ex. PW2/A and bears my signature at point A. The report is in my hand.

5. PW-3, Chander Bhan Suneja, deposes that the deceased was his son and on Sunday, 2.8.1992 at about 8.20 a.m. he heard some gun shot sound. He came out of his house and saw his son lying in the street in a pool of blood. He states that his son was removed by the neighbours to the hospital where he was declared "dead". The dead body was kept in the mortuary. The witness identified the dead body. He received the body of his son vide Ex. PW-3/B.

6. PW-4, Satish Gupta, states that in 1992 he was working in Ashok Yatri Niwas as Accounts Clerk at 19, Ashoka Road, New Delhi. He does not remember if

Police had come to Ashok Yatri Niwas and made inquiries from him by way of written application regarding the stay of Manish Gupta and Manjeet Singh or that he handed over any document regarding the stay in the said hotel. He also does not remember if he handed over the guest registration card No. 000562 pertaining to the stay of Manish Gupta and Vikram Singh in Room No. 1231 on 2.6.1992 and 3.6.1992. He also does not remember that he handed over a photo copy of the guest register regarding the stay of Manjeet Singh and Anil Sharma on 2.8.1992 in Room No. 1206.

7. PW-5. Ashok Ahuja, deposes that on 2.8.1992 he identified the dead body of Lalit Suneja who was his brother-in-law. The Police recorded his statement in this regard, Ex. PW-5/A.

8. PW-6, Inspector Pramod Kumar, deposes to the effect that on 5.8.1992 he was posted as SI. East District, Delhi Police and joined investigation along with SI Badal Singh and other Police staff. Accused, Manish Dixit, who has since died, was in the custody of SI Badal Singh and pointed to House No. 228, Bank Enclave, Shakarpur as the house of the deceased, Lalit Kumar Sunjea. The pointing out Memo is Ex. PW-6/A. He denied that he was deposing falsely.

9. PW-7, Sudhir Kumar, does not support the Prosecution's case. PW-8, Constable Manoj Kumar, states that he was posted as a Photographer in the Crime Team East District of Delhi Police. He was called by the SHO, Shakarpur, in front of Kothi No. 210/211, Bank Enclave, Shakarpur, Delhi, where blood was lying on the ground and fired bullets were also lying there. On the directions of the Investigating Officer, he had taken photographs in different angles which are Ex. PW-8/A to PW-8/D, the negatives are Ex. PW-8/E to PW-8/H.

10. PW-9, Constable Billu Singh, deposes that on 6.8.1992 he was posted as Constable in the Special Staff of East District. On that day, SI Badal Singh joined him in the investigation along with SI Pramod. Accused, Manish Dixit (who died during the trial), was in Police Custody. He deposes to the pointing out of Hotel Jukasso Inn by Manish Dixit. In cross-examination, the witness admits that there is overwriting from point "A to A" regarding date on Ex. PW-9/A. He does not know who has done the overwriting. He does not remember the number of the room of Jukasso Inn where the accused, Manish Dixit, had taken him. He also does not remember if Manish Dixit had taken room on the first floor, ground floor or any other floor. He does not remember if accused, Manish Dixit, was taken out from the lock up when this witness had joined the investigation.

11. PW-10, ASI Ram Niwas, deposes that on 2.8.1992 he was posted at Police Station Shakarpur as Head Constable/Duty Officer. On that day, he received a rukka through Constable Vijay Singh on the basis of which he recorded the FIR No. 258/1992 u/s 302 /34 IPC.

12. PW-11, Madan Sood, deposes to the effect that in the year 1993 he was working as General Manager, Ajanta Hotel, Bombay. The register for visitors staying in the Hotel was maintained by the Reception. He does not recollect the

name of the Receptionist. Police did not conduct any investigation or inquiry in his presence regarding stay of any particular person in the Hotel during his tenure. This witness also does not support the Prosecution.

13. PW-12, Jagdish Singh, was working as UDC in the Transport Licensing Authority. Rajpur Road, as Registration Clerk. He deposes that he did not maintain any record. He used to prepare registration documents and since it was a very old matter, he cannot say in whose name vehicle No. DL-1C-B-7874 was registered.

14. PW-13, Head Constable Satpal, was posted at Special Staff as Constable. On 9.10.1992, he received eight sealed parcels from HCM Police Station Shakarpur sealed with "SC" on four pulandas and the seal of "MS GTB Hospital" on other parcels. He deposited the same with CFSL R.K. Puram. The pulandas, so long as they remained with him, were not tampered.

15. PW-14, Om Prakash Tyagi, States that he was posted as ASI Special Staff (East) of Delhi Police. He joined investigation and went to Bombay at Ajanta Hotel, Juhu Road. He goes on to say that Manager, Madan Sood, told the SI that on 4.7.1992 to 19.7.1992, one Sanjay along with three others had remained in the Hotel. The witness admits that he had not seen Madan Sood writing or signing and, therefore, cannot identify his signature.

