

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. 527 of 2014

Reserved on: January 9, 2015
Decision on: February 11, 2015

JAGDEO SINGH @ JAGGA Appellant
Through: Mr. R.D. Rana, Advocate

versus

THE STATE Respondent
Through: Mr. Rajat Katyal, APP
SI: Surender Singh, Special Cell

WITH

CRL. A. 529 of 2014

GURDEEP SINGH Appellant
Through: Mr. Vikas Gautam, Advocate

versus

STATE Respondent
Through: Mr. Rajat Katyal, APP

SI: Surender Singh, Special Cell

WITH

CRL. A. 607 of 2014

SUKHVINDER SINGH @ SUKHI Appellant
Through: Mr. Anurag Jain, Advocate

versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP
SI: Surender Singh, Special Cell

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

11.02.2015

Introduction

1. These appeals are directed against the judgment dated 21st December 2013 passed by the learned Special Judge, NDPS in SC No. 82 of 2008 convicting Jagdeo Singh @ Jagga (Accused No.1) (A-1) (Appellant in CrI.A. No. 527 of 2014) for the offences under Section 21 (c) and 29 of the Narcotics Drugs Psychotropic Substance Act ('NDPS'), Section 489 C and 120 B of the Indian Penal Code ('IPC') and Section 25 of the Arms Act; Gurdeep Singh (A-2) (Appellant in CrI.A.No. 529 of 2014) for the offences under Section 21(c) and 29 of the NDPS Act, 489 C and 120 B IPC; and Sukhwinder Singh @ Sukhi (A-3) (Appellant in CrI. A. No.607/2014) for the offences under Section 21(c) and 29 of the NDPS Act and 489-C and 120- B IPC.

2. The appeals are also directed against the order on sentence dated 30th January 2014, sentencing A-1 to undergo twelve years of rigorous imprisonment ('RI') with fine of Rs. 1.5 lakh for each of the offences under Sections 21 and 29 of the NDPS Act and in default to undergo simple imprisonment ('SI') for six months, and imprisonment for three years with fine of Rs.10,000 and in default to undergo SI for one month

for each of the offences under Sections 489-C and 120-B IPC and further seven years RI and fine of Rs.50,000 and in default to undergo SI for three months for the offence under Section 25 of the Arms Act. All three sentences were directed to run concurrently. A-2 was sentenced to RI for ten years with fine of Rs.1 lakh and in default to undergo SI for three months for each of the offences under Sections 21 and 29 of the NDPS Act, RI for three years and fine of Rs.10,000 and in default to undergo SI for one month for each of the offences under Section 489-C and 120-B IPC; further A-3 was sentenced to RI for fifteen years and fine of Rs.1.5 lakh and in default to undergo SI for six months for the offence under Section 29 and 21(c) of the NDPS Act and three years RI and fine of Rs.10,000 and in default to undergo SI for one month and for the offence under Section 489-C and 120-B IPC. The aforementioned sentences were directed to run concurrently with the sentences already imposed upon A-1 in FIR No.164 of 2007 at Police Station ('PS') Sidhwabet.

Case of the prosecution

3. The case of the prosecution is that Inspector Anil Dureja (PW-16) received a secret information on 23rd March 2007 that Gurdeep Singh Lahoria (A-2), an active member of the Khalistan Zindabad Force (KZF), who was involved in smuggling of drugs along with his accomplice Jagdeo Singh @ Jagga (A-1) was going to deliver a consignment of smack/heroin to a Nigerian at Mother Dairy, Pandav Nagar on a Pulsar motorcycle bearing No. DL 7SAZ 2142. PW-16 endorsed the said information and discussed it with the ACP of the Special Cell. He then constituted a raiding team comprising of himself, Sub-Inspector ('SI') Harbir Singh (PW-1), SI Ramesh Sharma, SI Ranbir Singh (PW-4), SI

Kishan Lal, Head Constable ('HC') Suresh Chand, HC Ramesh Kumar, Constable Anil Kumar, Constable Ajay Kumar, Constable Hawa Singh and Constable Om Prakash. They left the office of the Special Cell in a government vehicle and reached the spot. On the way, as well as at the spot, the police asked two or three passersby to join the raiding team, but none agreed.

4. At around 7.30 pm, a Pulsar motorcycle No. DL 7SAZ 2142 stopped near the public toilet at Patparganj Road, Ganesh Nagar crossing. It was driven by Gurdeep Singh (A-2) who was carrying a black colour bag on his shoulder and on the pillion was Jagdeo Singh (A-1). A-2 took out a polythene bag from the black colour bag he was carrying and handed it over to A-1. A-2 remained on the motorcycle and A-1 stood at the Ganesh Nagar crossing. At that point of time, PW-1 with the help of HC Ajay Kumar (PW-10) apprehended A-1. PW-4 SI Ranbir Singh with the help of HC Ram Kishan (PW-11) apprehended A-2. Both of them were served with notices under Section 50 of the NDPS Act. They were apprised of their legal right to be examined in front of the Gazetted Officer or Magistrate. Both refused to exercise such right. Their refusal was signed by them on the notices issued to them. From the polythene bag carried by A-1, two packets wrapped in yellow colour tape were recovered. They were weighed at 1 kg each. Upon opening they were found to contain light skin colour powder which A-1 revealed to be heroin. The samples were drawn out of the substance and the remaining substance was sealed in a separate *pullanda*. The seizure memo was prepared and FSL form was filled.

5. A cursory search of A-1 conducted by PW-1 revealed a pistol, one magazine and eight live cartridges. They were sealed in a separate cloth *pullanda* and a separate memo and FSL form was prepared. The black bag carried by A-2 was checked. It contained two packets wrapped in yellow colour tape weighing 1 kg each. They too contained skin colour powder which A-2 revealed to be heroin. Again samples were drawn and the remaining substances were sealed in separate *pullanda*. The seizure memo was prepared and the FSL form was formed.

6. The case then was registered and investigation was handed over to Inspector Upendra Solanki (PW-17). He prepared the site plan and arrested both A-1 and A-2. Upon the personal search of both the accused conducted by PW-17, an amount of Rs.28,740/- was recovered from A-1 and an amount of Rs. 2,025/- from A-2. Their disclosure statements were recorded. Both purportedly disclosed that the currency notes were counterfeit; that they were in the business of drugs, arms and ammunitions as well as fake currency along with Sukhwinder @ Sukhi (A-3).

7. The currency notes were seized by a separate memo dated 4th April 2007. Twenty seven currency notes of Rs.1000 denomination were seized from the amount recovered from A-1, and two currency notes of Rs.1000 denomination were seized from the amount recovered from A-2, and a FSL form was prepared in respect of the said seizures.

Investigation and charge

8. A report under Section 57 of the NDPS Act was prepared by PW-17. The call detail records of the mobile phones recovered from A-1 and A-2

were obtained. The statements of witnesses were recorded. The recovered pistol, eight cartridges, samples of heroin was sent to the FSL, Rohini. The report of the FSL confirmed that the currency notes were counterfeit and the samples contained high percentage of diacetylmorphine (DAM). After obtaining sanction under Section 39 of the Arms Act, a charge sheet was filed on 12th September 2007.

9. On 2nd July 2008, an application was filed with the trial Court seeking production warrants for A-3 who had been arrested in FIR No. 77 of 2007 on 26th February 2008. The disclosure statement of A-3 in that case, and the intercepted calls on electronic surveillance in the said case revealed that A-3 was dealing in drugs, illegal arms and fake currency in conspiracy with A-1 and A-2. A-3 had been in continuous touch with A-1 and A-2. A-3 was thereafter produced and arrested in the present case.

