

(2012) 09 DEL CK 0416

In the Delhi High Court

Case No : Criminal A. 98 of 2012 and Criminal M. (Bail) 160 of 2012, Criminal A. 117 of 2012 and Criminal M. (Bail) 190 of 2012, Criminal A. 212 of 2012, Criminal A. 264 of 2012 and Criminal M. (Bail) 459 of 2012

Shakil @ Bhola and Others (Mohd.)

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 14-09-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Evidence Act, 1872 — Section 65(B)
Penal Code, 1860 (IPC) — Section 120B, 161, 201, 302, 307

Citation : (2012) 7 AD 550 : (2013) 196 DLT 540

Hon'ble Judges : S.P. Garg, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Anurag Jain with Mr. Parveen Malik, Mr. Anurag Ahluwalia with Mr. Rahul Dhankher, Mr. Sunil Upadhyay, for the Appellant; Sanjay Lao, APP for the State, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—The appellants (hereafter referred to by their names, i.e. Mohd. Staked, Kamal Tyagi, Sunil and Devraj) are aggrieved by the judgment dated 15-11-2011, of the learned Additional Sessions Judge, in SC No. 106/2011 whereby they were found guilty of the murder of Deepak Parashar ("the deceased") and convicted for the offences punishable under Sections 302/ 201/ 120B, IPC. The deceased, a lawyer was engaged by the appellants Mohd. Shakeel, Kamal Tyagi and Devraj to defend them in several cases. The prosecution had alleged that the deceased used to demand payment towards his fees from the appellants, which was the motive for murder; further, they suspected him of having divulged some information to one Kishan Solanki. The appellants, except Sunil, were sentenced to undergo life imprisonment, and pay fine; Sunil was sentenced to undergo RI for seven years and pay fine. The prosecution alleged that on 17.03.2005 the deceased called Kamal Tyagi,

demanding payment of fees. At that time, three accused i.e., Kamal Tyagi, Devraj and Mohd. Shakil were in Kamal Tyagi's car (DL-7C D-1466). They asked the deceased to reach Main Road near Mahavir Enclave where they picked him up. The car was driven by Mohd. Shakeel. In the running car, Devraj shot the deceased on the chest; Shakeel also shot and stabbed him and Kamal Tyagi strangulated the deceased. In the process of strangulating him, Kamal Tyagi himself sustained knife injuries on his hand. The deceased died inside the vehicle. The three accused then threw his body near the flyover near the railway line in Shahabad, Mohd. Pur. The prosecution alleged that since there were blood stains in the car, it was taken by the accused Sunil to Mahmudabad Village in Ghaziabad and burnt there to destroy evidence. It was alleged that while doing so, he too suffered burn injuries.

2. Following the lodging of a missing person report and the discovery of the body of the deceased, the accused were arrested. Charges u/s 302/ 120B, 201/ 120B IPC were framed against them. They denied the charges and claimed trial.

3. During the course of the trial, 48 witnesses were examined, medical, and forensic evidence was brought on the record, and all of this was put to the accused u/s 313, CrPC. They denied their involvement in the crime. The accused led their own evidence through deposition of two witnesses, DW-1 and DW-2. On the basis of this evidence, the trial court found Mohd Shakil, Devraj and Kamal Tyagi guilty of the offences u/s 302/ 120B IPC and 201 IPC. Sunil was convicted under Sections 201 /120B IPC. It is against this judgment and sentence that this appeal has been preferred.

4. The principal witnesses relied upon by the Trial Court in this case were PW-1, who reported that the deceased was missing; PW-5, the STD booth operator who deposed to witnessing the deceased leaving with the accused in a Wagon-R car; PW-24, the representative of the mobile service provider, in respect of the mobile phones of Kamal Tyagi and the deceased; and the IO, PW-48. Depositions of witnesses saying that a car was found in a burnt condition were also relied on. The prosecution story about the deceased having been whisked away in a Wagon-R car, by three accused, his being killed and the body thrown en route their escape to UP, and the discovery of the car (used for abduction) after it was burnt, was held to have been proved by the Trial Court.

Appellants' arguments

5. It was argued on behalf of Kamal Tyagi that the entire chain of circumstances alleged against that accused was not proved beyond reasonable doubt. It was submitted PW-1's deposition is doubtful as there were many improvements in three statements given by the witness, as between what he said on 18.03.2005 and the statement given on 19.03.2005. The missing person report DD No. 37B omitted any suspect, as did this witness's first statement u/s 161. He voiced his suspicion about the appellant and other two only in his third statement. It was contended that the prosecution story was that on 18.03.2005, the name of the

accused and other two accused were within the knowledge of the police. They could have been arrested on 18.03.2005 itself. Why no efforts were made to arrest them on 18.03.2005 and why there was a need to get help of secret informer to arrest them on 21.03.2005, remained unanswered; This showed that the appellant has been booked in a false case and was named as an afterthought.

6. Counsel for Kamal Tyagi submitted that PW-9, the last seen witness, according to the prosecution version received information regarding the deceased's death at about 12 noon on 18.03.2005. Yet, PW-1 in his testimony deposed that he received message from P.S. Dabri at about 11.30-12 noon that the dead body of the description given by him was lying at Safdarjung Hospital. PW-1 reached the hospital at 12.30 P.M. Therefore, the testimony of PW-9 was totally unreliable as he could not get information regarding death of the deceased from PW-1 at 12 noon as PW-1 got that information only after 12.30 P.M.

7. It was argued by counsel that PW-9 had criminal antecedents and was produced from judicial custody as he was accused in a murder trial. He did not inform anybody about the fact that he saw the deceased in the company of accused persons on 17.03.2005. The conduct of PW-9 is unnatural, suspicious and doubtful and he is not a reliable witness. Counsel urged that the nephew of PW-9 namely Bhupender s/o late Deewan Singh was also suspect in the present case and he was handed over to PW-9 on 20.03.2005, apparent from DD Entry No. 31 dated 20.03.2005 (Mark P.W.11/DX). Therefore, PW-9 deposed falsely to save his nephew. It was also urged that PW-9 deposed to having received a call from accused Mohd. Shakil on his mobile at 6.00/6.30 PM on 17.03.2005 at which point of time he was at Manglapuri. However, the call record details (Ex.PW-24/B) showed that the call was made at 07.42 P.M. If PW-9 was at Ram Sevak Chowk, it was impossible for him to reach at Mahavir Enclave on foot at 7.45 PM within three minutes. His statement that he was informed by PW-1 (brother of the deceased) about the murder telephonically on 18.3.2005 at around 12 noon was not corroborated by that witness (PW-1) any point of time; in fact PW-1 did not even mention PW-9's name in his entire Section 161 Cr. P.C. statement or examination in court. Furthermore, PW-9 also admitted that he did not remember the name of PW-1. PW-1 was not his friend or relative. In these circumstances, there was no question of PW-1 calling PW-9. PW1 also never said that he informed PW-9 about the murder by making a telephonic call to PW-9.