16. PW-15, Inspector Hanuman, Dan is the star witness of the case. He deposes that on 23.7.1992, while at Police Station Nizamuddin, he received a complaint of Lalit Suneja which was handed over to him by the SHO Police Station Nizamuddin. Lalit Suneja was also present. Lalit Suneja told this witness that there was a money dispute between him and Nitin Shah. Nitin Shah was threatening him to settle the dispute. Suneja also informed that one Babloo was also making similar phone calls and that on 23.7.1992 he was required to meet Nitin Shah and Babloo at Jukasso Inn in Sunder Nagar to settle the dispute. The witness deputed Constable Bir Singh and Joginder outside Jukasso Inn. At about 8.00 p.m. he also reached. At that time, Lalit Suneja and his employee, Ram Swaroop, introduced him to Nitin Shah and O.P. Srivastava. "Nitin Shah disclosed that he was a businessman and he was staying at Oberoi Hotel while O.P. Srivastava had disclosed that he was an Advocate and staying at G-128, Moti Bagh, Manish, Vimal Bhat, Satnam @ Fouji and Virender Pant (who also died during the trial) were also there. Lalit Suneja and Nitin Shah and his associates went inside the Jukasso Inn and returned at about 9.00 p.m. Lalit Suneja and Nitin Shah had told this witness that the date of settlement had been fixed for 30.7.1992. Both the parties left Jukasso Inn peacefully. The witness, in cross-examination, admits that the complaint marked "B" prima facie discloses a cognizable offence u/s 506 IPC. He admits that the case was not registered after making inquiries since the meeting fixed in the evening took place peacefully and no case u/s 506 IPC was registered. He admits that the allegations made in the complaint regarding threat were matters of inquiry. He also admits that the names of persons present in the meeting at Jukasso were not recorded by him

anywhere though the SHO was orally informed. He admits that he had not recorded the names of the person who had attended the meeting at Jukasso in his personal diary. He is unable to give names of any of the accused persons whose cases he had investigated a day earlier or day later to 23.7.1992. He admits that the departure entry regarding the two constables deputed were not made in the Rojnamacha. He admits that his departure entry in the Rojnamacha register on 23.7.1992 is of 1.30 p.m. (noon) and his return at 10.00 p.m. and no separate entry had been made for his visits in between this period. He admits that he did not go to Jukasso Inn from Police Station at about 8.00 p.m. He denied the suggestion that he had not gone to Jukasso Inn on 23.7.1992 or that no such meeting took place between Lalit Suneja and Nitin Shah on that day. He denied that he had not deputed any constable at Jukasso Inn on that day. He deposes that the complaint marked "B" was handed over to him by the SHO at 4.00 p.m. in the Police Station after calling him from the area where he was patrolling. The witness was recalled by the Prosecution to enable him to exhibit the complaint, PW-15/A1. In further cross-examination, the witness says that he came to know about the murder of Lalit Suneja on 4.8.1992 for the first time from SHO Hem Chand, Police Station Shakarpur, who had come to his Police Station in the evening in respect of the complaint, Ex. PW-15/A1. The SHO, Police Station, Shakarpur, did not record his statement at that time. The SHO had seized the complaint from him. A seizure memo in this regard was prepared. He does not remember who had scribed the seizure memo. He goes on to informed say that it was not prepared in his presence nor any policeman had signed any document in his presence. He had handed over the complaint after taking it from the file which was in the custody of the Reader of the SHO. He does not remember as to who was the Reader on 23.7.1992. He states that Constable Vinod Kumar was the Reader of the SHO, Nizamuddin, and denies that there was no such post of Reader in the Police Station. He further states that he had deposited the complaint with the Reader of the SHO on 23.7.1992 at about 10.00 p.m. on his return to the Police Station. He admits that he had not made any written report in this regard. He denies that the complaint, Ex. PW-15/A1, is a fabricated or manipulated document. He admits that the diary number encircled at point "XI" was written on the complaint at the time it was received by him at about 4.30 p.m. from the SHO. The number was given by Constable Vinod Kumar. He goes on to say that there was no practice to enter every complaint received in the Police Station in the Daily Diary No. 2. He admits that he has no knowledge that the entry about the complaint was made in the Daily Dairy. He admits that the complaint was not handed over by the complainant to the SHO in his presence. The witness deposes that he attended his duty on 23.7.1992 at about 9.00 a.m. but did not make any entry in the Police Station about his arrival. He remained in the Police Station till 9.30 a.m. and then proceeded to Patiala House Courts, on his return, he did not make any entry in the register. He deposes that he had Informed the Investigating Officer that Ram Swaroop was present with the complainant at the time the complaint was lodged at the Police Station. He was confronted with Ex. PW-15/DA where it was not so

recorded. He admits that in the register, Ex. PW-15/Mark "A" there are some pages on which page number is not mentioned. He admits that there is no entry shown like "604A". No other entry is with "A" in the entire register. He denies the suggestion that the entry "605" is made as entry "604A" after overwriting. He admits that there is overwriting in entry Nos. 604A and 605 which appear to have been made by Vinod Kumar, Reader of the SHO, but the same were not made in his presence. He does not know as to who has made these entries. He admits that serial No. 605 was noted on the complaint received by him from the SHO on 23.7.1992. The fact about the complaint that it bore serial No. 605 was told by him to the Investigating Officer in his statement. He does not remember if he met the SHO Hem Chand on 4.8.1992. Nor did he take any receipt of the seizure of the complaint from him. No entry was made in any register or personal diary. The seizure memo was not written in his presence. He had not taken any receipt from the Reader regarding deposit of the complaint on his return on 23.7.1992. He does not know as to which was the investigation for which he had gone on 23.7.1992 between 1.30 p.m. to 10.00 p.m. He does not remember if he had submitted any case diary on that date. The fact that deceased, Lalit Suneja, was also present in the Police Station on 23.7.1992 when the complaint was handed over to this witness, was mentioned in his statement u/s 161 Cr.P.C. He was confronted with the same but it was not so recorded. The witness was confronted with his previous statement where he had not mentioned that the complaint was written and signed by Lalit Suneja. He was also confronted with his police statement to the effect that the SHO had directed his Reader to make entry of the complaint in the Daily Diary register. He was also confronted with his assertion that he had told the Investigating Officer that the complaint was given to him by the SHO, Police Station Nizamuddin-and at that time Lalit Suneja was present. He was also confronted with his assertion that Nitin Shah had threatened Suneja to settle the disputes. As a matter of fact, the witness was confronted with his previous statement on all material aspects to the effect where he had not stated so in his statement before the Police.