10. An application was also filed for taking the voice sample of A-1 and A-2 for comparison with the voice appearing in the intercepted mobile conversations. However, both A-1 and A-2 declined to give their voice samples.

11. On 20th January 2009, a supplementary charge sheet was filed against A-3 for being in conspiracy with A-1 and A-2, for supply of drugs, arms and fake currency in Delhi.

12. On 13th July 2009, charges were framed against three accused for having conspired to deal in drug trafficking and having been found in possession of commercial quantity of heroin and fake currency and thus

having committed offences punishable under Section 21 read with Section 29 of the NDPS Act, Section 120-B and Section 489- C IPC. Additionally, A-1 was charged with having been found in possession of one pistol along with eight live cartridges and thereby committing an offence under Section 25 of the Arms Act. All the accused pleaded not guilty and claimed trial.

The trial

13. The prosecution examined twenty nine witnesses. When the evidence was put to the three accused under Section 313 of the Code of Criminal Procedure ('Cr PC'), each of them denied it and claimed to have been falsely implicated.

Statement of A-1 under Section 313 Cr PC

14. A-1 denied having come to the spot on the motorcycle or even knowing A-2 before the arrest in the present case. He stated that on 23rd March 2007 at 5.30 pm, he was forcibly picked up by the police in Faridabad and the contraband and arms were planted on him by the police officials. He stated that he was residing in rented premises E-874, Dabau Colony, Faridabad. While he was in the market with his wife and eight years old daughter, PW-1 and other police officials stopped him and asked him to accompany them in their gypsy vehicle. PW-1 is stated to have told A-1 that "Sahib" wants to inquire something from him and that A-1 should accompany them and when A-1 declined, PW-1 and other police officials pushed him into the gypsy and tied his hands with rope and covered his face with the cloth. The vehicle was taken to Dhaula Kuan and thereafter to Laxmi Nagar. In Laxmi Nagar under the railway bridge

the vehicle was stopped. The police officials then tried to shift him to a private Wagon R in which A-2 and PW-17 were already sitting. When A-1 raised hue and cry a lot of people gathered at the spot and questioned the police as to why they were taking A-1 away. The police did not listen and shifted him to the Wagon R and they were taken to Rohini Office, Sector-6.

15. A-1 denied having been apprised of any legal right under Section 50 of the NDPS Act. He was beaten by the police officials who forced him to write on the notice. He denied that any contraband or pistol was recovered from him. He denied any recovery of heroin from him or any that other proceedings took place in his presence. He claimed that no mobile phone was recovered from him or A-2. Further, in his presence, no site plan was prepared by PW-17 and no motorcycle was taken into possession. As regards notice under Section 50 of the NDPS Act he admitted that "I did tear it off as I was very tense and troubled on my false implication". He denied that any counterfeit currency, arms and ammunitions were recovered from him. He also claimed not to know A-3 prior to his arrest in the present case.

16. In respect to the transcript of the intercepted calls, A-1 denied having been part of this conversation or having made the conversation shown in that transcript. He stated that it was correct that on 2nd January 2009 he had agreed to give his voice sample but he had specifically requested that he should be taken to CFSL Chandigarh since he was apprehensive that in Delhi the police officials would manipulate his voice samples. Although the trial Court had permitted this but A-1 was not taken to CFSL

Chandigarh. On 12th January 2009 he refused to give the voice sample in Court apprehending that it would not be taken properly and would be manipulated.

17. When asked if he wished to say anything else, A-1 stated that he had been falsely implicated in the case. He stated that he has been in judicial custody from 2001 to 15th August 2006 since more than 21 cases has been registered against him in various police station and that he has been acquitted in most of them. In six cases he has been convicted and in two cases he has filed appeals which are pending in the High Court. He had shifted to outside Delhi after his release from jail and he wished to lead his life afresh. He stated that he has been falsely implicated pursuant to the statement given by him before DCP Alok Kumar against one SI Ombir Singh of the Special Cell who was dismissed from service in 1999. PW-1 (SI Harbir Singh) is related to SI Ombir Singh as they are cousins. A-1 alleged that consequently PW-1 had been responsible for A-1 being falsely implicated in the present case.

18. An Additional statement was made by A-1 on 11th July 2013 wherein he stated that no mobile phone was recovered from him and that he had nothing to do with the conversations of the intercepted mobile phones copied from the hard disc of the computer to a pen drive which was handed over to PW-17. He denied that the conversations recorded on the CDs and DVD between him and the other co-accused persons were in his voice.

Statement of A-2 under Section 313 Cr PC

19. In his statement, A-2 claimed that he was never a member of KZF. Although he had been arrested in two bomb blast cases, he had been acquitted. He denied having come to the spot on a motorcycle. He claimed that he did not know A-1 before his arrest. Though the motorcycle belonged to him, he was forcibly picked up by the police on 23rd March 2007 at around 2:30 pm outside Gurudwara Sheesh Ganj. He stated that he was a *sewadar* in Gurudwara Damdama Sahib, Nizamuddin and merely because he had given a room in the said Gurudwara to a person, who later on was discovered to be a terrorist, he was falsely implicated in two cases of bomb blast and was finally acquitted in 2004.

20. A-2 stated that one police official, SI Ramesh Sharma, Special Cell kept visiting him and inquired about his activities after his acquittal. Thereafter, he started working as a *Sewadar* in Gurudwara Sheesh Ganj and SI Ramesh Sharma used to visit him and also asked him to appear before the Special Cell. This continued for till two years, and when A-2 got fed up, he told SI that if he continued to harass him, he would file a petition in the Court. After about 1 ½ months of his telling him that, SI Ramesh Sharma came at around 2:30 pm on 23rd March 2007 and asked A-2 to accompany him. At that time, A-2 was standing near the STD booth near Gurudwara. SI Ramesh Sharma spoke very politely to A-2 and told him that it was last time “Sahab” wanted to talk to him and, therefore, A-2 agreed to go along with him to the Special Cell. Along with him, Gurlal, another *sewadar* was standing. A-2 gave the key of his motorcycle to Gurlal. He told Gurlal that the motorcycle was parked in the parking lot of Gurudwara. SI Ramesh Sharma then made him sit in a Wagon-R car

and as soon as he was seated, he tied up his hands and put a cloth on his eyes. There were two or more police officials in the Wagon-R car, including PW-17. Although his eyes were closed, he did hear the name Laxmi Nagar and at a place near Laxmi Nagar, the vehicle stopped for about 5-10 minutes and another person was put in the Wagon R, who was later revealed to be known as A-1. He and A-1 were then taken by the police officials to the Special Cell Rohini where they were beaten mercilessly with *dandas* by the police officer.

21. A-2 stated that he was not apprehended in the manner stated by the prosecution; nor was he apprised of his legal rights to get himself searched before a Magistrate or a gazetted officer. He stated that no notice was given in his presence to A-1. He was mercilessly beaten and was forced to write the words on Section 50 notice. Before he wrote the words, the document was blank. He denied that any contraband was recovered from him. He denied recovery of any mobile phone. He stated that only a SIM card bearing No. 9999579926 was recovered from his possession. No mobile phones were recovered from A-1 in his presence. No site plan was prepared by PW-17 and no motorcycle was taken into possession in his presence. He claimed that the police had planted a notice on him and when he received the said notice pursuant to the order of the Court, he tore it off as he was very tense and troubled due to his false implication. He claimed that no currency was recovered nor did he give any disclosure that the currency was fake. He claimed that the entire proceedings were false and manipulated. No arms or ammunitions were recovered from him. He denied the intercepted calls.