8. It was also argued that no prosecution witness deposed about having met PW-9 on 18.3.2005 at any point of time, contrary to his (PW-9) version. No prosecution witness ever deposed that PW-9 informed him about the last seen circumstance at any point of time. It is not clear as to how police came to know that PW-9 is a last seen witness. It was highlighted that PW-9's statement was not recorded on 18.3.2005. His testimony was without any corroboration and ran contrary to that of other witnesses. Moreover, he did not join any proceedings on 18.3.2005. Counsel urged that there was nothing on record as to what PW-9 was doing at the place where he allegedly saw the deceased in the company of

accused persons on 17.3.2005 at 7.45-8:00 P.M. He did not meet anybody there; nor did he have any work over there; he was on foot; no other person was with him and his residence is more than 3 Kms from that place. His presence at the spot where he allegedly saw the deceased with accused persons is doubtful.

9. The appellants' counsel urged that PW-9 had not stated relevant facts in examination-in-chief and he tried to improve his version only in cross examination. Reliance was placed on State of U.P. Vs. Arun Kumar Gupta, in this regard. It was also urged that PW-9's mobile call details (Ex.DW1/B) do not suggest that he was present at the STD booth where he allegedly saw the deceased in the company of accused persons at 7.45-8:00 PM on 17.3.2005. His call details suggest that his location was at Sadh Ram Sewak Chowk, Palam Colony, Delhi at that time. The distance between these two places is more than 2 KM and he was on foot. Lastly, submitted counsel, the IO, PW48 admitted that he had not verified the presence of PW9 at the spot where the deceased was lastly seen by him.

10. Counsel next urged that the deposition of PW-30, and the alleged recovery of the key chain, attributed to Kamal Tyagi, was a circumstance that could not have been taken into consideration. Kamal Tyagi was arrested on 21.03.2005 and thereafter, he allegedly disclosed about the key and the motor cycle key chain belonging to the deceased. However, the motorcycle was never seized or part of case property; the question of the key and key chain being proved against him could, therefore, not have arisen. Further, Ex. PW-42/A, specified that by letter No. 325/SHO/M.Pur dated 20.03.2005, 15 parcels were forwarded to FSL Rohini and Parcel No. 11 contained a key and key chain. Thus; when the key chain was already with the prosecution on 20.03.2005 the question of its recovery, alleged by it pursuant to the disclosure statement of Kamal Tyagi, did not arise. These demonstrated that the key and key chain are planted against the appellant.

11. Counsel for Kamal Tyagi urged that the call records pertaining to that appellant for 17-03-2005 (PW-24/A) and those of the deceased (Ex. PW-24/B) clearly revealed that the former (Kamal Tyagi) was at different locations at material times. It was argued that this aspect was completely overlooked by the Trial Court-which, in the impugned judgment assumed that the said appellant was present at the places where the deceased was, at all the material times, during the evening. It was submitted that the call records (Ex. PW-24/B) of deceased showed five telephone numbers, i.e. 01155733269, 9899522728, 9312052047, 9412627773 & 01125057051 with which the deceased had spoken for a considerable time. Yet, the prosecution did not make any effort to investigate about those five calls which were crucial in the case of circumstantial evidence. The possibility of someone else committing the crime could not have been ruled out.

12. Learned counsel argued further that the call records of PW-9 Rajesh Kumar (Mobile No. 9212041477 Ex.DW-1/A), show that he received a call from Kamal Tyagi (Mobile No. 9871226307) on 18.03.2005 which was not reflected in

Ex.PW-24/A (i.e. call records of Kamal Tyagi produced by the prosecution). This, he contended, clearly shows that Ex.PW-24/A is a manipulated record, and thus, could not have been relied upon.

13. It was also submitted that the Wagon-R car was not sent to CFSL as admitted by PW-48 in his testimony. There were no traces of oil as is clear from exhibit, PX-1. Further, the crime team report was never placed on record. The recovery of the Wagon-R car itself posed a question mark as the accused Sunil was arrested around 5-6 PM on 21.03.2005 (as per the testimony of PW-48 and PW-43A). However, PW-15 testified to getting information regarding location of the Wagon-R car at Mohamadabad, Muradnagar from Control Room at 3.30 PM on 21.03.2005 which clearly shows that there was prior knowledge of the location of the car.

14. Counsel for Mohammed Shakil argued that recovery of the purse cannot be relied since no public witness was associated with the alleged recovery. Further, the purse was not subjected to identification in the TIP proceedings. The alleged recovery was from an open place, accessible to all and as such recovery had no value. It was highlighted that in response to a court question, PW-30 stated that the purse was of dull grey colour, but in fact, the purse was of dark brown colour.

15. It was argued that to use call details of mobile no. 20049846 against Mohd. Shakil @ Bhola, the prosecution had to prove three things, viz (i) that the call details of mobile no. 20049846 are admissible in evidence; (ii) that the mobile number 20049846 belonged to Mohd. Shakeel @ Bhola; and (iii) that mobile location details of this mobile number matched with the locations of the mobiles of other accused persons and the deceased at the relevant time on 17.3.2005 and 18.3.2005.

16. It was argued that there was no certificate u/s 65(B) of the Indian Evidence Act to prove the call details of Mohd. Shakeel @ Bhola. Similarly, there was no evidence to show that the mobile no. 20049846 belonged to Mohd. Shakeel @ Bhola. The alleged call details of mobile no. 20049846 was not proved, verified or authenticated by any prosecution witness in accordance with law. In this context, it was submitted that PW-37 deposed in his examination that call details record of mobile no. 20049846 were not available. The certificate issued by MTNL in this regard was Ex.PW-37/A. It was also submitted that the Trial Court did not put to Mohd. Shakeel @ Bhola, u/s 313, Cr.PC the circumstance that the mobile no. 20049846 belonged to him. Call details of mobile no. 20049846 were also not put to the appellant. The prosecution failed to connect the mobile no. 20049846 with the appellant Mohd. Shakeel @ Bhola. Moreover, in any event, the mobile location of mobile no. 20049846 did not match with the mobile phones movement of other co-accused persons and deceased also on 17.03.2005 during the relevant time of 07:45 PM onwards, and even on 18.03.2005.