17. PW-16. Constable Vijay Singh, deposes to the effect that he took the rukka given to him and went to the Police Station to get the case registered. PW-17, SI Bhakhtawar Singh deposes that the Investigating Officer prepared the pointing out Memo of jukasso Inn on the pointing out of accused, Manish Dixit. This witness was extensively cross-examined and showed up in poor light. PW-18, SI Mukesh Jain, is the Draftsman who prepared the site plan. PW-19 is ASI Sahab Singh.

18. PW-20 is Inspector Hem Chand who deposes that on 2.8.1992 he was working as SHO Shakarpur. He received D.D. No. 4A and marked the same to ASI Chet Ram. He reached the spot at about 8.20 a.m. along with staff. Blood was seen on the ground as also the empty cartridges. He was informed that the injured had been removed to GTB Hospital. He obtained the MLC of the injured, Lalit Suneja, and learnt that he had expired. He came back to the spot and there were no eye witnesses in the hospital. One Narender Pal Naresh met at the spot

and he claimed to be an eye witness. His statement, Ex. PW-20/A, was recorded. The same was signed by Narender Pal Naresh at point "X". The crime team was summoned and samples collected. The wife and father of the deceased were interrogated. He also recorded the statements of Ashok Ahuja and Chander Bhan regarding identification of the dead body. He apprehended three persons on 4.8.1992 who, on interrogation, revealed their names as Manish Dixit, Manjeet Singh (who stands acquitted) and Vikrant. Vikrant was released while the other two persons Manish Dixit and Manjeet were" brought to the Police Station Shakarpur and recorded the disclosure statement of Manish, Ex. PW-20/F, and that of Manjeet, Ex. PW-20/G. Both were arrested and personal search were conducted and memos prepared. Manish Dixit (now expired) pointed out the place of murder. Veena, wife of the deceased, also came to that place and identified Manish as the same person who had shot her husband and left the place on a motor cycle. Narender Pal identified Manjeet as the person who had given his car to Manish Dixit and that Virender Pal left the place on a motor cycle. Investigation of the case was handed over to SI Badal Singh. In cross-examination, he admits that he had not made any arrival entry at Police Station Shakarpur either regarding himself or the staff or the accused persons. He cannot tell even the approximate time when Manish Dixit's disclosure statement was recorded. He denied that he along with SI Hanuman Singh had fabricated the letter marked "B". He goes on to say that he received photo copy of this letter on 2.8.1992 and its contents were got verified. He denied the suggestion that no such photo copy is available on the Police record. He denied that no such photocopy was received or that no entry was made in the case diary on 2.8.1992. He goes on to depose that when he handed over the case to SI Badal Singh on 4.8.1992, he had given to the Investigating Officer the photocopy. He admits that no seizure memo regarding the photo copy was prepared.

19. PW-22, Jai Prakash (retired SI) deposes that on 4.8.1992 he along with other police officials went in search of the accused persons but could not found. Upon secret information, they waited at house No. G-128, Moti Bagh and held a nakabandi. From a car, three persons, namely, Manish, Manjeet and Vikram had alighted. Manish and Manjeet were arrested.

20. PW-23. Constable Dev Dutt, is a formal witness. PW-24, Constable Salim Ahmed, had joined the party when they arrested Manish and Manjeet.

21. PW-25, Inspector Badal Singh, is the Investigating Officer. He deposes to the steps taken during investigation. PW-26, Gurumukh Singh (Retired ACP) brought Om Prakash Srivastava from U.P. PW-27, Vipin Talwar, is a formal witness. PW-28, Ms. Swatantra Pawa, is witness to the seizure documents pertaining to vehicle No. DL-1S-D-4680 while PW-29. A.K. Gupta, is the Handwriting Expert who examined Ex. PW-29/B. PW-30, SI Pankaj, collected the documents from the State Transport Authority in respect of DL-1S-D-4680. PW-31, Inspector Ram Mehar Singh, got production warrants against Babloo Srivastava who was being tried at Kanpur. He produced the accused before the Court and got Police

custody. He took sample handwriting of the accused who was in his custody. PW-32. Inspector Manoj Dixit, deposes to the effect that during interrogation it was revealed that Om Prakash Srivastava was arrested in Singapore on fake passport in the name of Arum Kumar Aggarwal. In cross-examination, he states that he was never the Investigating Officer of this case. He admits that he had recorded the statement of Vipin Talwar. He also admits that he had no authority to record statement of the witness or seize any document.

