

(2012) 12 AHC CK 0038

In the Allahabad High Court

Case No : Criminal A. No. 101 of 2003 with 3 other Criminal A.

Pradeep Kumar

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 21-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 34, 394, 411, 460

Citation : (2013) 2 ACR 1928

Hon'ble Judges : Rakesh Tiwari, J; Anil Kumar Sharma, J

Bench : Division Bench

Advocate : I.M. Khan and S.K. Yadav, Amicus Curiae, for the Appellant; Rajeev Ojha, R.Y. Pandey, G.S. Hajela, K.D. Tripathi, K.D. Tiwari, R.K. Saxena and Pankaj Shukla, for the Respondent

Judgement

Rakesh Tiwari, J.—Heard Dr. S.K. Yadav. amicus curiae, in criminal appeal No. 101 of 2003. Sri A.K. Sachan, Advocate in connected criminal appeal No. 5477 of 2002, Sri Mohit Singh in criminal appeal No. 5317 of 2002, Sri A.K.S. Solanki and by Sri S.N. Tripathi, amicus curiae, in criminal appeal No. 580 of 2004, Sri G.S. Hajela and Sri K.D. Tripathi, Advocates for the complainant and Sri R.Y. Pandey, learned A.G.A. assisted by Sri Rajeev Ojha, brief holder for the State and perused the record. Criminal Appeal No. 101 of 2003, Pradeep Kumar son of Banarsi Das v. State of V.P. and connected, Criminal Appeal No. 580 of 2004, Devendra Kumar alias Babloo son of Ram Bharose have been preferred challenging the validity and correctness of the judgment and order dated 5.12.2002 passed by the Additional Sessions Judge/Fast Track Court No. 5, Moradabad convicting and sentencing the appellants Pradeep Kumar and Devendra Kumar alias Babloo u/s 394, I.P.C. to undergo 10 years R.I. with a fine of Rs. 10,000 each and u/s 302, I.P.C. read with Section 34. I.P.C. to undergo life imprisonment and fine of Rs. 20,000. The impugned order further provides that in default of payment of fine of Rs. 10,000 u/s 394, I.P.C. the accused-appellants

to undergo a further period of imprisonment of two years and in default of payment of fine of Rs. 20,000 u/s 302 read with Section 34, I.P.C. to undergo a further period of imprisonment of 4 years. "The Court below further convicted and sentenced the appellants u/s 411, I.P.C. to undergo 2 years R.I.

2. Criminal Appeal No. 5317 of 2002 and Criminal Appeal No. 5477 of 2002 have also been preferred by appellants Devendra Kumar son of Ram Gopal and Vijay Pal son of Medhai Lal respectively challenging the validity and correctness of the judgment and order dated 5.12.2002 passed by the Additional Sessions Judge/ Fast Track Court No. 5, Moradabad convicting and sentencing the aforesaid appellants u/s 411, I.P.C. to undergo 2 years R.I. with a fine of Rs. 5,000 and in default of payment of fine to further undergo imprisonment for a period of 6 months. All the sentences were ordered to run concurrently.

3. The appellants in Criminal Appeal Nos. 101 of 2002, 580 of 2004 and 5317 of 2002 have challenged the judgment and order on the ground that the conviction of the appellants is against the weight of evidence on record; that the conviction of the appellants is bad in law and the sentence is too severe; and the trial court has not correctly assessed the evidence on record. Appellant Vijay Pal in Criminal Appeal No. 5477 of 2002 has also challenged the impugned judgment and order on similar grounds except that the alleged recovery of Rs. 50,000 shown from him is false and fabricated as there is no evidence in this regard.