17. Counsel highlighted that no motive was proved by the prosecution; that in cases based on circumstantial evidence, motive is of great importance. The

motive alleged to have been in play by the prosecution that the deceased was killed because he had been demanding his professional fees from the accused, is a very weak motive. In cases based on circumstantial evidence, strong motive is of great importance to complete the chain of circumstances. Reliance was placed on *Niranjan Panja Vs. State of West Bengal*, : and *Sheo Shankar Singh Vs. State of Jharkhand and Another*, : .

18. Counsel for the appellant Sunil argued that there was absolutely no evidence to connect him with the crime. No one saw him with the accused; he was alleged to have assisted in the recovery of the burnt vehicle. No public witness was involved, and there were discrepancies between the evidence of PW-15, on one hand, and police witnesses, on the other, about the time at which and the place from where the car was actually recovered. It was submitted that even the village Pradhan, whose testimony was sought to be relied on by the prosecution, did not support its case. Consequently, this accused was falsely implicated in the case, and deserved to be acquitted.

19. The learned Additional Public Prosecutor submitted that the findings of the Trial Court did not call for any interference. All the circumstances, as well as each link in the entire chain of circumstances, had been conclusively proved. All the accused had or were being represented by the deceased, in the cases they were involved in. They had a common motive to do away with him, since they felt that he was charging excessive fees. On the day of the occurrence, PW-5, the STD booth operator had seen the deceased keeping his motorcycle at around 7-45 PM; he vanished after that. His brother came back for the bike two days later. It was submitted that the first intimation about the deceased going missing was given by his brother, PW-1. Though at that time, he did not voice any suspicion, the fact remained that in his later statement, he did suspect the accused to have played a role in his brother going missing. Merely because he recorded it later, after it had been confirmed that his brother had died, did not mean that it was unbelievable. The APP argued that there was no reason for PW-1 to falsely implicate any of the accused; the latter did not concededly suggest that he had any enmity, or bore any ill will against them.

20. It was submitted that PW-9's testimony cannot be discarded merely because he was brought to depose in the court, from custody. He was accused in some other case, and he knew the deceased, at the time he went missing. He deposed having seen the accused and the deceased in the car, on the day the deceased went missing. The mobile call records of Kamal Tyagi proved that both were in the vicinity. The appellant's argument that the call details furnished by the service provider did not pertain to Kamal Tyagi or his conversation with the deceased, was not borne out by the record.

21. It was submitted that the failure to hold a TIP for the articles did not mean that they were not recovered in the manner proved by the prosecution in this case.

Material Evidence

22. PW-1, Rohit Sharma, the brother of the deceased, lodged a missing person report when he did not return home the next morning. It was lodged at P.S. Dabri as Ex. PW-1/DA : Missing Person Report DD No. 37B (dated 18.3.2005). In this report, he stated that his brother had gone missing, but that he did not suspect anyone. Even in his first statement to the police, post the discovery and the identification of his brother's body, he did not name any suspect (Ex. PW-1/DB). It was in his supplementary statement to the police that this witness first indicated that he suspected Mohd Shakeel, Devraj and Kamal Tyagi for the murder of his brother. He stated that the deceased had told him that these three were bad characters and therefore he had to take up their briefs. He even stated that a few days before his death, his brother had told him that these three appellants had threatened the deceased when he demanded his fees.

23. The witness deposed that his brother was a criminal lawyer practicing at Tis Hazari Court. On 17.03.2005, while returning home from Som Bazar Wali Gali on a motorcycle, he met his brother, the deceased who was walking on the road. He (PW-1) gave the bike to his brother who told him that he would be back soon. The Motor cycle no. is DL-9S N-4663. Because his brother would regularly come home late from work, he stated that his family was not concerned when he had not returned that night. When even by the next morning his brother had not returned, he tried calling his phone, but his phone (Mobile No. 9818577457) was switched off. He then, on 18.3.2005, went to P.S. Dabri and lodged a missing person complaint at 10.45 A.M. At 11:30-12 PM, he received a message from P.S. Dabri that a dead body that matched the description given by him was found lying at Safdarjung Hospital. He identified the body at 12.30 P.M. Then he went to P.S. Mahipalpur where the Police had asked him if he suspected anyone, and he told them that he suspected Kamal Tyagi, Mohd Shakeel and Devraj, who were clients of his brother. He then identified these three in Court. He told the police that his brother who was a lawyer, used to wear a ring of Pukhraj, had a Nokia 6600 Cell Phone, had a locket with thread on his neck, a Maxima wrist watch and the keys of the motor cycle.

24. On 19.03.2005, the postmortem was conducted on his brother's body. He received his brother's body. He then made an additional statement to the police on 19.03.2005, wherein he stated his suspicion about the above-mentioned three appellants. He suspected that they had killed him. He stated that he had seen the three accused near his house a week prior to his brother's death and he heard them abusing his brother though he could not hear their exact conversation. When he had asked his brother why they were threatening him, he was told by his brother that it was because he (the deceased brother) had demanded his professional fees from them. He stated that on 16.04.2005, in a TIP Proceeding, he identified his brother's motorcycle keys, his black maxima wrist watch, and signed the TIP Proceedings (Ex. PW-16/B). On 20.05.2005, he gave photocopies of three files of the accused persons' cases that his brother

had been handling by Ex. PW-1/D. The witness identified the watch, keys, the blood stained t-shirt, jeans and underwear that his brother had been wearing on the day of his death.

25. In his cross-examination by the counsels for the defence, it was brought out that he did not mention the fact of his brother having told him that he would return soon, or of him subsequently trying to contact his brother on his cell phone. This witness readily agreed that he had not mentioned these facts when he lodged the missing person's report. He was confronted with the fact that he had told the police in his statement on 18.03.2005 that he had seen the accused persons with his brother a few days before the incident, and that before the Court, during his examination-in-chief, he had stated that it had been a week before the death of the deceased. He stated that he had indeed told the police that he had seen the accused persons with his brother a few days back and not a week back.

26. In his cross examination, he also revealed that he handed over his brother's files later to the Inspector Ram Pal and two/three other police officials. He said that he had given them three files and that they had not been sealed. He deposed that his statement on 19.05.2005 was recorded at his house, and that he did not go to the Police Station that day or on 20.05.2005 when the Police took the files. He revealed that his brother had got Md. Shakeel acquitted in a case, but that there was still some enmity between them.