22. The trial court upon analyzing the material on record came to a finding that the appellants herein were guilty u/s 120B read with Section 302 IPC. It also returned a finding that Lalit Suneja was murdered by two unidentified persons on 2.8.1982 i.e. two days after the date of further meeting to resolve the dispute. It acquitted Manjeet Singh of all charges and held that there was nothing on record to implicate accused, Manjeet Singh, for any offence as is alleged against him. The trial court also expressed its displeasure at PW-15, Inspector Hanuman Dan while holding that his was a case of dereliction of duty. The trial court also held that the Prosecution has failed to prove that any of the two vehicles seized were used in the crime in question as also that the Public Prosecutor had conceded that "the Police very often desist to register an FIR or even avoid making entry in relevant register of complaints being received in Police Station. But when events take unexpected turn, they try to fill up lacunae by inserting post hoc entries here and there. Even if all this exercise results in tampering of records maintained in the Police Station". Further, it returned a finding that "it is manifest that entry about complaint, Ex. PW-15/AI in Register No. 12 was made later on by tampering the said register."

23. Mr. Ram Jethmalani, learned counsel for the appellant, Nitin Gunwant Shah, while challenging the judgment and order of the trial court pointed out that the judgment of the trial court is perverse and based on "no evidence". He contended that the circumstances relied on are either innocuous or unproved by any legal evidence. The judgment does not set out any incriminating evidence against the appellants. The approach of the trial court, as is evident from paras 64 and 87 of the judgment, is contrary to the well established principles in dealing with a case of circumstantial evidence. His formulation of proposition in para 64 betrays lack of judicial approach. He submitted that the Court failed to address the question as to who were the conspirators, what was the conspiracy of the accused, what was done in pursuance of the said conspiracy, if the same stood proved or not, have not been answered. He also took exception to the scholarly discourse in the judgment as being neither relevant nor of any probative value to prove the evidence. The scholarly reading to arrive at the presumption is contrary to settled principles of criminal jurisprudence. Counsel further contended that the question formulated by the trial court namely "can, in these circumstances, it be presumed that the accused Om Prakash Srivastava and Nitin Shah were involved in the murder of Lalit Suneja?", is wholly out of place. The appellants were charged with conspiracy with other named co-accused

24. Learned counsel submitted that it was the case of the Prosecution that Manish acted in pursuance of the conspiracy and did the final act of killing the deceased, but the trial court has categorically come to a finding that the death of Lalit Suneja was caused at the hands of two unidentified persons. With this deduction, the trial court could not have held the appellants guilty for the offence of conspiracy to commit murder of Lalit Suneja. He contended that without a clear finding that Manish was the one who killed the deceased, the learned trial court could not have proceeded to convict the appellants of the conspiracy charged. No conspiracy is proved or even held to be proved. The deposition of PW-15, assuming it is reliable, at the highest, can be taken to mean that the accused had met the deceased to settle a money matter at the Jukasso Inn on 23.7.1992 and they parted peacefully whereafter the deceased did even persist in his complaint. Obviously, PW-15, nor the two constables along, thought of taking any further Police action on the so-called complaint of the deceased. The complainant never contacted the Police till 30.7.1992 or any time thereafter. From this, by no stretch of imagination, is it possible to deduce that the appellants are guilty of conspiracy to murder Lalit Suneja. Counsel further argued that motive, if any, can only be proved by direct evidence and cannot be proved by evidence admitted u/s 32(1) of the Indian Evidence Act. Motive is not the cause of death u/s 32 of the Indian Evidence Act nor is it a "circumstance of the transaction which resulted in death". The "circumstances" must be circumstances of the transaction; general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death, will not be admissible. "Circumstances" of a "transaction" is a phrase, no doubt, that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is narrower than "res gestae". The circumstances must have close proximate relation to the actual occurrence. In support of this proposition counsel relied upon AIR 1939 47 (Privy Council) .

25. Learned counsel contended that "circumstance" should be of a conclusive nature as to exclude every hypothesis other than the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act has been done by the accused. He relied upon Hanumant Vs. The State of Madhya Pradesh, . He also relied upon Onkar Vs. State of Madhya Pradesh, ; Sharad Birdhichand Sarda Vs. State of Maharashtra, ); Nimoo Pal Majumdar Vs. The State, ; Gentela Vijayavardhan Rao and another Vs. State of Andhra Pradesh, .

26. Learned counsel while contending that Ex. PW-15/A1 or any oral statement made by the deceased to the Police Officer on 23.7.1992 does not fall u/s 32(1) of the Indian Evidence Act and become subject to the prohibition in Section 162 Cr.P.C. besides being hearsay, submitted, it establishes a negative circumstance pointing to the innocence of the appellants, namely, that whoever killed Lalit

Suneja, did not kill him as a result of what transpired on 23.7.1992. For this proposition, he relied upon The Public Prosecutor Vs. Munigan alias Munisami, . Counsel challenged the FIR based on the statement of Narender Pal Naresh as being a statement u/s 162 Cr.P.C. and cannot be termed as an FIR. He contended that there is material on record to show that the information about the commission of the offence was received at 8.12 a.m. in Police Station Shakarpur on 2.8.1992 recorded in DD No. 4A. Thereafter DD No. DA No. 9B was recorded at 8.55 a.m. on 2.8.1992 under which the information was entered into Roznamcha, copy prepared and given to ASI Chet Ram for necessary action. The Police having acted on an information received of a cognizable offence is the FIR and not the statement recorded subsequently of Narender Pal Singh at 9.45 a.m. on 2.8.1992. This statement, according to the counsel, was recorded in the course of investigation u/s 161 Cr.P.C. and could not have been used as an FIR. The statement of Narender Pal Naresh recorded u/s 161 Cr.P.C. is hit by Section 162 Cr.P.C. It cannot be counted as substantive evidence. Narender Pal Naresh was not even examined in the Court as he had died prior thereto. The trial court placed reliance on the above statement by recourse to a judgment in Inder Singh and Another Vs. The State (Delhi Administration), which, in fact, is wrong reading of the judgment as no such proposition of law is laid down that such statement is admissible.