22. A-2 stated that he knew A-3 because on a few occasions he had come to Gurudwara Sheesh Ganj and being a *sewadar*, one room had been allotted to him. He, however, had no dealings with A-3. Once or twice A-3 had called him to confirm about the availability of the room in the Gurudwara. He had nothing to do with the intercepted calls. As regards voice samples, A-2 stated that he did agree on 2nd January 2009 to give his voice sample but requested that he should be taken to CFSL, Chandigarh for that purpose. However, they were not taken there. On 12th January 2009, he had refused to give the voice sample in the Court as he was apprehensive that it would be manipulated.

23. A-2 admitted that mobile No. 9999579926 was recovered from him but he had nothing to do with the mobile phone pertaining to A-3. He had not used the SIM card of the mobile No.9871060613 and 9910117964. An additional statement was recorded of A-2 on 11th July 2013 when he denied all the intercepted calls.

Statement of A-3 under Section 313 Cr PC

24. In his statement, A-3 stated that he used to go and meet Daya Singh Lahoria while he was lodged in Nabha jail as he was a good friend of his. He stated that he used the mobile No.9876933745 but thereafter stated that he had never used the said mobile phone and that he was not dealing in fake currency notes, drugs, arms and ammunition. He stated that he did not know A-1 but knew A-2 who was a *sewadar* in Gurudwara Sheesh Ganj, New Delhi. He had got in touch with A-2 when he had come to Delhi for *pairvi* of cases of Daya Singh Lahoria in the Supreme Court and in Jaipur courts. He claimed that no mobile phone was recovered from his

possession.

25. A-3 stated that he had no knowledge of the interception of the mobile phone conversations. He claimed to know nothing of the seizure of narcotics from A-1 and A-2. He stated that he did not even know A1 before his arrest in this case. He claimed that he had been falsely implicated and nothing had been recovered from him – neither any contraband nor pistol nor mobile phone. He claimed that even in FIR No. 77/2007 he had been falsely arrested. He claimed that he never had any conversation with A-1 or A-2 regarding heroine and that the intercepted calls did not pertain to him. He claimed that DVDs and CDs did not contain any calls made by him. He claimed that his signatures were taken on many blank and written documents forcibly and that the police officials used to beat him if he refused to sign.

26. A-3 admitted that he had given his voice sample in the FSL but claimed that he made no calls to A-1 or A-2 or any other person, the transcripts of which were Ex. PWs-30 to 34. He claimed that the voice or conversation which he had heard in Court did not pertain to him and that “though the said voice sounds similar to my voice, the CDs and the DVDs have been tampered.”

Defence evidence

27. The first witness for the defence was Dr. Anand Kumar (DW-1), Medical Officer attached with CJ-4 dispensary at Tihar Jail. He brought the attested copy of the first medical examination record of A-2 (Ex. DW-1/A), when he was examined on 4th April 2007. A-2 had complained that

he had been beaten by the police. On examination “pattern bruises were found present over the left side of the back and he was prescribed medication for the pain.” Apart from the suggestions to him that the document wrongly recorded that bruises were found and that A-2 had been seen by Dr. Rakesh, who prepared the report, nothing much was elicited in the cross-examination of this witness by the learned APP.

28. The next witness for the defence was Pargat Singh (DW-2), who was working as a *sewadar* in Gurudwara Sheesh Ganj since 2003. He was standing with A-2 and other *sewadar* Gurlal at the STD booth situated near the entrance of Gurudwara at around 2:30 pm on 23rd March 2007 when a person of medium height and slightly dark complexioned told A-2 “*sahib bula rahe hain.*” A-2 addressed the said person as Mr. Sharma and asked him what happened but the said person merely repeated the statement made earlier. A-2 then told Gurlal that his bike was parked in front of the museum opposite Gurudwara and that he should bring the bike inside the Gurudwara premises and park it. The next day when he came to the Gurudwara, Gurlal told him that he had handed over the keys of the motorbike to the brother and father of A-2, who had come to the Gurudwara after coming to know of his arrest. It was found that A-2 had been taken away by the police and his bike was also taken away by the police after breaking its lock. Gurlal had since left the services of the Gurudwara and was presently residing in Punjab.

29. In his cross-examination, DW-2 stated that neither he nor Gurlal made any complaint to the police about the motorcycle of A-2 being taken by some police officials. He also did not complain to the police after coming

to know from his father and brother that A-2 had been picked up by the police. He denied the suggestion that he was falsely deposing at the instance of A-2.

30. The third defence witness was Mr. S.K. Jain, Dy. Director, CFSL, Chandigarh (DW-3). DW-3 clarified that although in reply to the RTI application of A-1 (Ex. DW-3/B), it had been stated that no official from the CFSL, Chandigarh had attended the trial Court, he stated that he had appeared in the trial Court on 12th January 2009 to record the voice sample. He also brought an attested copy of the office movement register showing his movement from Chandigarh to Delhi (Ex. DW-3/E). In his cross-examination by learned counsel for A-1, DW-3 stated that he had been authorised and directed by the CFSL, Chandigarh to appear in the learned trial Court on 12th January 2009.

31. The 4th defence witness was Mr. Deepak DW-4), the Nodal Officer who brought the summoned record (Ex. DW-4/A and 4/B respectively). A copy of the Vodafone Delhi Cell ID Chart (Ex. DW-4/A) and the details pertaining to mobile No. 9811328172 was exhibit DW-4/B. The said mobile phone was functional till 15th March 2007. It was not functional thereafter.

32. DW-4 also brought the records pertaining to mobile No.9873836607 (Ex. PW-4/C) which showed that the phone was functional till 23rd March 2007 in the Delhi circle. The last call in the said phone received was at about 19:38:08 hours. Thereafter, it was not in network in Delhi circle. At about 17:58:44 an outgoing call was made from that mobile for 61

seconds. As per the cell chart ID, the location of the mobile at that time was Nangla Rai at Delhi Cantt., and at about 18:00:50 one outgoing call was made from the same cell tower. At about 18:07:10, an incoming call was received from the same tower. Another incoming call was received at around 18:17:23. At about 18:18:15, an outgoing call was made from the same mobile tower. Another outgoing call was made at about 19:06:18 from the tower at Lajpat Nagar, Part-II. At around 19:32:15 an outgoing call for 29 seconds was made from the same cell tower at Sarai Kale Khan. At about 19:32:47 an incoming call was received for 16 seconds from the cell ID tower of Bhairon Marg, Pragati Maidan. The mobile phone was used with IMEI No.354540018396220 for all the aforementioned calls.

33. Dr. Anand Kumar Chopra, the Medical Officer, Central Jail-1, Tihar was examined as DW-5. He had joined CJ-1 dispensary on 1st February 2013. He brought the medical record of A-1 prepared on 4th April 2007. An attested copy of the first medical examination of A-1 was (DW-5/A) was brought on record. A-1 had complained that he was beaten by the police on 2nd April 2007 and had pain over his whole back. On examination, pattern bruises were found present over the whole back, left arm upper and lower left thigh and the legs. A-1 was prescribed medication for the pain. In his cross-examination, he could not state as to which doctor examined A-1 since he was not working in Tihar on 4th July 2007. He was unable to speculate how A-1 could have received the injuries.

34. Head Constable Sanjeev (DW-6) attached to PS Special Cell, Lodhi

Colony was examined next. He brought the *malkhana* register No.19 for the year 2007 and the daily diary register for the same year. He pointed out that the register with respect to the duty roster of the year 2007 had been destroyed within a period of two years. He had brought the daily register for the period from 7:00 am on 23rd March 2007 till 7 am on 24th March 2007. He stated that there was no entry as to PW-17 (Inspector Upendra Solanki) receiving any case property from *malkhana*. He further stated that PW-17 had made the said entry at NR Rohini where he was then posted.