4. The prosecution case is that Girish Kumar son of late Radhey Shyam Agarwal resident of Mohalla Bajigran, P.S. Mughalpura, District Moradabad submitted a written report (Ext. Ka-1) on 8.2.2000 alleging that some unknown persons after killing his uncle Deoki Nandan Agarwal some time in the night of 7.2.2000 have committed theft from his Almirah. On the basis of written report entry was made at Sl. No. 17 of 2000 and case crime No. 80 of 2000. under Sections 302 and 460, I.P.C. was registered against unknown miscreants. The averments made in the written report were that Deoki Nandan Agarwal, the uncle of the first informant was doing his business under the name and style of "Devyan Company" situated in Mohalla Bajigran. His uncle was sleeping alone in the firm. In the night of 7.2.2000 some persons had entered in the firm and murdered him. In the morning when Vinod Kumar Bhatnagar came on work he saw the main door open. He gave a call but there was no answer from inside the firm, therefore, he reported the matter to Sri Girish Kumar, nephew of Deoki Nandan Agarwal. When the complainant went inside the building he saw the body of his uncle lying on the floor. Both his hands and legs were tied by a piece of jute rope and Almirah was lying open. In the written report he also averred that articles/ goods have been stolen from the Almirah would be informed after ascertaining the same and prayed that legal action may be taken in the matter. CC-684, Dhoop Singh, P.S. Mughalpura, District Moradabad prepared the chick report and S.H.O. R.P. Gupta took up the investigation of the case.

5. Recovery memo dated 8.2.2000 was prepared by the Investigating Officer in presence of witnesses Rupendra Bhatnagar son of Madan Lal Bhatnagar resident

of Mohalla Kanungoyan Hathi wala Mandir P.S. Mugalpura, Ram Prakash Gupta son of Vasudeo Gupta resident of Mohalla Gujrati Gali. P.S. Mughalpura, District Moradabad showing recovery of one plastic torch of two cells (Eveready). a woollen cap and a pair of teeth, blood stained concrete and plain concrete, a bed-sheet and blanket, an old pair of chappals and a piece of jute rope by which the hands and legs of the deceased were tied, from the place of occurrence. The recovered articles/goods were sealed and registered as case property in case crime No. 80 of 2000 by the police.

6. Another written report (Ext. Ka-3) was submitted on 10.2.2000 by Raj Kamal Agarwal son of Deoki Nandan Agarwal (since deceased) stating that he also looks after the work of firm alongwith his father and had gone to Great Britain on 2.2.2000 for some business purpose. He was informed by telephone on 8.2.2000 regarding murder of his father by some unknown persons in the previous night. On checking the Almirah on his return he found that about Rs. 2,15,000 cash, i.e., about Rs. 1 lac in denomination of Rs. 100 and in denomination of Rs. 50, which were bearing stamp of State Bank of India, Civil Lines, Moradabad were missing. An Atlas cycle No. 1410229 of the firm was also not found. He sent the information and requested for appropriate action.

7. On 14.2.2000, S.H.O. Rajendra Prasad Gupta alongwith S.S.I. Dinesh Kumar Singh, S.I. Akhtyar Ahmad Ansari, Constable 402 Vimal Kumar, Constable 1195, Satish Chandra and Constable driver Yunus Ali went with accused-appellant Devendra Kumar alias Babloo son of Ram Bharose Lal resident of Mohalla Mahboobullahganj recovered a sum of Rs. 50,000 cash which he had hidden in his one room house and a piece of jute rope about 6 metres long by which the hands and legs of the deceased had been tied from his house saying that this money was part of loot by him after murdering his employer Deoki Nandan Agarwal.

8. On 15.2.2000 accused Devendra Kumar alias Babloo son of Ram Bharose resident of Mohalla Mahboobullahganj went to the house of Devendra Kumar son of Ram Gopal Halwai, his sister's husband (Bahnoi) alongwith the police party and got recovered from him a sum of Rs. 45,000 in cash saying that he had given this money to him for safe keeping after telling him everything. The case property was sealed in a white cloth by the police.

9. The police on 15.2.2000 also got recovered Rs. 40,000 cash on the pointing of Smt. Manju wife of Pradeep Kumar, brother-in-law of accused Devendra alias Babloo. She was informed to be in her father's house in Daswaghat, P.S. Nagfani. On enquiry by the police about the money she stated that a sum of Rs. 40,000 was given by her for safe custody but due to fear she had concealed the same in the floor of the Kothari built by her father in agricultural fields across Ramganga. The police party took her to the spot from where she got recovered the amount of Rs. 40,000 wrapped in a plastic from its hiding place in presence of her father Jagat Singh.