27. Learned Counsel contended that Ex. PW-15/A1 is a forged and fabricated document, unproved and inadmissible in law. He also contended that testimony of PW-15 is contradictory, false and is unworthy of any credence specially when PW-15 has been found guilty of tampering with Police register by the trial court. In any event, Ex. PW-15/A1 cannot be construed as a circumstance of the transaction which resulted in the death of Lalit Suneja. Even the conspiracy has not been established and the impugned judgment does not give a finding as to who murdered Lalit Suneja. Consequently, the judgment of the trial court suffers from gross errors of law which totally vitiate the entire judgment. The reliance placed by the trial court on two applications filed by the accused at different stages of the case as admissible and proved were not even exhibits nor they form part of the evidence nor were put to the accused in his 313 Cr.P.C. Statement and so could not be used for holding that appellant, Nitin Gunwant Shah, had taken a false plea that he did not know the deceased. Learned counsel for the appellant, Om Prakash Srivastava, primarily adopted the aforesaid submissions of the counsel for the appellant, Nitin Gunwant Shah. He also contended that the false defence/plea of the accused cannot be constituted a link to fortify the Prosecution's case or to be used to fill up the lacunae of the Prosecution. In other words, the judgment of the trial court is unsustainable.

28. Mr. K.T.S. Tulsi, learned counsel appearing for Om Prakash Srivastava @ Babloo Srivastava in Criminal Appeal No. 527 of 2006 made a guest appearance and adopted the arguments of Mr. Ram Jethmalani.

29. Learned counsel for the State, on the other hand, argued that Ex. PW-15/A1

is a complaint of the deceased revealing the threat held out by Babloo Srivastava for settling a money dispute with Nitin Shah. The said complaint is evidence not only of motive of crime but also of evidence of the fact that the offence of conspiracy to commit a criminal offence had already been committed when the accused, Babloo Srivastava, made threatening calls to the deceased at the behest of Nitin Shah. The complaint, Ex. PW-15/A1, is a clear manifestation of criminal conspiracy already hatched between Nitin Shah and Babloo Srivastava. Counsel relied upon the judgment reported as *Firozuddin Basheeruddin and Others Vs. State of Kerala*, . Counsel contended that Sections 120A and 120B IPC have brought the law of conspiracy in India in line with the English Law by making an overt act inessential when the conspiracy is to commit any punishable offence. The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy, some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty u/s 120B IPC. Reliance was placed upon the judgment in *State through Superintendent of Police, CBI/SIT Vs. Nalini and Others*, .

30. Counsel argued that when there is a reasonable ground to believe that two or more persons have conspired together to commit an offence, then in view of Section 10 of the Indian Evidence Act anything said, done or written by any one of such persons in reference to their common intention is a relevant fact against each of the persons believed to be so conspiring. Reliance was placed on *Mohd. Khalid Vs. State of West Bengal*, , *Bhagwan Swarup vs. State of Maharashtra*. AIR 1965 SC 682 , *Suresh Chandra Bahri Vs. State of Bihar with Gurbachan Singh*, and *State through Superintendent of Police, CBI/SIT Vs. Nalini and Others*, . Counsel argued that in the present case not only is there reasonable ground to believe that the offence of conspiracy has been committed but also there is direct evidence of the said offence in the form of the complaint of the deceased. Ex. PW 15/A-1, and the testimony of PW-15 who has witnessed the manifestation of the said criminal conspiracy.

31. It was argued that the genuineness of the said complaint cannot be attacked on the ground of certain entries in the register being allegedly altered, without the accused having availed of the right to call the Reader who made the entries and have him examined. The said entries are inadmissible in evidence as the same are neither exhibited nor proved. The said document is only a marked document. PW-15 has clearly stated that he did not make the entries. Therefore, to call it a fabrication is misplaced and not borne out from the record. Nitin Shah

had filed an application u/s 340 Cr.P.C. before the learned Trial Court in this regard to which a reply was filed by Inspector Vijay Sule explaining the facts. Inspector Vijay Sule was called as a witness under Sec. 311 Cr.P.C. but by the time the application of the State was decided in view of the opposition by the appellant, Inspector Vijay Sule had expired.