The trial Court judgment

35. By the impugned judgment dated 21st December 2013, the learned trial Court found the three Appellants to be guilty of the offences under Section 21(c) and 29 of the NDPS Act, Section 489(c) and 129-B IPC and Section 25 of the Arms Act. By the order on sentence dated 30th January 2014, the learned trial Court sentenced the A-1, A-2 and A-3 in the manner indicated hereinbefore.

36. The conclusions arrived at by the learned trial Court, on an analysis of evidence, could be summarised as under:

- (i) Although A-2 had contended that his motorcycle had been forcibly taken by the police from the parking lot after breaking open the lock, in an application filed by him before the learned Special Judge on 7th June 2007 (Mark R-1), he took a very different stand. He stated that at around 6-6:30 pm, when he was standing with his friend near the STD booth near the Gurudwara, SI Ramesh Sharma had come there and asked him to accompany him to his

office for some inquiry; that A-2 followed the SI on his own motorcycle and that only after he and the vehicle of SI passed the Lal Qila red light, SI Ramesh Sharma asked him to leave his bike and accompany in his vehicle since he had received a message that a senior officer was leaving and would return only after 9:00 pm and SI Sharma did not want A-2 to spoil his whole night. Therefore, A-2 sat in the vehicle with SI Sharma and his bike was driven by a police official. Since this application was filed three months after his arrest, the answers given under Section 313 Cr PC was false.

(ii) SI Harbir Singh (PW-1) in his cross-examination denied knowing any police official by the name of Ombir Singh. Therefore, the bald allegation by A-1 in this regard could not be made a ground for doubting the version of the prosecution.

(iii) The intercepted mobile conversations proved on record by the prosecution totally corroborated the version put forth by the prosecution with respect to the manner of apprehending the accused persons. The intercepted mobile conversations proved that A-1 and A-2 were known to each other, much before 23rd March 2007 and were together involved in some business. Even on 23rd March 2007, A-1 and A-2 were in continuous touch with each other till 7:30 pm. The mobile conversations were played in Court and the transcripts were also filed in the judicial record. It showed that at around 4:45 pm, A-1 called up A-2 and both of them decided to meet near a tea vendor's shop. The learned trial Court also adverted to the further

conversation that took place between the two at 5:13 pm, 7:05 pm and 7:35 pm. At around 7:35 pm in the conversation between A-1 and A-2, A-1 informed A-2 that he was able to reach the designated spot by taking a lift and told A-2 that he was standing near a banana vendor. Two minutes thereafter, A-2 made a call to a person, whom he addressed as 'Raju' stating that the said person Raju should be able to spot him and tried to tell him where A-1 was standing. Three minutes thereafter, A-2 again called Raju and while talking, he screams, telling him to run away. Consequently, both A-1 and A-2 had taken a false defence before this Court.

(iv) The intercepted mobile conversations were of unimpeachable quality and could not be doubted merely because they were produced belatedly. The prosecution was able to satisfactorily explain the delay. The depositions of PW-s 1, 17 and 30 revealed that the four mobile phone Nos. 9876933745, 9317534945, 9811328172 and 9817060613 were under the surveillance of the Special Cell, much before the apprehension of A-1 and A-2 and the conversations that took place on the said mobile phones were automatically saved in the server of the Special Cell. Through the server of the mobile service provider and the said telephonic conversations were copied on 2nd April 2008 by PW-1 on the instructions of ACP Ravi Shankar first from the computer system in a pen drive and then in a DVD which was exhibited during trial as Ex. P-26. As per the deposition of PW-17, after listening the calls in the DVD, he copied them in the CDs (Exs. P-29, 36 and 38). Thus, the conditions laid down under Section 65-B of the Evidence

Act had been complied with. PW-17 had deposed that the computer system installed in the office of the Special Cell was under the supervision and control of Inspector Sandeep Malhotra (PW-30) and that the password of the computer system used to remain with him and that during the relevant time, neither was there any problem in the operation of the computer system nor was there any break down and that the CDs in question contained the calls that were initially stored in the server of the computer system installed in the office of Special Cell, NR, Rohini.

(v) The plea of the accused that these calls were mimicked in the voices of the accused by somebody else and then copied on to the CDs was unsubstantiated. The call related information was automatically recorded at the time the calls were made and thereafter transferred to the server of the Special Cell using a software application. Since there was no manual intervention, it could not have been tampered with. When the CDs were played in Court, the call related information was reflected on the computer screen along with the graphs of the voice patterns. The details showed that the calls in question were made during the period February 2007 and March 2007, i.e., before the arrest of the accused.

(vi) The contention of the accused was that the mobile transcripts showed that A-1 and A-2 were having conversation around 7:45 pm was contrary to the stand of the prosecution that they were arrested at around 7:30 pm. The members of the raiding party deposed that

the time of apprehension of accused persons “was about 7:30 pm.” and this did not mean exactly 7:30 pm. Further, the cell tower catches the frequency of a mobile phone if the location of the said mobile is within 1-2 km range. Therefore, there was no discrepancy if the cell tower at Pragati Maidan was able to catch the frequency of mobile phone used by A-1 when he was near Ganesh Nagar. The said spot was within 2 km. of Pragati Maidan. The evidence of Dr. Rajender Singh (PW-28), who was the head of the Foreign Voice Identification Unit, CFSL proved that the questioned voice of A-3 in the taped conversations tallied with his specimen voice.

(vii) Dr. S.K. Jain, Dy. Dir. (DW-3) had come to the Court on 12th January 2009 to record the voice sample of A-1 and A-2 but they had refused. An adverse inference, therefore, was drawn against them. The allegation that the signatures of A-1 on various documents was forged was false as the evidence of the handwriting expert did not conclusively prove that the signatures of A-1 were forged. There was no merit in the contention that the mobile phones were planted on A-1 and A-2. Right from the supply to them of the chargesheet and documents, they were taking the plea that no contraband had been recovered from them. They did not take the plea that no mobile phone had been recovered from them, although the recovery memos were duly supplied to them with the chargesheet.

(viii) Since the recoveries in the present case had not been effected from the persons of the accused, but from the bags carried by them, hence Section 50 NDPS Act was not applicable.

(ix) Dr. Madhulika Sharma (PW-14), the FSL expert, explained that the colour of the samples which were received for analysis, which were of cream colour, could change to brown colour due to moisturization. PW-14 was not examined on this aspect. The percentage of diacetylmorphine in the four samples, i.e., S-1, S-3, S-5 and S-7 showed that these were of commercial quantity. An attempt had been made to remove number 3 (from 31.6%) and 41 (from 41.2%) which was noticed by the learned trial Court. The deposition of PW-14 put to rest any doubt as to the discrepancy that resulted as a consequence of such tampering.

(x) Even in the absence of the public witnesses, the prosecution has been able to prove recovery of 4 kg. of heroine, one pistol and fake currency from A-1 and A-2 on 24th March 2007.

(xi) The taped telephonic conversations showed that from February 2007 till the date of apprehension, A-1 and A-2 were in touch and in conversation with each other and with A-3. After A-1 and A-2 were apprehended, A-3 spoke about the arrest to at least three persons from his mobile. After the arrest of A-1 and A-2, the conspiracy in question had come to an end and, therefore, the statements made by A-3 thereafter could not be read against his co-conspirators under Section 10 of the Evidence Act, but they could be read against A-3 himself under Section 8 of the Evidence Act.

37. Consequently, all the three accused were held guilty for the offences with which they were charged and sentenced in the manner indicated

hereinbefore.

Submissions of counsel for the Appellants

38. This Court has heard the submissions of Mr. R.D. Rana, learned counsel appearing for A-1, Mr. Vikas Gautam, learned counsel appearing for A-2 and Mr. Anurag Jain, learned counsel appearing for A-3.