27. PW-5 Suresh Solanki was the owner of an STD Booth at D-3 Mahavir Enclave, Palam Dabri Road. He stated that on 17.03.2005, the deceased Deepak Parashar came near his booth at 7.45 PM and told him that he was parking his motorcycle near his booth and that he should take care of it and that he would be back after some time. He stated that he did not know where Deepak was going. When this witness shut his shop and left for the day at 8.30 PM, Deepak's motor cycle was there, and it was still there when he came back the next morning. At around 11 A.M., the deceased's younger brother came inquiring about Deepak, but left to return again after sometime to take back the motorcycle. At about 5-6 P.M. in the evening, when the Police reached his booth, he (PW-5) found out that he (the deceased) had been murdered.

28. In his cross examination by the counsel for the accused Kamal Tyagi, he stated that he had told the police that the brother of the deceased had come back with the keys of the motorcycle. Upon this, he was shown by the counsel that that it had not been so recorded in the statement. PW-5 further stated that his statement had been recorded at about 6 P.M. in the evening on 19.3.2005 by a person in police uniform who had been accompanied by 2/3 other police officials.

29. PW-6 Sunita was the Gram Pradhan of the village in which the burnt car was found. As per her statement to the police, the witness had been present during the recovery of the burnt car, the recovery being at the instance of the accused

Sunil. However, in her examination-in-chief, she only stated that the police had come to her house and asked her to arrange a vehicle to remove a burnt car. She stated that she did not come out of her house to help but sent one Tejvir to do the needful, and that the police obtained her signatures on some papers. In her cross examination by the APP, when she was confronted with her statement to the Police, she denied having seen the accused Sunil with the police during the recovery of the car. She also denied the fact that she had gone to the place where the burnt car was found. PW-7 Tejvir was hired by the police, on being told by PW-6, the Gram Pradhan Sunita, to take the burnt car to Delhi using his Tractor Trolley. He identified the burnt car in Court.

30. PW-9 Rajesh Kumar is crucial as he is the only "last seen" witness who was consistent during the entire proceedings. In his examination-in-chief, he stated that on 17.03.2005, at about 7.45/8 P.M., he saw Md. Shakeel, Kamal Tyagi and Devraj, along with Deepak Parashar in a Wagon-R DL-7C-D-1466, and that Shakeel was driving the car and that they were taking the deceased somewhere. He stated that he knew the deceased and the accused persons.

31. In his cross examination by the counsel for the accused Devraj, he revealed that he had been in judicial custody since December 2005, facing trial in three criminal cases of PS Uttam Nagar, RK Puram and Dwarka for charges u/s 420, section 308/302 /34 and section 307/ 387, IPC respectively. He stated that he was on talking terms with the accused persons, particularly Shakeel, whose no. he stated was 200449846, as Shakeel used to hire his bus on a contract basis. He stated that he had spoken to this accused at 6:30 P.M. on the 17th itself about a payment he had to make for the hire of this witness" bus. He further stated that he had seen the accused persons with the deceased for about a minute when he was standing in the market; the STD booth was 15 feet away and he was not able to hear their conversation.

32. In his cross-examination by counsel for accused Shakeel, he revealed that when he saw the accused with the deceased in the car, the car had already been standing there and then they drove it away. In his cross examination by the counsel for the accused Kamal Tyagi and Sunil, he revealed that he had known the father of the deceased for the last fifteen years, and that the brother of the deceased, i.e. Rohit (PW-1) had called him on 18.03.2005 and told him about the murder and had also called him to the police station. He further stated that he did not tell him (Rohit) on the telephone that he had seen the deceased with the accused persons the previous day; but on going to the police station, he told the Police, Rohit and others about having seen Deepak in the company of the accused persons. He reached the police station at about 12 noon. He also admitted that Kishan Solanki, Deepak and Hari Kishan were co-accused with him in a murder case. He stated that he was unaware that Kamal Tyagi had made any complaint against these persons on 14.03.2005, and he also denied that for this reason he falsely deposed against the accused.

33. PW-10 Dr. Samarjeet deposed that he had treated Kamal Tyagi for a cut

injury on his hand on 17/03/2005. He proved Ex. PW-10/A which was the dispensary register on which a record of Kamal Tyagi's treatment had been made (as the second last entry). In his cross examination by the counsel for Kamal Tyagi, he stated that the accused had told him that he received these injuries when he was driving a vehicle at night. PW-12 Sita Ram, the Data Entry Operator at the Transport Authority, testified that the car was registered in the name of Kamal Tyagi. During his cross-examination by counsel for Shakeel, he stated that as per their record, the first owner was a Mumtaz Ali and that they did not have the copy of the R/C in which the registered owner was Kamal Tyagi.

34. PW-29 HC Baljeet Singh was posted in PS Mahipalpur. On 21.03.2005, he joined the investigation of the case with SI Rambir, Inspector Ram Pal Singh, SI Satbir, SI Ranglal and HC Vinod. He stated that they reached the house of the accused Sunil at Dukana Mohalla, PS Sihani Gate, Ghaziabad U.P.; accused Sunil was found there. Inspector Ram Pal made inquiries from the accused and then arrested him. He made a disclosure statement in which he stated that he had burnt the Wagon-R and that he could get it recovered. Then Insp. Ram Pal, SI Rambir, this witness, the accused and a few others went to Morad Nagar, Ghaziabad. This witness, the accused Sunil, and SI Rambir reached the spot at Mehnoodabad, PS Morad Nagar, and the accused showed then where the burnt, white Wagon-R, bearing the number DL-7C D-1466 was. The accused apparently also revealed that the car had been given to him by the accused Devraj to burn and that he did so using petrol. This witness stated that the car was completely burnt, that only the iron frame of the front seats was visible. The chasis number (1919768X) was checked by SI Rambir. The Crime Team was called. Since it was raining, the IO requested a tractor trolley that was passing through to take the car. Photographs of the car were taken. From the spot, burnt pieces of tyres, iron, broken pieces of glass and one burnt blue coloured shirt, which the accused allegedly claimed that he had been wearing at the time of the recovery, were recovered from that spot. This witness claimed that the Pradhan of the village, PW-6 Sunita was also there, and all these articles were seized in her presence. All these articles, as well as the car were seized through Memo Ex. PW-6/A. He proved his signature on the memo, and identified the Wagon-R; broken pieces of iron, glasses and ash; a piece of tyre and a burnt blue shirt.

35. In his cross examination, the witness said that they left the station at about 2:00 A.M. in the morning, went to Sadh Nagar looking for the accused persons and returned to the police station either at 3-4 P.M. or 5-6 P.M. During such time, Kamal Tyagi, Shakeel and Devraj had been arrested by the SHO. From there, they went to Ghaziabad, reached the house of Sunil at about 6.30 P.M., from there they went to the spot where the burnt car was recovered at around 8:30-9:00 P.M. He again reiterated that Pradhan Sunita was also present at the spot, and that the crime team arrived at the spot at about 10 P.M. The formalities were completed by around 10.30 P.M., he returned to Delhi at 11.30 P.M. and the accused Sunil was admitted to Safdarjung Hospital at around 12 midnight. He deposed that at the time of Sunil's arrest, he (Sunil) had burn injuries on his

chest, face and shoulder.