10. Another amount of Rs. 50,000 from the part of the loot of Rs. 2,15,000 was recovered from two accused persons namely, Vijay Pal son of Midhai Lal Gangwar resident of Mohalla Pagambarpur, P.S. Shahjadnagar, Rampur and Pradeep Kumar Saini son of Banarsi Das resident of Mohalla Saraigate Ghoslyan, P.S. Kotwall Rampur at present living in Mohalla Panch Kheda near Durga Mandir Katghar, Moradabad. The door of his house was got opened and on search a token with numerical "50" written on it was found from the person at search Pradeep Kumar Saini. He informed that in the night of 7/8.2.2000, he with Devendra Kumar son of Ram Bharose Lal, driver of Deoki Nandan Agarwal had looted the cash of the firm and the cycle which he had kept at the cycle stand at the Bus Station and that after informing Vijay Pal aforesaid had given him a sum of Rs. 50,000 which was part of the loot for safe keeping for the time being. Accused Vijay Pal gave the aforesaid amount of Rs. 50,000 which was part of the loot from his Almirah alongwith the bag of the company. The stolen Atlas cycle of the firm was recovered on the pointing out of accused Pradeep Kumar from Roadways Bus Stand, Moradabad in presence of witnesses Charan Das son of Ram Swarup resident of mohalla Narangi Tola Mukha Kali Kothi, P.S. Sikhilalas, Moradabad and Pawan son of Surendra Singh resident of Nishad Khas P.S. Mayanpur, Moradabad.

11. After inquest the body of Deoki Nandan Agarwal (since deceased) son of Kishan Lal resident of Gudia Bazi Garan, P.S. Mughalpura, District Moradabad was sent for post-mortem by the Investigating Officer. P.S. Mughalpura in a sealed cloth, which was brought and identified by C.P. No. 930, Ram Singh, C.P. No. 523, Pratap Singh and Bhan Singh, P.S. Mughalpura, Moradabad in District Hospital. Moradabad. Dr. D.S. Ahlawat Artho Surgeon, conducted the post-mortem examination on the dead body of Deoki Nandan Agarwal and found that the deceased was more than 76 years/male, who had died about a day earlier. The external examination showed that eyes and mouth were closed, clotted blood was present near right angle of mouth, Rigor mortis was absent in neck and was passing in upper limbs but present in lower limbs. P.M. staining present on the back. The internal examination of head and neck showed fracture of the frontal bone. Haematoma in S/c tissue present at the side of injury and on both side of frontal region. Membranes were lacerated. Brain was lacerated haematoma present. Spinal Cord was not opened. The abdomen contained greenish fluid 100 ml., present, Small and large intestines contained gases and faecal matter.

12. In the opinion of the Doctor the cause of death was as a result of ante-mortem head injury which were reported by the doctor in his postmortem report thus:

1. Lacerated wound 2 cm. x 1.0 cm. x scalp deep on the right side of top of head. 10 cm. above (R) ear.
2. Lacerated wound 1.0 cm. x 0.5 cm. x scalp deep on the top of (R) side of head. 1.5 cm. away in front of injury No. 1.

3. Lacerated wound 0.5 cm. x 0.5 cm. x scalp deep on the top of head in (L) side. 10.0 cm. above left ear.
4. Three lacerated wound in an area of 3 cm. x 0.5 cm. x all muscle deep on the (R) side of forehead. 3.0 cm. above (R) eyebrow.
5. Lacerated wound 0.5 cm. x 0.25 cm. x muscle deep on the left side of forehead. 4.0 cm. above (L) eyebrow.
6. Contusion 1 cm. x 0.25 cm. on the (L) side face. 3.5 cm. in front of left ear.
7. Contusion 1 cm. x 0.5 cm. on the (R) side of face near nose.
8. Contusion 1.5 cm. x 0.5 cm. behind the palm of (R) hand. 2.0 cm. below the index finger.
9. Contusion 1.5 cm. x 1.0 cm. on (R) side behind the little finger.

The Doctor also handed over the following items to the police alongwith papers after the post-mortem for scientific investigation in the lab.

1. One sealed envelope containing one P.M.R. with fourteen police papers (14) sent to S.S.P., Moradabad through C.P. No. 930 Ram Singh, P.S. Mughalpura, Moradabad.
2. One sealed envelope containing one P.M.R. with sealed bundle of cloth containing one pant, one shirt, two sweaters, one Jarsi, one coat, one Pajami, one underwear, one pair shoe black leather, one pair shocks, one inner upper, one baniyan shadow, one dori sent to S.O. P.S. Mughalpura, Moradabad through concerned constable.
3. One sealed envelope containing one P.M.R. sent to C.M.O. Moradabad.