39. On behalf of A-1, Mr. Rana made the following submissions:

(i) The prosecution story regarding the arrest of A-1 was totally false. While PW-1 deposed that A-1 had approached the spot from the Laxmi Nagar side, PW-4 deposed that he approached from the Seelampur side; PW-10 stated that he approached from Patparganj side and PW-16 stated that he approached from Seelampur side. It is pointed out that the site plan is not prepared and the identification by PW-16 is different from the site plan filed by the IO (PW-17).

(ii) PW-1 deposed that there was a *goal chakkar* at the place of arrest, whereas the site plan did not show any such *goal chakkar*. In fact, it was a red light crossing.

(iii) Even as regards the time of arrest, there were inconsistencies. While PW-4 stated that A-1 is arrested at 7:30 pm on 23rd March 2009, the CDR and the call locations contradict the whole story. The CDR and the call locations filed by the prosecution for mobile nos. 9811328172 and 9873836607 allegedly recovered from A-1 shows that the said mobile was at Sarai Kale Khan at 7:32 pm and at Bhairon Marg on 7:32:47 pm, which is approximately 6-7 kms.

from the place of arrest shown by the prosecution. The journey on the motorcycle from Sarai Kale Khan to the place of arrest takes at least 20-30 minutes in peak hours. Reliance in this behalf was placed on the deposition of PW-1. The prosecution story that A-1 was at *goal chakkar* on 23rd March 2007 was, therefore, false and fabricated.

(iv) The mobile No.9871060613 was recovered from A-2. The Nodal Officer (PW-29) confirmed that the said mobile number was at Laxmi Nagar Chowk at 7:30 pm, which was 2 kms. from the place of arrest and 8-10 kms. from Sarai Kale Khan.

(v) Although the place of arrest was a busy public place with many markets, shops etc. being there, PW-17 did not bother to involve any public witness.

(vi) The signature of A-1 on the different memos and notice under Section 50 NDPS Act were forged by the IO. The expert had opined that the writing and signature on the memos and notice did not tally with the specimen signature and writing of A-1. Reliance has been placed on the decisions in *Vijaysinh Chandubha Jadeja v. State of Gujarat (2011) 1 SCC 609*, *Rakesh @ Shanker v. State* (decision dated 8th January 2014 in CrI. A. No. 663 of 2010), *Narcotics Control Bureau v. Sukh Dev Raj Sodhi 2011 [4] JCC 212*, *Kishan Chand v. State of Haryana 2013 1 AD (SC) 39* and *State of West Bengal v. Babu Chakraborty (2004) 12 SCC 201*.

(vii) The very genesis of the case is, according to Inspector Anil Dureja (PW-16), a secret informer gave information at around 18.10 pm about A-1 coming to Mother Dairy, Pandav Nagar, whereas PW-17 stated that they arrested A-1 on the basis of surveillance kept on the mobile phone used by him.

(viii) The transcript of the conversations given in the pen drive purportedly by PW-1 to PW-17 on 2nd April 2007 was more than one year and 10 days after the event. PW-17 uploaded the said transcripts in his computer on 24th January 2008, i.e. after 2 months and 22 days. The voice samples along with the said CD and DVD made from the said copies were sent to CFSL on 6th October 2008, i.e., 8 months after taking the sample, but it had not been verified by the FSL Lab as to whether the CD was an original one or a fake one. Also, if the voice sample of A-3 was collected on 26th February 2008 when he was arrested in FIR No. 77/07, then there ought to be an explanation as to why there was no deposit in the *Malkhana* till 24th April 2008.

(ix) The recoveries were planted on the accused. There was discrepancy in the depositions of PWs 13 and 16 as to whether the case property was deposited in the *Malkhana* or MHMC Malkhana was called to the office handed over the properties recovered.

(x) PW-17 stated that he had opened the sealed *pulanda* on 4th April 2007 without permission of the Court, and then took out Rs.

27,000, while keeping Rs. 1,740 there. A question arose as to how

he knew that Rs. 27,000 were fake currency, whereas Rs. 1,740 were genuine. Moreover, Ms. Deepa Sharma (PW-12), the FSL expert deposed that she received Rs. 27,000 in loose condition.

(xi) The linking evidence regarding chain of events of the source from which the contraband was produced and its final destination was not proved.

(xii) The IMEI No. mentioned in the CDR was different from the IMEI No. of the mobile phone used by A-1.

(xiii) As per judicial as well as other records, the time of arrest of A-1 on 23rd March 2007, was 7:30 pm the CDR for mobile number 9873836607 showed that A-1 was still making calls to A-2 at around 19:41:07 pm to 19:41:35 pm (call No.8629). Further, DW-4 deposed that at around 19:32:47 pm he was in Bhairon Marg and not Ganesh Nagar. He confirmed that the mobile phone was switched off at 19.38 pm, then the prosecution ought to explain how A-1 could have made a call to A-2 at 17:41:07.

(xiv) The sanction for interception of the mobile number 9811328172 was ordered on 23rd March 2007 with retrospective effect from 15th March 2007. If, as per DW-4, the said mobile remained switched off w.e.f. 12:03 noon on 15th March 2007, there was no need to obtain any sanction for interception of such call. The circumstance in which A-3 was arrested was also doubtful. He was arrested on 26th July 2008 while he had already been arrested

in FIR No. 77/07 with the same Special Cell. This happened after the report of the handwriting expert was received by the learned trial Court on 5th May 2008, which showed that the signature of A-1 on various documents were forged whereupon the prosecution panicked and to do damage control, made A-3 an accused in the cases.

(xv) A-1 had an enmity with the Special Cell, dating back to 1999. He had complained against ASI Ombir Singh, who was then dismissed from service after a departmental inquiry. Reliance is placed on the letter dated 10th May 2013 of the Special Cell obtained after the RTI Act. Since then, the Special Cell of the Police have been trying to implicate A-1.

40. Apart from reiterating many of the above submissions, Mr. Gautam, learned counsel for A-2 pointed out inconsistencies in the prosecution witnesses as to the time and place of arrest and the steps taken thereafter. He highlighted the failure to send the FSL forms and relied on the decision in ***Satinder Singh v. State* 69 (1997) DLT 577**. He referred to the evidence of PW-21 to the Court that the voice sample could be manipulated. It was pointed out that the mobile phone remained with the IO for a long time. There were no CDRs for the mobile stated to be in the name of A-2. DW-1 had proved injuries inflicted on A-2. Therefore, his statement could not be said to be voluntary.

41. Mr. Gautam submitted that inasmuch as the case property was taken to the office and not deposited at the nearest PS, an adverse inference ought

to be drawn against the police. Reliance is placed on the decision in ***Inder Dev Yadav v. The State 2014 (3) JCC (Narcotics) 129***. There was no evidence to prove that A-2 was a member of the KZF. The mobile phone seized from A-2, i.e., 9821060613 was not in his name. It was not shown to him either.

42. Mr. Anurag Jain, learned counsel appearing for A-3, submitted that he was falsely implicated in this case. The mobile conversations which allegedly took place between the accused persons were false, and concocted. There was no explanation as to why the said mobile conversations were not part of the original charge sheet. The alleged information that A-3 was using from the mobile No.9876933745 for contacting KLF was not part of the original charge sheet. There was no evidence to show that any of the mobile phones pertained to A-3 or how the phones were intercepted. The technology used in the system was capable of being manipulated. The procedure for interception was full of loopholes and Section 65B of the Evidence Act has not been complied with. The report of Dr. Rajender Singh (PW-28) regarding matching of the voice samples of A-3 on the taped conversations with the sample voice was 'doubtful' and has not been proved in accordance with law.