32. Counsel further argued that on the day of the meeting on 23.7.1992, Nitin Shah stayed at Oberoi Hotel and that fact corroborates the testimony of PW-15 and also the Ex. PW-15/A-1. Reliance was placed on the testimony of PW-25 Inspector Badal Singh where he collected the Registration Card memo Ex. PW 25/A as also the testimony of PW-17 ASI Bhaktwar Singh who also states about the seizure of Registration Card regarding stay of accused, Nitin Shah, and details of the telephone bills prepared in the presence of accused, Manish and Manjeet. Counsel further relied on the cross examination of PW-17 where a suggestion on behalf of accused, Manjeet, is given that on 11.8.1992 the guest register of the hotel was not seized but the registration card of the hotel was seized, thereby admitting the above mentioned seizure of registration card. The fact that Nitin Shah denies the same u/s 313 Cr.P.C. leads to an adverse inference qua him and is an additional link in the chain of circumstances.

33. The fact that appellant Om Prakash Srivastava @ Babloo Srivastava stayed at Kanishka Hotel, Delhi on the day of the incident i.e. 2.8.92 under an alias is admissible as res-gestae evidence against him. The testimony of PW 25 Inspr. Badal Singh and PW 17 SI Baktawar Singh is relevant in this regard. This fact that appellant Om Prakash Srivastav @ Babloo Srivastava stayed at hotel Kanishka under assumed name is further proved by the testimony of PW-29 AK Gupta, the Handwriting Expert. In view of the fact that the appellant Babloo Srivastava stayed in the hotel in an assumed name an adverse inference ought to be drawn against him. The fact that Babloo Srivastava gave a false answer in his statement u/s 313 Cr.P.C. qua staying at Kanishka Hotel on 2nd and 3rd July in an assumed name and the fact that he owned the motor cycle DL-1 SD 4680, an adverse inference ought to be drawn against him. The said fact is also an additional link in the chain of circumstances. An application u/s 340 Cr.P.C. was filed by Appellant, Nitin Gunwant Shah, wherein he acknowledges the fact that the deceased was employed by him and that he knew the deceased and that there was a dispute over money.

34. Counsel argued that in order to establish the association and role of Manish Dixit vis-a-vis the other accused persons and to demonstrate his association with the conspiracy, reliance is placed on the testimony PW-20 SHO Inspector Hem Chand, the 10 of the case and PW-22, Jai Prakash, would reveal that Manish was identified as the assailant by PW-1 Veena, wife of the deceased, and by Narender Pal Naresh, the complainant and maker of the FIR. The said identification is recorded vide memo Ex. PW-20/K and has been deposed to by PW-20 and PW-22. The said act of identification is admissible as evidence of conduct u/s 8 of the Evidence Act. Counsel further relied on the testimony of PW-6, Inspector

Pramod Kumar. Who was a witness to the pointing out by Manish Dixit of the house of the deceased which establishes the fact that Manish Dixit knew the house of the deceased. The pointing out memo is Ex. PW-6/A. It was argued that the testimony of PW-7, Sudhir Kumar, read with PW-25 Inspector Badal Singh goes to show that the vehicle bearing No. DL-1S-D4680 bearing engine No. 334304 make Yamaha Motor Cycle which was recovered at the instance of Manish Dixit was in the name of Arun Kumar Aggarwal, under which Appellant No. 1 i.e. Babloo Srivastava had stayed at Kanishka Hotel. The said pointing out memo is Ex. PW-17/E. The said fact establishes that Manish Dixit knew about the bike of Babloo Srivastava and was in touch with Babloo Srivastava. Counsel placed reliance on the testimony of PW-9, Constable Billu Singh and PW-17, SI Bhaktawar Singh, who are the witnesses to the pointing out by Manish Dixit of Jukasso Inn. The memo in this regard is Ex. PW-9/A. The said fact clearly establishes that Manish knew about the place of meeting and thus corroborates the testimony of PW-15. The testimony of PW-17 SI Bhaktawar Singh shows that it was at the instance of Manish Dixit that the Police got to know about the stay of Babloo Srivastava at Kanishka Hotel which fact is admissible in terms of Section 8 and 27 of the Indian Evidence Act, both as evidence of conduct and discovery of a new fact pursuant to the disclosure of Manish Dixit which is Ex. PW-17/A. Counsel argued that all the aforesaid facts prove, beyond reasonable doubt, that Manish Dixit was the actual assailant who had killed the deceased in pursuance of the conspiracy hatched between Appellant No. 1 & Appellant No. 2 along with other accused. Reliance was placed on Himachal Pradesh Administration Vs. Om Prakash, , Prakash Chand Vs. State (Delhi Administration), , and State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, .

35. Counsel argued that the offence of conspiracy as defined u/s 120-A IPC and made punishable u/s 120-B IPC is an independent offence which is committed once there is an agreement to commit an illegal act. In other words, even where two persons conspire, as in the present case, to commit the murder of another, the offense as punishable u/s. 120-B has been committed. In case the conspiracy does not lead to the carrying out of the said offence, Section 115 of the Indian Penal Code is attracted. It is not a requirement of the Law of Conspiracy that where two or more persons conspire, and one of them dies and cannot face trial, the Trial Court must arrive at a conclusive finding of the guilt of the deceased accused who did not even get an opportunity of cross-examining the Prosecution witnesses. Reliance was placed on State through Superintendent of Police, CBI/ SIT Vs. Nalini and Others, , where the main assailant had died on the spot and though the roles were discussed but no finding of guilt qua them was arrived at. On the other hand, Section 10 and Section 114 of the Indian Evidence Act make it abundantly clear that the Court can draw an inference and a presumption having regard to the natural course of events and human conduct that where the factum of conspiracy has been established between two persons to eliminate the victim who, in fact, dies-under circumstances which are unnatural/homicidal, than the third person who was identified as the person responsible for carrying