36. PW-30 SI Ranglal Meena was a part of the team that arrested Kamal Tyagi, Shakeel and Devraj. He stated that on 21.03.2005, when he was posted in Mahipalpur, he joined the investigation of the case with Inspector Rampal Singh, SI Satyavir (presumably Satvir) and SI Rambir Singh. He stated that at about 5/6 P.M., at the instance of a secret informer, who met them in Sad Nagar, Mangla Puri, they reached the bus stand at Mangla Puri from where the accused Kamal Tyagi was apprehended. He was searched and his mobile phone was recovered and a seizure memo was prepared. He was arrested. His disclosure statement (Ex. PW-30/A1) was recorded, which this witness signed. In this disclosure, he revealed that Mohd Shakeel, and Devraj were also involved in the murder. At his pointing out, Shakeel and Devraj were arrested from Sad Nagar. They were also interrogated. A mobile phone was seized from Shakeel. Both Shakeel and Devraj made disclosure statements (Ex. PW-30/A2 and A3 respectively). Then, the three accused pointed out the bridge (pulia) where they had thrown the body of Deepak Parashar. The witness said that thereafter, Kamal Tyagi led them to the spot in Shahbad Mohmadpur where he had thrown the motorcycle keys of the deceased and it was accordingly recovered (Memo Ex. PW-30/D). This witness could not recall how the key ring looked. Thereafter, accused Devraj led them to some bushes in the same area, near the Indian Oil Corporation Premises from where he got the wrist watch of the deceased recovered (Ex. PW-30/E). This witness, however, wrongly described the wrist watch as having a round dial, whereas it had a square dial. Shakeel then led them to a Y-point in the same village and got recovered a rexine purse which contained the deceased's Bar Council ID Card, some visiting cards, a card on which some dates had been written and some cash (Ex. PW-30/F). This accused then led the police to Uttam Nagar from where he allegedly recovered a Nokia Phone Model 6600 which belonged to the deceased (Ex. PW-30/G). The Trial Court, however, pointed out at this instance that no such seizure memo (of Nokia phone model 6600) was on record. He identified the key ring, wrist watch (though he had wrongly described it previously in his statement as being round with a leather strap), a brown and cherry coloured purse (though he had described it as being a dark grey in colour) the ID card, visiting cards a 100 note and a telephone diary containing details of a case State v. Gurmeet.

37. In his cross examination, he stated that no statement of any public witness was recorded when Kamal Tyagi was arrested from the bus stand, nor at the time of pointing out of the spot where the dead body had been thrown and subsequently recovered from.

38. PW-23 HC Parvir Singh, the photographer in the Mobile Crime Team proved the photographs taken of the body at the spot of its recovery (Ex. PW-23/P-12 to 22). He stated that the body was lying at the side of the pulia. He denied having taken a photo of any key ring. He also denied having taken any photos of the key ring, watch and other articles belonging to the deceased which, as per the

prosecution story, were lying next to the body. He lastly denied that he later destroyed these photos on being asked to do so by the IO. PW-24 Rakesh Bakshi worked as a security officer in Bharti Airtel. He proved the call records of Kamal Tyagi and the deceased Deepak (Nos. 9871226307 and 9818577457) (Ex. PW-24/A and Ex. PW-24/B). He stated that the cell ID showed the location of the call user within a range of 1-1.5 Kms.

39. PW-25 ASI Joginder Pal deposed that he was posted in the PCR on 17/18-3-2005 from 8:00 P.M. to 8:00 A.M., on the airport base. He stated that at about 7.30 A.M., he received information from an unknown person that a dead body had been found near the railway line pulia at Shahabad, Mohammadpur. When he reached the spot he saw a dead body of a person about 25-26 years old, and a crowd of 15-20 persons had gathered there. He informed the Control Room upon which SI Satbir and other police persons reached the spot.

40. The last important witness, PW-48 Inspector Rampal Singh was the IO of the case. He was posted as the SHO at PS Mahipalpur. He stated that on the recording of the DD, Inspector Satyavir Janola and HC Ramphal left for the spot at 8:10 A.M., and he left for the spot where the body was found. He stated that once he reached there, he prepared a Rukka, which he sent back with HC Ramphal, on the basis of which the FIR was registered, and brought back to him. He prepared the site plan Ex. PW-48/A. He corroborated the testimony of PW-43A Satyavir Janola with respect to the recoveries from the spot : blood stained earth and control, blood stained plaster, blood gauze, golden Om pendant, golden ring, a light pink colored piece of cloth that was blood stained and lying near the pulia, another completely blood soaked piece of cloth, and other pieces of cloth which were black and white in colour, all seized by Memo Ex. PW-33/A on which he signed, and then sealed.

41. After the body was sent to Safdarjung Hospital he made enquiries about any reported cases of missing persons in the P.S. Dabri. On finding out that there was one such person, he informed the informant in the missing person complaint i.e. Rohit Sharma. Rohit was called to the police station, and then sent to the mortuary of Safdarjung Hospital where he identified the dead body as that of his brother Deepak.

On 19.3.2005, the postmortem was conducted. This witness recorded the statement of PW-1 Rohit Sharma and Ashwani Kumar. The body was handed over to the relatives of the deceased. This witness also recorded the statement of Rajesh Kumar who had last seen the accused persons with the deceased. This witness corroborated the statement of PW-43A Satayavir Janola with respect to the arrest of Kamal Tyagi, Shakeel and Devraj and the recoveries at their instance, in all material particulars.

42. The witness also stated that all the three accused revealed that they had thrown the weapons used in the offence : one knife and two country made pistols, and the blood stained clothes that they had been wearing into the Hidon

River in Ghaziabad. He stated that the three accused then took them to the house of the accused Sunil who was also arrested. His disclosure statement was recorded wherein he disclosed that he had burnt the car used in the commission of the offence, and that he could get the same recovered. This accused was handed over to HC Baljeet and SI Rambir. They went with the accused to the spot where the car had been burnt. Once this was done, they all returned to Delhi and the accused Sunil was taken to Safdarjung Hospital. Once they returned to the police station, PW-7 Tejveer, who had been hired to bring the burnt car to Delhi had already reached the station, and his statement was recorded. All the case property collected was deposited in the Malkhana on 21.03.2005. Since Kamal Tyagi had injuries on his right palm, on 22.03.2005, he was taken to Safdarjung Hospital with SI Ranglal Meena to be examined. This witness stated that the accused had revealed in his disclosure that he had received these injuries during the commission of the offence and had got treated at Shri Ram Hospital Dabri. This fact was later verified from the hospital.