43. Mr. Jain submitted that the prosecution had failed to prove that A-3, at any time, either subscribed to or owned mobile Nos. 9876933745 and 9317534945 and, therefore, he could not have been convicted under Section 20 NDPS Act. The tampering of the CDs containing the taped conversations cannot be ruled out. The necessary ingredients to make out Sections 21 and 29 of the NDPS Act and Section 120-B IPC as regards A-

Criminal Appeal Nos. 527 of 2014, 529 of 2014 & 607 of 2014 *Page 28 of 57*

3 were missing. There was no evidence to show that A-3 had entered into a criminal conspiracy with the other accused to deal in trafficking of fake currency, arms and ammunition and heroine.

Submissions of learned APP

44. In reply, Mr. Rajat Katyal, learned APP for the State, explained the steps involving the receipt of secret information by Inspector Anil Dureja (PW-16). At around 6.10 pm information was received by PW-16 that A-1 and A-2 would come near Pandav Nagar Mother Diary around 7.30 pm for supply of smack to one Negro and the said information was passed on ACP Ravi Shankar who instructed PW-16 to conduct a raid. In any event since the secret information was not in respect of the contraband being in some house, the provision of Section 42 NDPS Act was not attracted.

45. As regards the occurrence at Pandav Nagar, Mother Diary, Mr. Katyal pointed out that although notices were in fact issued under Section 50 NDPS Act to each of accused, i.e., A-1 and A-2 separately, both of them had destroyed the copies of the notices served upon them. In any event, contraband was recovered from the polythene bag of A-1 and from bag of A-2 and thus the contraband was not present on their person. The contraband was sealed with the seal of HS and handed over to PW-16 along with FSL forms and PW-16 left the spot at around 10.20 pm. It was taken to PS Lodhi Colony at about 11.15 pm and handed over to SHO Paras Nath (PW-13) who affixed his seal of PNS on all the parcels and FSL forms and deposited the same in the *malkhana*. He further stated that he handed over the parcels to MHC (M) HC Mahavir Singh (PW-5) who affirmed the same. As regards the deposit of parcels and FSL forms, PW-

8 stated that four samples sealed with the seal of HS and PNS along with FSL forms were handed over to PW-11 by a road certificate. PW-11 affirmed the same and stated that he deposited the samples with FSL Rohini. PW-14 affirmed that she received the four sealed parcels along with FSL form and specimen seal impression as HS and PNC for chemical examination. Therefore, the link evidence is complete. Although there was some gap in sending of the samples to FSL, the link evidence showed that the samples still remain intact. Reliance is placed on the decision of the Supreme Court in dated 20th August 2008 in Criminal Appeal No. 737 of 2007 (***Hardip Singh v. State***) wherein the delay of 40 days was not found to be fatal.

46. According to Mr. Katyal, the site plan (PW-17/A) when read in consonance with the evidence of the witnesses shows that there was no discrepancy as regards the place of apprehension at the spot. The reports under Section 57 NDPS Act (Ex.PW-6/C) & Ex.PW-6/E) having the receiving of office of ACP, Special Cell, NR were also proved by Ex.PW6/D and F.

47. As regards the mobile phones used by A-2, Mr. Katyal pointed out that from the CDR of Mobile No. 9871060613 it was apparent that it was being used on both the mobile phones i.e., Nokia 2300 (IMEI 355361003085245) having a SIM of Airtel and Nokia 8310 (IMEI 350700106948921) having SIM of Hutch. The mobile Phone No. 9999579926 was admittedly in the name of A-2 himself that was used on Nokia 8310 as evidenced from the CDR. As regards A-1, the mobile instrument is Motorola 5960 (IMEI 358612004213070) with the SIM of

Hutch. The mobile used on this phone was 9811607709. The second phone was recovered from A-1 was Nokia 1110 with IMEI 354540018396 as 6223) with the SIM of Hutch. On these mobile instruments the mobile numbers of 9888979849 and 9811328172 were used. The third was Sony Eriksson with the IMEI 354244013209750 having a SIM of Hutch. The mobile number was 9811538286. The CDRs evidenced by PW-2, PW-9 and PW-15 show that A-1 and A-2 were also in constant touch with each other and with A-3. Till placing on record the intercepted conversations, A-2 took the stand that the mobiles were not recovered from them. The intercepted conversations showed that A-1 and A-2 knew each other very well and were involved in some clandestine activity. Mr. Katyal submitted that for the purpose of investigation, the mobiles were not deposited in the *malkhana* in time. However, no prejudice was caused to the accused persons as a result of such delay. Neither the CDRs nor the voice interceptions could be manipulated with the mobile phone.

48. Mr. Katyal took the Court to the various interception orders in respect of the mobile phones used by the authorities. He pointed out that the requirement of Section 65B of the Evidence Act were complied with and it was consistent with the law explained by the Supreme Court in ***Anvar P.V. v. P.K.Basheer (2014) 10 SCC 473.***

49. As regards the beatings given to A-1 and A-2, Mr. Katyal pointed out that during police custody of A-1 and A-2, they were produced before doctors for their medical check-up and in none of the reports there was any complaint made regarding the alleged beatings.

50. It was pointed out that the retraction statements of A-2 showed that when he was produced before the Court, he did not complain of any torture. The plea that they were kept standing outside the Court of the learned MM, when remand was sought, was not substantiated.

51. As regards A-3 Mr. Katyal submitted that after moving an application before the trial Court on 2nd July 2008 seeking production warrant stating that he had been arrested on 26th February 2008 in FIR No. 77 of 2007 registered at Police Station Special Cell, A-3 was formally arrested on 26th July 2008. His voice samples were taken by the CFSL experts on 28th July 2008. Inspector Yugraj Kishan (PW-23) went to PS Sidhwa Bet, Punjab to collect 6 mobile phones along with SIM cards, memory card and six separate SIM cards as recovered in FIR No. 164 of 2007 registered at PS Sidhwa Bet pertaining to mobile recovered from A-3. Inspector Preetam Singh (PW-24), SHO, PS Sidhwa Bet confirmed that A-3 had been arrested in FIR No. 164 of 2007 and mobile phones and other materials had been recovered from him. PW-21 A.D. Tiwari also confirmed the collection of voice sample of A-3 and PW-28, Dr. Rajender Singh, CFSL expert confirmed that the sample voice and the voice in interceptions matched with the voice of A-3.

52. Mr. Katyal took the Court through the various interception orders. The intercepted calls were copied on DVD/CD and were seized by seizure memo. These memos were in substantial compliance of Section 65B of the Evidence Act. A perusal of the call details and transcripts of various conversations between the accused and certain others showed that A-1 and A-2 were in constant touch with each other and with A-3. He

submitted that the trial Court had extensively dealt with the evidence on record and had rightly convicted them in the manner indicated hereinabove

Electronic evidence and Section 65-B of the Evidence Act

53. Among the critical pieces of evidence the intercepted conversations on the mobile phones allegedly used by the three accused and the call detail records (CDRs) of those phones. One of the questions that arose in considering the evidence in relation to intercepted calls, which is essentially electronic evidence, is whether the requirement of Section 65B of the Indian Evidence Act (EA) was satisfied.

54. A two-judge Bench of the Supreme Court in *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru (2005) 11 SCC 600* had relied upon this question of law in this case, the CDRs of mobile phones used by the accused were relied upon by the prosecution. The print outs of the CDRs were taken from the computers/servers by mechanical process and certified by a responsible official of the service provider. Although the said official himself was not examined, the witness who identified the signatures of the certifying officer was examined. In the circumstances, it was observed that although the certificate containing the details in terms of sub-Section (4) of Section 65B was not filed in the instant case, that evidence can be led by using Sections 63 and 65 of the Evidence Act. It was further observed that Section 65B of the Evidence Act being a provision dealing with admissibility of electronic records, “there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65.”