out the purpose of the conspiracy will be guilty of the substantive offence in light of his conduct, actions, antecedent, contemporaneous and subsequent, even though no such finding has been recorded qua him. It was contended that the criminal liability that is incurred for the commission of the offence of conspiracy is distinct from that incurred for the commission of the offence of murder pursuant to a conspiracy. In the facts and circumstances of the present case, sufficient evidence has come on record, to prove beyond reasonable doubt that the Appellants have been rightly convicted u/s 120-B read with 302 IPC for commission of the offence of conspiring to murder Lalit Suneja. The evidence on record also proves beyond reasonable doubt that in pursuance of the conspiracy the murder was, in fact, committed by Manish Dixit.

36. We have very carefully gone through the material of this case and have extensively noted the submissions made by counsel for the parties before us. It is not necessary for us to advert to nor reply each and every contention raised by counsel since some of them emanate from assumptions made which do not arise from the facts of the case and even the trial court's decision is based on surmises only. The case of the Prosecution, in a nutshell, stated is that the deceased, Lalit Suneja, was shot dead at point blank range by Manish Dixit who came on a motor cycle driven by his co-accused, Virender, and that Manjeet Singh was waiting in a car to receive the two and to facilitate the get away. These assailants are alleged to have been hired by Babloo Srivastava who, in turn, was engaged by Nitin Shah to eliminate Lalit Suneja on account of a money dispute.

37. To establish its case, the Prosecution has pressed into service 32 witnesses and the defence examined one witness. The trial court, as already noticed above, returned a finding that Lalit Suneja had been killed by two unidentified persons. It also returned a finding that the vehicles alleged to have been involved in the incident were not those which according to the Prosecution were used. In other words, the vehicles were not of Om Prakash Srivastava @ Babloo Srivastava. The trial court acquitted Manjeet Singh who is stated to have been in the car present at the spot to enable a successful get away. But the trial court has returned a finding that the appellants before us have been proved to be guilty u/s 120B read with Section 302 IPC for the murder of Lalit Suneja. With these findings, the appellants have challenged the judgment as being perverse based on "no evidence" while the State claims the judgment to be a well reasoned one and capable of being upheld at law.

38. According to us the cornerstone of the Prosecution case rests on the veracity of PW-15 and the evidentiary value of Ex. PW-15/A1. This is so since the appellants are charged with conspiracy along with others to commit murder. Manish and Virender who have allegedly committed the murder have expired. Ex. PW-15/A1 is a complaint alleged to have been made by the complainant to the police on 23.7.1992. This complaint is alleged to be in the handwriting of the deceased, signed by the deceased and addressed to the SHO Police Station

Nizamuddin. The document is in Hindi bearing the signatures in English. This document has not been proved to be in the handwriting of C. the deceased nor is it proved that the deceased signed the same. The Prosecution has not led any evidence of any witness who is conversant with the handwriting of the deceased or conversant with the signatures of the deceased. As a matter of fact, PW-1, Veena, wife of the deceased, in her evidence has categorically deposed to the effect that she is conversant with the signatures of her husband and can identify his signature but cannot identify the handwriting since she had never seen him writing. She deposed to the effect that she had been shown the complaint dated 23.7.1992 addressed to the SHO Police Station Nizamuddin which is marked "B" but this complaint is not signed by her husband, Lalit Suneja. The wife of the deceased has denied that the so-called complaint is signed by the deceased. The Prosecution has failed to secure the genuine signatures of the deceased nor have them proved by forensic evidence, as required u/s 67 of the Indian Evidence Act, in which event the Prosecution has failed to prove Ex. PW-15/A1 to be in the handwriting of the deceased or signed by the deceased, Lalit Suneja. Furthermore, this document is alleged to have been received by PW-15 on 23.7.1992 from the SHO Nizamuddin Police Station. SHO Nizamuddin, Vijay Sule, could not be examined since he had died during the trial. However, the Police Station register No. 12 was exhibited. The entry of the said complaint is shown as Entry No. 605/2 dated 23.7.1992. On examination of this entry in the Register No. 12, it is seen that there is overwriting which is visible to the naked eye and apparent that the original Entry 605 was changed to Entry 604A to insert the document Ex. PW-15/A1 in Register No. 12. This entry has also been commented by the trial court as being manipulated and fabricated.

39. Yet another aspect which we found strange was that the Prosecution claims that the photocopy, Ex. PW-15/A1, was alleged to have been obtained by the Investigating Officer, PW-20, from PW-15 on 2.8.1992, but in reality there was no such photo copy in existence in the Police file as was admitted by counsel for the State. PW-20 states that PW-15 joined investigation on 2.8.1992 which was denied by PW-15 who claims to have joined investigation only on 4.8.1992. From such material we can safely deduce that document, Ex. PW-15/A1, has not been proved to be in the handwriting of nor signed by the deceased. The assertion that it was handed over in the Police Station on 23.7.1992 is doubtful due to lack of corroborative contemporaneous Police record. Its seizure on 4.8.1992 by PW-20 is doubtful. There is neither a receipt on 23.7.1992 nor the existence of this document on 2.8.1992 and its sudden appearance on 4.8.1992 is not beyond doubt. The register in which the complaint is alleged to have been recorded has been declared to have been tampered with, to rely upon the existence of PW-15/A-1 would be highly dangerous. In the absence of any reliable evidence to the existence of Ex. PW-15/A1, prior to 4.8.1992, the only evidence of threat made out to the deceased by the appellants is the oral testimony of PW-15 who is stated to have verified the complaint orally from the deceased on 23.7.1992.