It appears from the report of the Forensic Science Laboratory, Agra dated 5.7.2000 that following items were investigated/examined in the lab.

1. Piece of rope,
2. Coat,
3. Pant alongwith Gelis,
4. Shirt Dharidar,
5. Green Jarsi,
6. Sleti Sweater half,
7. Sweater Half Jamuni,
8. Half Sweater,
9. Baniyan full size,
10. Baniyan shadow,

11. Gown Woollen,
12. Pajami,
13. One pair shock,
14. One pair shoe,
15. Blood stained and plain earth, and
16. Piece of rope by which the hands and legs of the deceased were tied.

The report stated that on item Nos. 2 to 4, 8 to 10, 12 and 15 large spots of blood stains were found, which were examined through spectrometer. This report further stated that item Nos. 1 and 16 are the same in its pattern. Human blood was found on item Nos. 2 to 4, 8 to 10, 12 and 15. Blood group "B" was found on item Nos. 3, 4 to 8, 9 and 15 but no definite result could be given on item Nos. 2, 10 and 12 and that quantity of blood on item No. 15 being too less could not be examined.

13. The finger prints from the place of occurrence were also lifted by the Finger Print Expert on tapes which were sent through Special Messenger on 26.2.2000 alongwith covering letter for examination. These finger prints from the place of occurrence were tallied with the finger prints of accused Devendra Kumar Saini and Pradeep Kumar by the Finger Research Department U.P. Lucknow.

14. After investigation charge-sheet was submitted in the Court of Chief Judicial Magistrate, Moradabad who vide his order dated 21.6.2000 committed the case to the Court of Session. Charges under Sections 394, 302 read with Section 34, I.P.C. and 411, I.P.C. were framed by the trial court against accused-appellants Devendra son of Ram Bharose and Pradeep Kumar son of Banarasi and also charge u/s 411, I.P.C. was framed against accused Vijay Pal, Devendra son of Ram Gopal and Smt. Manju. They pleaded not guilty to the aforesaid charges and claimed to be tried.

15. The prosecution in order to prove its case examined Girish Kumar, P.W. 1, Raj Kamal Agarwal, P.W. 2, Vinod Kumar, P.W. 3, Rupendra Bhatnagar, P.W. 4, Satish Chandra Gupta, P.W. 5, Dr. D.S. Ahalawat. P.W. 6. Kayam Singh, Assistant Scientist, P.W. 7, S.H.O. R.P. Gupta, P.W. 8, and Dinesh Kumar Singh, P.W. 9. whereas the accused-appellants were examined u/s 313, Cr.P.C. and stated that they have been falsely implicated in this case due to enmity.

16. The trial court after appreciating the evidence and upon hearing learned counsel for the parties by the impugned judgment and order dated 5.12.2002 convicted and sentenced the accused-appellants in the manner as stated above.

17. Sri I.M. Khan, learned counsel for the appellant was continuously not appearing in this case as such Dr. S.K. Yadav, Advocate was appointed as amicus curiae. He has placed recovery memo dated 14.2.2000 of Rs. 50,000 cash from accused Pradeep Kumar and submits that this recovery memo was not proved by

any person to the recovery, rather it has been proved by P.W. 9, Dinesh Kumar Singh, S.O., who was not present on the spot. In this regard he has placed reliance upon following passage of the examination and cross-examination of P.W. 9:

Sri S.N. Tripathi, amicus curiae in Criminal Appeal No. 580 of 2004 has argued that in fact the murder was got committed by the son of the deceased who in a preplanned manner had sent away the members of the family and had himself gone to Britain so that the needle of suspect does not point at him. In this regard he has placed reliance upon cross-examination of P.W. 2, Raj Kamal, which reads thus:

He has also relied upon paragraphs 11 to 14 of the aforesaid statement which reads thus:

He submits that it is apparent from the aforesaid fact that it is the accused who was the most weak person being an employee of the Company who could be framed by P.W. 2.