55. Recently, a three-judge Bench of the Supreme Court in *Anvar P.V.* (supra) overruled the above dictum of the judgment of the two-judge Bench in *Navjot Sandhu* (supra) by holding that Section 65B relating to electronic records being a special provision, “the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law.” It was held that “Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record.” Even “in the case of CD, VCD, chip, etc. the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.” In *Anvar P.V.* (supra), in relation to the CDs no certificate had been produced in terms of Section 65B EA. It was held that the electronic evidence in the form of CDs/DVD/Chip shall be accompanied by the certificate “in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

56. Turing to the facts in the present case, there is a whole chain of events that has taken prior to the interception orders of the mobile phones. The interception orders were in respect of the mobile phones (Ex.PW20/A, Ex.PW20/B, Ex.PW26/A, Ex.PW26/B and Ex.PW26/C). PW-1 stated that after the after the bomb blasts that took place in 2005 at Liberty and Satyam Cinemas the mobile phones of the suspects were kept under surveillance. PW-1 had been deputed to listen to those conversations. He

came across the mobile used by A-3. He learnt that A-3 was in constant touch with Daya Singh Loharia, a Member of KLF. An FIR No.77 of 2007 was got registered in PS Special Cell. A-3 was arrested in the said FIR on 26th February 2008. There was a specific instruction from senior officers that the surveillance of the mobile phones had to be kept secret. In that process PW-1 learnt that A-3 was involved in the racket of supplying of fake currency, drugs, arms and ammunitions and he used to supply drugs to A-1 and A-2. PW-1 revealed some facts to PW-16 by keeping his operation to be secret.

57. PW-1 stated that he was given permission only on 2nd April 2008 to hand over the intercepted phone conversations transcriptions in a pen drive to SI Upender Solanki (PW-17). The conversations between the accused persons were intercepted and provided to the office of the Special Cell. This was spoken to by PW-1, PW-17 and PW-30. PW-17 explained that after hearing the conversations of all the calls, he copied all of them in DVD and CDs (Ex.P-29, P-36 and P-38). The computer system installed in the Special Cell was under the supervision and control of PW-30 and the password of the same remained with him. It was stated that during the relevant period there was no problem in the operation of the computer system while recoding the calls nor was there any break down.

58. PW-17 clarified that it was PW-1 who downloaded and handed over the transcripts to him for observation. He had opened the file in the office computer giving it the name of Upender. He prepared four folders after hearing the intercepted calls and they were downloaded in the DVD (containing all calls) and CDs, the CD pertaining to A-3 was given mark

Q. The second one pertaining to A-2 was given mark Q1 and the third pertaining to A-1 was given mark Q2. He spoke of the preparation of the transcripts of all mobile phone calls. They were translated into Hindi. Since A-3 knew only Gurumukhi, the calls pertaining to him were translated.

59. When the DVD prepared by PW-17 (Ex.P-26) for reference was produced, defence counsel objected to it in view of Section 65B EA. They also objected to marking of CD (Ex.PW-29) containing the questioned conversation with the specimen voice sample taken of A-3 during investigation. CD then was played on the CD player in the Court and was found to contain the conversation of call Nos. 40967, 74932, 76459, 87521 and 87895. The transcripts of those conversations were also exhibited as Ex.P30 to Ex.P34.

60. Likewise, the CD containing the selected calls of each of the other accused were tendered in evidence. They too were objected to by the defence counsel. Those conversations were nevertheless played in Court and transcripts thereof also produced.

61. In his cross-examination PW-17 stated as under:

“The original device on which the intercepted call records pertaining to this case was not sent for examination to the FSL. I was only given the pen drive in which the said intercepted call details were copied by SI Harbir Singh. I did not see from where these call details were copied.

62. PW-17 further stated as under:

“We have not intercepted the telephones of the accused persons in this case but I have only analysed the voice of the telephone conversations in FIR No. 77/07. For this purpose no permission is required. It is a part of my investigation.”

63. An application was filed by the prosecution before the trial Court under Section 311 Cr PC. It was allowed by the trial Court on 17th May 2013. In the further examination-in-chief, PW-17 stated as under:

“After SI Harbir Singh handed over the said pen drive to me at about 7 pm and I copied the data from the same in the hard disk of the computer system that I was using at that time. Since the calls ran into thousands, it took me almost three months to hear all the calls and thereafter, I copied all the calls in DVD Ex.P26 and the relevant calls in the CDs Ex.P29, P36, and P38 (the CDs and the DVD will be heard by this Court during the final arguments). I had returned the pen drive to SI Harbir Singh on 2nd April 2008 itself and after copying the data in the computer system. I had not tampered with the data in any manner. I had copied the data in a file which could only be accessed by using the password which was known to me only. Nobody could have accessed to file made by me without my knowledge. During the three months period, no fault occurred in the computer system in which the relevant file was stored and neither was the said file corrupted in any manner. I state that the calls recorded in the CDs and the DVDs Ex.P26, P29, P36 and P38 are the true and correct copy of the calls that were stored in the pen drive and thereafter copied by me.”

64. In his cross-examination by learned counsel for A-2, PW-17 stated as under:

“I have no personal knowledge of the procedure followed by Harbir Singh in copying the data in his pen drive. I have no personal knowledge whether Harbir Singh could have tampered or manipulated the data in the pen drive. I did not

at any time hear the original intercepted calls. I did not seize the hard disk of the original computer system from which the intercepted calls were copied.”

65. In his cross-examination, PW-17 further stated as under:

“I have been posted in Special Cell since July 2006 and the computer system was already installed at that time in the office of Special Cell. I did not at any time make an enquiry whether the original computer monitoring system which was recording the intercepted calls had a breakdown or not. Vol. I did not have access to any such record. It is incorrect to suggest that I am deposing falsely.”

66. In his cross-examination by learned counsel for A-1, PW-17 stated that:

“I created a folder in the name Upender and I stored the data from the pen drive in the said folder. It was the folder which was password protected and not the computer.”

67. In response to another question by learned counsel for A-3, PW-17 admitted: "it is correct that I had not deposited mobile phones recovered from the personal search of accused Jagdeo Singh and Gurdeep Singh while the other case property was deposited in the *malkhana*". He further denied the suggestion that he had kept those mobiles phones with him “for tampering and retrieving data from those mobile phones and thereafter I manipulated the data and transferred it into the pen drive of the case.”

68. At this stage, it is necessary to understand what should be done to satisfy the requirement of Section 65B EA. It has been reiterated by Mr. Katyal, learned APP, before the Court and in the written submissions that there was ‘substantial compliance’ with Section 65B EA. This provision

is inserted in the Chapter V titled 'Of Documentary Evidence'. It occurs after Section 65 which permits secondary evidence to be given in relation to documents. Both Section 65A which is titled 'Special provisions as to evidence relating to electronic record' and Section 65B regarding 'Admissibility of electronic records' proceed on the major premise that as far as the electronic records are concerned, it may be difficult in many instances to produce 'original record' which would be on a huge server or a server that is unable to be produced before the Court or on a major tower etc. The very purpose of Section 65B EA was to obviate this difficulty. What it essentially does is it brings secondary evidence to the level of primary evidence in order to make it admissible in accordance with law. All conditions set out in Section 65B (2) and Section 65B (3) EA have to be satisfied.

69. The mandatory requirement under Section 65B (4) is that the certificate produced should satisfy the requirement under Section 65B (4) (a), (b), and (c) and the requirement that they should be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate). The electronic evidence thus produced that is accompanied by such certificate "shall be deemed to be also a document", dispensing with the further proof of production of the original. In other words, there is no escape from the requirement of producing the signed certificate by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities.