43. The witness also deposed about having collected the details of the mobile phone of Devraj, from the shop from where it was bought, the call details of the accused persons and the deceased, the details relating to the ownership of the motorcycle. On 16.04.2005, the TIP of the case property was conducted where the key of the motorcycle and the wristwatch of the deceased were identified by the deceased's brother (Ex.PW-16/B-C). On 20.05.2005, PW-1 Rohit gave him the copies of documents relating to the cases FIR No. 342/02, 354/02 and 819/02 which were seized vide memo Ex. PW-1/D. In these cases, the deceased had been the counsel for Shakeel and Devraj.

44. The ownership details of the car were also collected (Ex. PW-48/H) and it was found to belonging to Kamal Tyagi. The complaint made by Kamal Tyagi against Kishan Solanki was also seized (Ex. PW-28/A). In his cross examination, the witness revealed that the death report was half prepared at the spot, and the rest, prepared at the mortuary after the post mortem was conducted.

45. The Court now proposes to examine the material circumstances held to be incriminating against the accused, which led to their conviction.

Last seen circumstance

46. The last seen circumstance is sought to be proved through the testimony of PW-9. He deposed to having seen the deceased in the Wagon-R car with all the accused, at around 7-45 P.M. on the day of the incident. He claimed to have known them, as they used to hire his buses. According to the witness, two accused, Kamal Tyagi and Shakeel had hired his buses, even on the day of the incident. His Section 161 statement was recorded on 19.03.2005. He also deposed to having been informed about Deepak's death, and having gone later to his house, and to the police.

47. The appellants' objection to this witness' deposition stems from the fact that he was produced from judicial custody as he was an accused in some criminal

case, at the time of the trial. It was also suggested to him that his nephew was an initial suspect, and later given up; that as some sort of bargain, he allegedly deposed against the accused. The accused/appellants also rely on what they term as inconsistencies and fatal discrepancies. They argue that the witness could not have been at the place where he claims to have sighted the deceased, allegedly with them, because at his own showing, it was quite a distance away from his house. It was also argued that the prosecution did not explain how this witness' presence was known to the police. Counsel also argued that the call details of the mobile phone number of this witness did not establish that he was anywhere near where he claimed, and that his whole deposition had to be discarded because he made improvements in his deposition before court.

48. This witness is important for the prosecution as he is the only one who sought to prove the last seen circumstance. He deposed to having seen, on 17.03.2005 at about 07.45-08.00 P.M., the accused along with the deceased, in the Wagon-R DL-7C D-1466. He deposed that Mohd. Shakil was driving the car and that he was taking the deceased along with others somewhere else. He knew the deceased as well as the accused. The witness admitted to having been in judicial custody since December 2005 in criminal cases involving cheating, attempt to commit culpable homicide and attempt to commit murder. He stated that Mohd. Shakil and Kamal Tyagi were his acquaintances and even mentioned Mohd. Shakil's mobile no. 20049846. He deposed that Mohd. Shakil used to hire his buses and had spoken to him at 06.30 P.M. on that day itself, i.e. 17.03.2005 itself. This witness saw the three accused and deceased for about a minute when he was standing in the market about 15 feet away from the STD booth. He also said that he could not hear their conversation. In the cross-examination on behalf of Kamal Tyagi and Sunil Tyagi, the witness stated that he knew the deceased's father for 4-5 years and that the deceased's brother, PW-1 called him up on 18.03.2005 regarding the murder of Deepak Parashar. He said that he was called to the police station. Initially, he did not tell PW-1 that he had seen the deceased with accused the previous day. However, he later told so after reaching the police station the next day.

49. The testimony of a witness, such as PW-9 cannot, in the opinion of the Court be blindly rejected on the ground that he was an accused at the time he deposed in Court. During the cross-examination, on behalf of the accused, the witness clearly mentioned the circumstances under which he was acquainted with them. He knew them fairly well. Equally well he knew the deceased and his family having been familiar with the deceased's father for more than 15 years. The witness was aware of Mohd. Shakil's telephone number. Even though initially he had some doubt, during the course of his deposition, he even stated the telephone number. No suggestion was put to him on behalf of Mohd. Shakil that the said telephone number mentioned by the witness did not belong to him. Furthermore, the accused did not dispute their acquaintance with the witness.

50. It was also argued on behalf of the appellants that the last seen

circumstance cannot be said to have been proved by PW-9 since there was some doubt about when he made the statement to the police. In this connection, it may be noted that the witness was clear that on 18.03.2005, after having received news of Deepak's murder, he went to visit the family, and was also asked to reach the police station. He appears to have informed the police at that stage itself. However, his statement was not recorded at that time, but was recorded later. Here again, the appellants have not shown that the witness contradicted himself or made improvements on the statements made earlier u/s 161. The suggestion that he was not telling the truth was generally made and no attempt was made to describe his testimony with regard to facts.

51. The question which, therefore, arises is whether the testimony of PW-9 can be said to be decisive as regards the last seen circumstance. The law, if one can recapitulate briefly is that "last seen circumstance" is a sub-species of circumstantial evidence based prosecutions. The obligation of the prosecution to prove every circumstance and every link between the circumstances conclusively, and the further duty to prove that all the circumstances add up to only one conclusion, i.e. the accused's guilt ruling out every possibility of his innocence, are constant factors. In a "last seen circumstance" based case, that burden remains equally constant. What is added is the duty of the prosecution to show that the circumstances which surrounded the death were such that the only inference possible is that the accused, and accused only and no one else, could have been the perpetrator/perpetrators, as the case may be. If there is any possibility of the crime being committed by someone else, the "last seen circumstance" fails. The last seen doctrine essentially premises a criminal charge on the assumption that having regard to all the other circumstances, the victim's being last seen with the accused, if proved through unimpeachable evidence, and if all the circumstances likewise are proved, the court can conclude that it was only the accused, and no one else who committed the crime. In *State of U.P. Vs. Satish*, , the Supreme Court clarified that the last seen theory can be used only where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so short that the possibility of anyone other than the accused being the author of the crime becomes impossible. The same reasoning has been echoed in *Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh*, .