40. Analyzing the deposition of PW-15, we find that he states in his examination-

in-chief that he was Sub Inspector on 23.7.1992 posted at Police Station Nizamuddin. He was called by the SHO and directed to inquire into the complaint received from the deceased. This witness inquired from the deceased as to what the complaint was about. It is the deceased who is stated to have informed PW-15 that there was a money dispute between him and Nitin Shah. Nitin Shah had threatened him to settle the dispute and that he had received phone calls from one Babloo Srivastava. The deceased also informed this witness that a meeting had been arranged at Jukasso Inn at 8.00 p.m. on 23.7.1992 to settle the dispute. PW-15 deputed two constables, Bir Singh and Joginder, to go to Jukasso Inn at 8.00 p.m. when he was also present there. The witness was introduced by Lalit Suneja to Nitin Shah and Om Prakash Srivastava @ Babloo Srivastava while Manish, Vimal Bhai, Satnam, Fouji, Virender Pant who were also present introduced themselves. At about 9.00 p.m. the deceased along with others emerged from the Jukasso Inn stating that the date for settlement had been fixed for 30.7.1992. All the parties left Jukasso Inn peacefully. We find from the evidence on record that there is no departure entry in the Roznamcha register on 23.7.1992 of PW-15 or Constables Bir Singh and Joginder having gone to Jukasso Inn from Nizamuddin Police Station. The departure entry of PW-15 in the Roznamcha Register of 23.7.1992 is of 1.30 p.m. (noon) and of return is 10.00 p.m. at night. The Prosecution has not examined Constables Bir Singh and Joginder but rely only on 3 PW-15. Analyzing the deposition we find that PW-15 was not in the Police Station between 1.30 p.m. till 10.00 p.m. on 23.7.1992. Consequently, there was no occasion for the SHO, Vijay Sule, to have handed over the complaint, Ex. PW-15/A1 nor PW-15 to have verified its contents from the deceased at 4.00 p.m.

41. From the above it can safely be deduced that PW-15 did not receive any complaint on 23.7.1992 nor was he aware of any meeting to be held at jukasso Inn at 8.00 p.m. The ipse dixit of PW-15 finds no corroboration from any contemporaneous record which was required to be maintained nor is there any witness supporting PW-15 in his claim. There is however evidence to show that this witness has improved his statement in Court substantially giving further rise to an inference that he is not worthy of credence. With the testimony of PW-15 and the complaint, Ex. PW-15/A1 not being found reliable and worthy of credence, the very edifice of the case of the Prosecution is knocked off. There is hardly any necessity for us to go any further into this case since the vital links in the chain of circumstances to establish conspiracy to murder are non-existent. Building of a case in vacuum without recourse to facts can hardly be justified by citing judgments or advancing learning. The propositions of law sought to be advanced cannot be analyzed since the proven facts necessary for their application are missing in this case. To contend that Ex. PW-15/A1 is a clear manifestation of criminal conspiracy already hatched between Nitin Shah and Babloo Srivastava or that the law of conspiracy in India is in line with English Law or to rely upon Section 10 or Section 114 of the Indian Evidence Act is of no consequence since the very edifice of the factual aspect of the case of the

Prosecution against the accused persons has not been established by the Prosecution to enable the Court to proceed further to examine the nature of conspiracy or to the end that was sought to be achieved. There is nothing on record to show that any of the two appellants had anything to do with the murder of Lalit Suneja.

42. Another circumstance which was relied upon by the trial court was the contents of the application moved by appellant, Nitin Gunwant Shah, u/s 340 Cr.P.C. This was pressed into service as an admission of the accused to his monetary transactions with the deceased. This application cannot be used as evidence for reasons that it has not been proved in the trial as evidence nor has this aspect been put as a circumstance incriminating to the accused in his statement u/s 313 Cr.P.C. The use of this document by the trial court was itself erroneous to come to a conclusion that the accused had taken a false plea creating a circumstance that could be used against the accused.

43. It appears that the trial court has based its judgment only on an assumption that the appellants are guilty. This, with great respect to the trial Judge, is not the correct perspective of law, which requires the Prosecution to prove its case beyond shadow of doubt. There is a great distance between an assumption and proven fact. Ex. PW-15/A1, which by itself dehors any other circumstance, cannot be the basis of conviction. The document reveals only an apprehension which was expressed by the deceased, if at all. But, as already stated, much water had flown since that apprehension and the murder. During the interregnum no incident has been brought on record to establish the guilt of the accused. In the totality of the circumstances, we find that there is nothing on the record to show that any of the two appellants had anything to do with the murder of Lalit Suneja. Consequently, we set aside the judgment and order under challenge and allow Criminal Appeal Nos. 519/2006 and 527/2006. The appellant, Nitin Gunwant Shah, is on bail. His bail bond shall stand discharged. Appellant, Om Prakash Srivastava @ Babloo Srivastava, is in custody. He shall be set at liberty forthwith, if not wanted in any other case.