18. Sri Ajit Singh Solanki, Advocate, who was also appearing for the appellant before amicus curiae was appointed in Criminal Appeal No. 580 of 2004, has also been heard in the interest of Justice. He has submitted that appellant Devendra Kumar alias Babloo was the driver of the deceased and he does not dispute his employment. Sri Solanki argues that the appellant had met P.W. 2, Raj Kamal on 10.2.2000 when he reached Moradabad. The reason for the accused-appellant not going to Delhi was that his driving licence had been kept by his employer Deoki Nandan Agarwal (since deceased) as he was of the view that Devendra Kumar forgets his licence whenever he goes out of State and as the deceased was also going alongwith him, therefore, he had kept the driving licence of his driver with him. He did not want to take any chance in this regard. He has placed reliance upon statement of P.W. 2, Raj Kumar which reads thus:

He has also raised question as to whether the lock of the Almirah was found open or broken has not come in the evidence and there is no recovery of the key of the Almirah, which has neither been found at the place of occurrence nor has been recovered from any of the accused. According to him, accused Devendra alias Babloo has been framed as he may have been asked to open the Almirah and then his finger prints were tallied to show him as accused. Therefore, he has supported the contention of Sri S.N. Tripathi, amicus curiae that accused Devendra Kumar alias Babloo has been framed in this case, who had also met P.W. 2 on his return on 10.2.2000 and had he been guilty, he would not have met P.W. 2 when he reached Moradabad.

19. Sri A.K. Sachan, learned counsel for appellant Vijay Pal, who has been charged u/s 411, I.P.C. submits that the accused was arrested on 14.2.2000 and stated that it is not in dispute that Pradeep Kumar Saint son of Banarsi Das and Vijay Pal are friends, therefore, he is shown to have been arrested from the house of Vijay Pal on 14.2.2000. He has also reiterated that from perusal of

recovery memo dated 14.2.2000 regarding recovery of Rs. 50,000 cash it appears that the said recovery was made by Sri Naresh Pal Singh, S.O. and others but they were not examined. P.W. 9 Dinesh Kumar Singh stated that he had prepared the recovery memo which is signed by him yet his name is not amongst the officers with those whose name is on the said recovery memo. According to him, money is said to have been kept in a bag of the company entrusted to accused Vijay Pal for putting it in the Almirah for the night as both were staying together in the house of Vijay Pal, the co-accused. The bag of money containing Rs. 50,000 was recovered by the police from the house of Pradeep Kumar as such Vijay Kumar was falsely implicated being friend of Pradeep Kumar. The cycle of the firm which was missing was also recovered on the pointing out of accused Pradeep Kumar. Placing reliance upon u/s 411, I.P.C. he lastly submits that no case u/s 411, I.P.C. is made out against either of the accused as they had no knowledge about the money in the bag of the firm.

20. Per contra, learned A.G.A. submits that no adverse inference can be drawn from the statement of the witnesses and there are no discrepancies therein. The prosecution case, according to A.G.A., is that the appellant had not met P.W. 2 at Delhi when he was returning from foreign country on 8.2.2000. This establishes that the appellant was avoiding P.W. 2 due to his guilty conscious otherwise, there was no reason for him to go to Delhi to bring P.W. 2 Raj Kamal son of the deceased by car. The offence committed by the accused-appellants has been found proved by the trial court. There is no Illegality or infirmity in the judgment and order impugned and that accused-appellants have rightly been convicted and sentenced according to law. The judgment and order of the Court below does not require any interference by this Court in appeal and the same is liable to be upheld in appeal by this Court.

21. After hearing learned counsel for the parties and on perusal of the record it appears that the arguments raised before us are the same which had been raised by the appellants before the trial court and have been considered by the court below and we have to ascertain as to whether the Court of Session has rightly arrived at the conclusions or not?

22. It is argued that the accused persons Devendra alias Babloo son of Ram Bharose and Pradeep Kumar son of Banarsi Das cannot be held accountable for the murder of Deoki Nandan Agarwal or for guilty of doing away with him with the iron rod merely because on the basis of recovery of iron rod, lock and key of the main door or a part of jute rope.

23. The main thrust of arguments by the learned counsel for the appellants on record is that monies alleged to have been recovered from the appellants was not in accordance with the provisions of Section 27 of the Evidence Act; that there is no independent witness to the alleged recoveries of cash said to be part of the loot, iron rod, lock chain key of the main gate and cycle. The argument as to whereabouts of the key of the Almirah by which it was opened is an important link missing from the chain of circumstances in the prosecution story. The key of

the Almirah has not been found either at the place of occurrence or has been recovered from any of the accused and the witnesses to the recovery of items at the place of recovery namely, Naresh Pal and others have also not been examined.