52. In the present case, PW-9 deposed to having seen the deceased in the company of accused around 07.45/08.00 P.M. In his examination-in-chief, the witness did not precisely state the place where he observed these facts; he clarified this later during his cross-examination, and mentioned that he saw the accused sitting in the car with the deceased near the Mahavir Nagar market. His statement was recorded by the police during the investigation on 19.03.2005. His intimation about Deepak's disappearance was around 10:40 A.M. on 18.03.2005 (Ex.PW-1/DA). The first intimation about the discovery of the body took place almost simultaneously, i.e. in the morning of 18.03.2005 (Ex.PW-11/A). The Postmortem Report (Ex.PW-17/A) reveals that the autopsy began at

10:10 A.M. on 19.03.2005. The report reveals that the examining doctor found 15 injuries on the body. Two of them, injury nos. 9 and 12 were by two separate fire-arm ones-one on the head, and one on the chest. These, in the opinion of the doctor, were the cause of death. Crucially the doctor's opinion mentioned the time of death at about 1 1/2 days prior to the examination. Thus, the approximate time of Deepak's death was around 10 P.M. on 17.03.2005. This would in turn mean that the time gap between the "last seen" circumstance and the approximate time of death was just about 2 hours, which can, under the circumstances, be considered reasonable.

53. Having regard to the conspectus of circumstances, this Court is of the opinion that the "last seen" circumstance in this case is said to have been proved by the prosecution. There is no infirmity in the findings of the Trial Court on this score.

54. The prosecution had also sought to place reliance upon the testimony of PW-4, in support of the last seen circumstance. However, the witness resiled from the previous statement made under Section 161 Cr.PC. His deposition is, therefore, of no use and significance.

Reporting of the crime

55. The first ground for attacking the impugned judgment by the appellants was that at the time of reporting the crime, the deceased's relatives had not voiced any suspicion and even in the first statement of PW-1, recorded on 19.03.2005, none of them had been named. These, coupled with the fact that the body was discovered within a few minutes somewhere else after the Missing Person Report was lodged on 18.03.2005, are highly suspicious. It was also emphasized that the swiftness with which body was sent for Postmortem examination and the equal speed with which PW-1 appears to have reached there and identified the body, all revealed that the accused were framed for the crime. It was argued on behalf of the appellant that the Trial Court ought to have taken into account all these suspicious circumstances, which created grave doubts about their involvement and consequently went a long way to discount the prosecution case.

56. According to the prosecution, the deceased left his home on 17.03.2005 at 07.00 P.M. and thereafter went missing. PW-1 lodged missing person report with P.S. Dabri as DD 33B (Ex.1/DA). Its report described the deceased and the clothes he was wearing. After the discovery of the body, in the Safdarjung Hospital Mortuary, PW-1, in his statement, Ex.PW-1/DB did not name any suspects nor name any individuals whom he suspected for the crime. He stated to having returned home on his motorcycle and that the deceased left home with it on that motorcycle, stating that he would return soon. The motorcycle-Hero Honda Ambition, DL-9S N-4633 and the deceased's mobile number 9818577457 and a Maxima watch were mentioned by the witness PW-1 in his first statement. He also described the golden pendant which the deceased used to wear on his neck and white-coloured jewel.

57. The suspicion voiced by PW-1 in respect of the three accused was on 19.03.2005, when a supplementary statement was recorded for this purpose. He revealed then that the deceased used to defend the cases of the accused as their counsel. He also stated that the three accused had gone to the deceased a few days before the incident. According to PW-1, the deceased had confided in him about a demand in respect of fees from the accused; the latter are alleged to have threatened that "they would see him". The Trial Court noticed that the first statement dated 18.03.2005 was no doubt silent and did not speculate on who could have been responsible for the crime. However, equally it did not mention anything at all as to whether the witness had any suspicion. The occasion to state his suspicion arose on 19.03.2005, after the impact of the crime had sunk in and the witness could recall the events which had transpired. The Trial Court also noticed that during the process of cross-examination, the witnesses had not confronted PW-1 on his deposition about a quarrel between them and the deceased a few days before the incident. Further, the Trial Court noticed that the cross-examination of this witness also was based upon the premise that the appellants used to engage the deceased as their lawyer.

58. This Court does not find anything unnatural in the conduct or the deposition of PW-1. He testified that his brother Deepak often used to reach home late and as a result, his disappearance was not reported late night on 17.03.2005. It was only when the family noticed his absence in the morning that a missing persons' report was lodged. The fact that the appellants used to engage the deceased is not only spoken about by PW-1, but also by PW-9 who especially mentioned this during the course of his deposition. For these reasons, the submission that the police sought to frame the accused, and that the entire story was an afterthought, is rejected.

Recoveries

59. The prosecution relied on various recoveries attributable to the disclosure statements of the three accused, i.e. Kamal Tyagi, Mohd. Shakil and Dev Raj. The seized items were wrist watch, attributable to the disclosure statement of Dev Raj (A-2). This was sought to be proved through the depositions of two police witnesses, i.e. PWs-30 and 43. Key with key ring/key chain seized during investigation was said to be recovered pursuant to the disclosure statement of Kamal Tyagi (A-3). Here again, PWs-30 and 43 witnessed the recovery and the seizure memo was prepared by the IO as in the case of wrist watch. For the wallet, the prosecution relied on disclosure statement of Mohd. Shakil to say that he led to recovery of those articles. Here again, the maker of seizure memo was PW-48 and PW-30/F (PW-40 and the prosecution witnesses were 30 and 43).

60. From the testimonies of prosecution witnesses, a common pattern emerges, i.e. that specific individual articles were attributed to the disclosure statement of each one of the accused. This alone is unnatural and suspicious circumstance. To compound it, what also emerges from the record is that each of the three articles were recovered from an open place accessible to all and not shown to be a

specific area or which were within the special knowledge of the accused. Having regard to the settled position in law that recovery of common objects and articles—a watch, key ring and wallet undoubtedly falling within that description—unless shown to be specifically connected with the deceased or the accused, cannot be itself indicative of guilt. The description of the wallet given by PW-1 was also different from what was actually recovered. Moreover, the Court is conscious of the fact that none of the recoveries was witnessed by independent witnesses. Having regard to these facts, it is held that the recovery of such articles by themselves do not amount to incriminating circumstances.

Recovery of burnt Wagon-R

61. The Wagon-R car (registration no. DL-7C D-1466) was according to PW-9, the car in which the deceased was seen last with the accused. The testimony of PW-12, an employee of the transport authority, Anand Vihar, reveals that the car was registered in the name of Kamal Tyagi, Chassis No. HA 388D81500191768. A copy of the RC of this car was produced and placed on record as PW-12/A. PW-9 had specifically mentioned the model and the registration number of this car.