24. Devendra alias Babloo son of Ram Bharose and Pradeep Kumar have denied their participation in the crime stating them to have been falsely implicated in the case. According to the counsel, since recovery has not been made according to the provisions of Section 27 of the Evidence Act and recovery shown to have been made from Vijay Pal and Devendra son of Ram Gopal, Smt. Manju is also illegal, hence the same cannot be relied upon.

25. The appellant's counsel have tried to explain the finger prints of accused Devendra alias Babloo and Pradeep Kumar which had been lifted by the Finger Print Experts from the place of occurrence stating them to have been prepared at the police station.

26. In the argument learned counsel for the appellants has laid much emphasis upon the fact that Devendra Kumar alias Babloo was not employed as driver in the firm of Deoki Nandan Agarwal and that the prosecution has failed to establish any case against the accused-appellants.

27. From the evidence on record it appears that Deoki Nandan Agarwal was done away with in the night of 7/8.2.2000. The crime was discovered by Vinod Kumar, an employee of the Devyan Company, who had found the main gate open. The post-mortem report of late D.N. Agarwal shows that 9 ante-mortem injuries were found on his body as given earlier in the judgment.

28. The argument by the counsel for the accused Pradeep Kumar that Devendra alias Babloo had left the employment of Sri Agarwal, as a driver in the "Devyan Company" some time back and that he has been falsely implicated in the case because he was a friend of Devendra Kumar alias Babloo, does not repose confidence for the reason that there is no explanation whatsoever by these two accused Devendra alias Babloo and Pradeep Kumar as to how their finger prints were found on the Almirah and on the telephone receiver particularly when appellant Devendra alias Babloo had come out with the case that he was not in the employment of Deoki Nandan Agarwal since a long time and Pradeep Kumar had never ever been in the employment of the firm.

29. As regards the explanation of the accused Devendra alias Babloo regarding his employment in the firm of Deoki Nandan Agarwal is concerned, suffice it to mention here that the account book of the firm showed that he was employed as a driver even immediately before the said incident and that accused he was the driver of the firm of Deoki Nandan Agarwal, who had taken advance from him. His signatures appeared on the vouchers wherein it is mentioned that the advance may be deducted from his salary. If he was not an employee of the firm of Deoki Nandan Agarwal, there could not have been the question of deduction from his salary because he was an employee of Deoki Nandan Agarwal. This

explanation how the finger prints of accused Devendra alias Babloo could have been found on the Almirah and its handle he after committing the murder of his employer he opened the Almirah as he had access into the firm as well as to the residential part in which Deoki Nandan Agarwal slept, being his driver. It might be that during the incident some telephone calls had come and Pradeep Kumar may have cut the calls by lifting the receiver of the instrument having his finger prints on it.

30. The finger prints lifted from the door of the Almirah and its handle as well as from the telephone receiver were examined by the Finger Print Expert. The finger prints on the Almirah and its handle matched with the finger prints, of accused Devendra alias Babloo whereas finger prints on telephone receiver tallied with the finger prints of accused Pradeep Kumar son of Banarsi Das. After the arrest of the accused persons two Iron rods (Sariya). lock and key were got recovered on the pointing out of accused Devendra from the Nall near the shop of barber in Mohalla Bajigran. A part of the Jute rope which was used for tying the hands and legs of Deoki Nandan Agarwal, who was later on killed by the accused persons was also recovered from the house of accused Devendra. Accused Devendra alias Babloo, driver of the deceased had not only taken Raj Kamal, the younger son of the deceased to Delhi on 2.2.2000 but had also confessed to the crime, therefore, his statement that he was not in employment is incorrect.

31. It also appears from the record that at the time of arrest of accused Pradeep Kumar a token No. 50 for keeping a cycle in the Bus stand was recovered from him. He had stated that after committing the murder of Deoki Nandan Agarwal they had taken the "Atlas Cycle" of the company which can be identified by the word of Deoyan Company written on its mudguard and was recovered on his pointing out at the Bus stand. No explanation whatsoever has come forward, as stated above regarding recovery of these items from the possession of the accused, hence it is clearly established from the attending circumstances and their statements on record that these two accused had in fact done away with Deoki Nandan Agarwal (since deceased).