62. The disclosure statements of each of the accused Kamal Tyagi, Mohd. Shakil and Dev Raj (Ex.PW-30/A-1, A-2 and A-3) are alleged to have led to the disclosure of the fact that the Wagon-R car was given over to the fourth accused Sunil, who was a relative of Kamal Tyagi. Accused Sunil was arrested on 21.03.2005 (through memo PW-39/D). His disclosure statement (Ex.PW-22/A) apparently led to the recovery of car in a burnt condition. Now, the recovery of this car stands on an entirely different footing. What is noteworthy here is that the burnt car was in the vicinity of Ghaziabad. Sunil was arrested from the house Sahni Gate, Dhokna Mohalla. PW-48 deposed that accused Sunil, when he was found at the house, was lying on a cot and his face and front portion of the body had burn injuries. PW-29's deposition reveals that Sunil led the police party to a place in the area of PS Murad Nagar, a katcha raasta. The white-colored Wagon-R was in a burnt condition. All its four tyres were burnt and so was its rear seat. Only its structure and concerned seats were visible. The car was loaded on to a tractor trolley which was passing by. PW-15, Crime Team Photographer took pictures of the car, Ex.PW-15/A and PW-15/A-15 to A-28, including the negatives. The car was taken into possession through Seizure Memo Ex. PW-6/A.

63. PW-6 was cited in support of the prosecution. She was the pradhan or village official. However, during the course of trial, she did not support the prosecution and denied that Sunil was with the police in her village or that the burnt car was recovered at his instance. However, she significantly deposed that on 21.03.2005, in her presence, Delhi Police reached there and asked for arranging vehicle for removing the burnt car. She admitted to asking Tejvir to take-up the burnt car. PW-7 Tejvir deposed that the police took the burnt car on the trolley for that purpose on 21.03.2005. The burnt car was, in fact, identified by him. He was not cross-examined. The Trial Court discarded the testimony of PW-6 and stated that PW-7's deposition about her presence and the further testimony with

regard to seizure of the car had proved the facts alleged by the prosecution.

64. Another corroborative and material fact was that Sunil, after his arrest was medically examined by PW-40; he issued the MLC (Ex. PW-40/A). The report stated that Sunil had deep thermal burnt injuries on the front of his face, neck, upper part of the chest, hand and fore-arm. The Trial Court noticed that even though Sunil denied having been handed-over the car by Kamal Tyagi, yet admitted that when police went to his house, he was lying on a cot with burn injuries. The Court also significantly noticed that Sunil did not explain the cause of his injuries. On the other hand, Kamal Tyagi in his statement u/s 313, Cr.PC mentioned that Sunil had received burn injuries on account of fire in the court due to a short-circuit. These two statements made by the co-accused are contradictory. In fact, if Sunil had received injuries in the manner described by Kamal Tyagi, there was no reason why he ought not to have disclosed it. The statement of Kamal Tyagi, on the other hand, implies that he and Sunil were together and that the latter was in possession of the car when the burn injuries occurred.

65. Having regard to the entire evidence on the record on this aspect, this Court is of the opinion that the finding with regard to the recovery of the burnt car is an incriminating circumstance not only vis-?-vis Sunil but also as regards other co-accused.

Miscellaneous

66. The mobile phone call details brought on record (Ex. PW-24/A, EX. PW-27/A, Ex. PW-24/B) and testimonies of PW-24 as well as PW-27 appear to have been valuable to aid the prosecution in nabbing the accused. However, the argument of the appellants here is that the documents are inadmissible, and the findings of the Trial Court unsupportable, because Section 65-B was not complied with. This court finds force in the submission. Neither the deposition of PW-24, the security officer of the telecom service provider, nor that of PW-27 who claims to have seized the call detail print outs in respect of Shakeel's mobile number, are supported by Section 65-B certification, or even deposition in conformity with its provisions. In the absence of any such material, the Court cannot entertain and rely on such documents. There is no declaration that the printouts are in conformity with the records faithfully and accurately maintained in respect of the call logs concerning the particular mobile phones. Therefore, these call detail printouts cannot be considered evidence. At best they were investigative tools which assisted the police during the course of investigation.

67. The testimony of PW-46 Dharmendar, who during 2008 had worked as Alhmad in the Court of a Metropolitan Magistrate, had the effect of proving that the deceased Deepak had represented the accused in their cases in Court. The documents and files produced were discussed by the Trial Court, in the impugned judgment. The accused notably did not cross examine the witness, nor sought to distance themselves from the record. Thus, the testimony of PW-1 in one sense

about the deceased representing the accused, in their cases, has been corroborated. This in turn, points to existence of some motive, because the witness had stated during his testimony that the accused and deceased had a quarrel regarding the amount payable as fees for representing them, and had left, threatening the deceased.

Conclusions

68. As a result of the above discussion, it is held that the prosecution was able to successfully establish and prove vital incriminating circumstances, such as the "last seen" evidence, through the testimony of PW-9; it also proved that the car used to abduct the deceased belonged to Kamal Tyagi, and that after committing the crime, the accused quickly sought to dispose it off by handing it over to accused Sunil. The testimony of PW-40 proved that Sunil had suffered burn injuries; the Wagon-R was found in a burnt condition in Ghaziabad, U.P. The other three accused mentioned about it, and about the role played by Sunil. That led the police to Sunil; his disclosure statement led to recovery of the burnt chassis of the car. PW-7 proved that the burnt car was seized and transported by the police. The postmortem report established that the approximate time of death was 10 P.M. on 17-3-2005; the deceased was last seen together with the three accused, in the Wagon-R car at around 8 P.M. that evening. The court is, however, of the opinion that in the absence of any other evidence linking the accused Sunil with the other accused, there could not have, on the basis of assumption of conspiracy, been a finding that he was guilty of the offence u/s 120-B of the Indian Penal Code. Therefore, his conviction under that provision is set aside; his conviction for the offence punishable u/s 201 IPC is affirmed. In view of the above discussion, the conviction of Mohd. Shakeel, Kamal Tyagi and Devraj u/s 302/201/ 120B, IPC is confirmed. We do not find any reason to interfere with the sentence awarded to them. Their appeals (Crl. Appeal Nos. 98/2012, 212/2012, and 117/2012) are accordingly dismissed. The conviction of appellant Sunil u/s 120B, IPC is set aside; his conviction is, thereby, modified to one u/s 201, IPC. Consequently, sentence awarded to him is modified to rigorous imprisonment for a period of three years. His appeal (Crl. Appeal No. 264/2012) is allowed in the above terms. All convicts shall be entitled to the benefit of set-off in respect of the period already served by them.