32. As regards accused Vijay Pal and Devendra son of Ram Gopal are concerned, they have been charged only for an offence u/s 411, I.P.C. Accused Devendra son of Ram Gopal is the brother-in-law of main accused Devendra alias Babloo. Manju, sister of accused Devendra alias Babloo is married to him and Pradeep Kumar is friend. Four money recoveries, i.e., Rs. 50,000, Rs. 45,000, Rs. 40,000 and Rs. 50,000, total amounting to Rs. 1,85,000 have been made from these accused persons. These recoveries have been made by the police stating that these amounts of loot was kept by these accused Vijay Pal, Pradeep Kumar son of Banarsi Das, Smt. Manju and Devendra son of Ram Bharose after telling them about the incident. The bank notes were in a sealed bundle having seal of the bank having been withdrawn from the Bank. The accused persons could not explain as to how these bundle of notes came into their possession. It is also evident from the statements of P.W. 1 and P.W. 9 that the aforesaid sum of Rs.

1,85,000 alongwith the part of jute rope, which was used in the commission of crime and Sariya etc. were recovered on the pointing out of the accused-appellants which clearly establish that these persons had committed the murder of Deoki Nandan Agarwal for the purpose of looting of a sum of Rs. 2,15,000. which was kept in the Almirah.

33. Learned counsel for appellant Vijay Pal has relied upon the case of Pancho Vs. State of Haryana, , wherein the Apex Court has held that where there is belated discovery of article at the instance of co-accused, who had made a confession, cannot be used or treated to be a substantive evidence against the other co-accused. In these circumstances, the Court allowed the appeal acquitting the accused In that case on the ground that there was no credible evidence in this regard.

34. One of the contentions raised by Sri S.N. Tripathi, amicus curiae in connected Criminal Appeal No. 580 of 2004 that the murder of Deoki Nandan Agarwal has not been committed by his younger son Raj Kamal may also now be considered. From the record it is apparent that Deoki Nandan Agarwal had two sons namely, Neel Kamal, elder son, who had settled in a foreign country whereas the younger son Raj Kamal was doing business with his father in India. Raj Kamal was admittedly not in India at the time of incident. In this regard he had also filed ticket of the flight by which he had gone to foreign country and came back to India on 10.2.2000 after receiving the information of murder of his father. It also appears that the relations of Deoki Nandan Agarwal with his own wife and daughter-in-law were strained and they were living separately. Raj Kamal was the only person who was running business with his father and, therefore, there was no circumstance or occasion for him to done away Deoki Nandan Agarwal, his father, who was already aged about 76 years for a paltry sum of Rs. 2,15,000. In our view, he was running the business of the company for all practical purposes and had no reason at all to do away with his father at advance age of his father.

35. The irregularities pointed out by the learned counsel for the accused-appellants said to have been done in the investigation by the Investigating Officer are not such which would be fatal to the case of the prosecution. As stated above, all the links in the chain of circumstantial evidence only point out that the accused persons have committed the crime.

36. We also find that the recovery memo was not prepared by the police in presence of any independent witness, hence, the trial court has erred in convicting and sentencing accused Vijay Pal and Devendra son of Ram Gopal u/s 411, I.P.C. They are therefore, acquitted of the charge u/s 411, I.P.C.

37. For the reasons stated above, Criminal Appeal No. 101 of 2003, Pradeep Kumar v. State of U.P., and Criminal Appeal No. 580 of 2004, Devendra Kumar alias Babloo v. State of U.P., are dismissed. The conviction and sentence of the aforesaid appellants namely, Pradeep Kumar and Devendra Kumar alias Babloo is

maintained.

38. Criminal Appeal No. 5317 of 2002, Devendra Kumar son of Ram Gopal v. State of U.P., and Criminal Appeal No. 5477 of 2002, Vijay Pal v. State of U.P. are allowed. Appellants Devendra Kumar son of Ram Gopal and Vijay Pal, are acquitted of the charge u/s 411, I.P.C. Dr. S.K. Yadav, amicus curiae in Criminal Appeal No. 101 of 2003 and Sri S.N. Tripathi, amicus curiae in connected Criminal Appeal No. 580 of 2004 will be paid Rs. 2,100 each as fee from the State Government within a period of one month from today.

Let a certified copy of this judgment be sent to the court below for its Immediate compliance which should be reported to this Court within two months.