70. PW-1 is the witness who tells the Court that he was himself listening to the intercepted conversations. However, he is unable to tell the Court anything whatsoever about the original computer device in which the taped conversation was recorded. Importantly he is not the person who is “occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities”. His evidence only states that when the Liberty and Satyam Cinema bomb blast cases were being investigated, “I was directed to listen the conversation on those numbers.” He then states that “During the course of observation one of the numbers, i.e., 9876933745 came to our knowledge and the said mobile was also taken on observation and we came to know that the said mobile phone was used by accused Sukhvinder @ Sukhi present in the Court today.”

71. There is no certificate issued in terms of Section 65B EA either by PW-1 or anyone else. It is understandable that PW-1 being a police officer and not conversant with the operation of a device used to record the conversations which he was listening, may not be the person capable of giving such a certificate in the first instance. But then there is no certificate by any other person satisfying the requirement of Section 65-B (4), i.e., a person “occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities”.

72. PW-1 states that on 2nd April 2008, which is nearly one year after the arrest of A-1 and A-2, he “obtained the permission from competent authority regarding observation of 4 mobile having no. 9876933745,

9317434945, 9811328712, 9871060613” and he was “deputed to hear the conversation on the aforesaid mobile phones.” He states that “he got collected the aforesaid information in my pen drive and the same was handed over to the SI Upender Solanki, who copied the said information in his own computer and returned my pen drive.” It was only in 2008 that PW-1 handed over the conversation downloaded by PW-17. In the words of PW-1 himself, PW-17 in turn prepared the CDs of the conversation which he listened to. A separate folder was prepared. In effect what was happening in the process was that electronic data was copied from one device to a pen drive. This was then handed over to and further copies made out of it by another police officer, in this case PW-17. When he was examined in detail it became apparent that what was being spoken of was the making of further copies of those copies. The original remained on a server which none of the other persons had occasion to access.

73. The Court has not been shown any certificate under Section 65-B EA which is in writing signed by the person “occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities”. Since PW-17 can speak only about the computer which he was using and what he was listening to on it are copies made of the originals, no part of Section 65-B EA can be said to have been complied with, much less “substantially complied with”.

74. The trial Court went only by the judgment in *Navjot Sandhu (supra)* to come to the conclusion regarding substantial compliance with Section 65-B EA. However, what was perhaps overlooked was that even in terms of the said decision, secondary evidence could have only been led by a

person who was otherwise conversant with the working of the computer system or who could recognise the signatures and writings of the person who had given certificate in relation to the working of such system. No such person was examined in the present case. It has also come in the evidence of PW-17 himself that “I did not at any time make an enquiry whether the original computer monitoring system which was recording the intercepted call had a breakdown or not.”

75. The other piece of electronic evidence is the intercepted mobile conversations. PW-28 Dr. Rajinder Singh, the CFSL expert, who analysed the voice samples stated in his cross-examination: “The intercepting machine was not sent to us and the questioned sample was sent in a cassette.” As far as Inspector Sandip Malhotra (PW-30) is concerned, his evidence is to the effect that he was the administrative head of the system which was used for monitoring the calls. The password of the said system remained with him. He opened the system using the password and in his presence PW-1 copied the relevant calls. He has stated “The computer system runs 24 hours under my supervision and custody. I state that there was no problem in the operation of the computer system while recording the calls in the present case and there was no breakdown whatsoever. I was present during the entire period the relevant data was copied from the hard disk of the computer system to the pen drive and no tampering was done at that stage.”

76. In his cross-examination he stated that no record was maintained regarding the data having been transferred from the computer system to the pen drive by PW-1. He stated that the computer system was installed

in the office in the Special Cell in 2005 and that “I cannot exactly tell how many times there was a breakdown in the computer system from the year 2005 to the year 2008.” In his cross-examination by counsel for A-1, he stated “I was throughout present with SI Harbir Singh when he copied the data from the monitoring system. It took about 8-9 hours to copy the data. He further stated “SI Harbir Singh copied all the data in his own pen drive.”

77. It appears that as far as the original computer system which was used, the evidence of PW-30 makes it clear that he was in charge of the supervision and custody of the said computer system. It is, however, apparent that PW-30 did not actually issue any certification under Section 65-B EA. While in terms of law explained by the Supreme Court in *Navjot Sandhu* the evidence of PW-30 may have been sufficient compliance with Section 65-B EA. However, in view of the subsequent decision in *Anvar P.V.* (supra) overruling the decision in *Navjot Sandhu* on this aspect, the electronic evidence in the present case is inadmissible.

78. There was no question of further secondary evidence to be produced in terms of Section 65B. Which is why the Supreme Court in *Anvar P.V.* held categorically that “Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B.” The decision in *Navjot Sandhu* to the above extent was held to be no longer good law The Court in *Anvar P.V.* did not stop there. It further declared:

“Thus, in the case of CD, VCD, chip, etc, the same shall be accompanied by the certificate in terms of Section 65B

obtained at the time of taking the document, without which the secondary evidence pertaining to that electronic record is inadmissible.”

79. In other words, the law is now abundantly clear. If there is no certificate accompanying electronic evidence in terms of Section 65B i.e., such evidence is “inadmissible.” This evidence is inadmissible because it does not satisfy the requirement of the law under Section 65B EA. Such evidence cannot be looked into. Consequently, as far as the present case is concerned, the Court is satisfied that the intercepted telephone calls presented in the form of CDs before the trial court which were then examined by the FSL expert do not satisfy the requirements of Section 65-B EA. The net result is that the electronic evidence in this case in the form of the intercepted conversations and the CDRs cannot be looked into by the Court for any purpose whatsoever.

Case against A-3

80. As far as the case of A-3 Sukhwinder Singh @ Sukhi (the Appellant in CrI.A. No. 607 of 2014) is concerned, the entire case of the prosecution against him is based on electronic records. It may be recalled that Sukhwinder was already arrested in some other case when the investigation of the present case was underway. Initially, the FIR did not include the name of Sukhwinder.

81. According to the prosecution during the course of investigation of the case against Jagdeo Singh and Gurdeep Singh, they made the link between the case in which Sukhwinder had been arrested, i.e., FIR No. 77 of 2007 and then sought to match the voice of Sukhwinder with the voice

appearing in the conversation recorded by intercepting the mobile phones used by the three accused. Interception orders were obtained in respect of the mobile numbers used by the three accused. The case of the prosecution, which was accepted by the trial Court, was that the call details and the transcripts of the intercepted conversations showed that A-1 and A-2 were in constant touch with each other and also with A-3. Before the trial Court (and even before this Court), the intercepted calls were played and the transcripts of the conversations recorded were read out to substantiate the above plea.

82. Since the trial Court did not have the benefit of law explained by the Supreme Court in *Anvar P.V.*, it proceeded on the basis that it could look at the transcripts of the intercepted calls on the basis that secondary evidence could be led in respect of such electronic record. For reasons explained hereinbefore, it is impermissible after the decision in *Anvar P.V.* for the Court to consider such electronic evidence. The transcripts of such intercepted calls cannot also be looked into. Therefore, as far as A-3, Sukhwinder @ Sukhi is concerned, the entire electronic records have to be kept out of consideration.

83. There is no dispute that as far as A-3 is concerned, there is absolutely no other evidence to connect him to the two accused, i.e., A-1 and A-2 and to bring home the charges framed against him after the filing of the supplementary chargesheet. In the view of the matter, the impugned judgment of the trial Court convicting A-3, Sukhwinder @ Sukhi for the offences with which he was charged with cannot be sustained.

84. Sukhwinder @ Sukhi is accordingly acquitted of the charges and the impugned judgment of the trial Court to that extent is set aside. Correspondingly, the order on sentence *qua* Sukhwinder @ Sukhi is also set aside and his appeal is accordingly allowed.

Case against A-1 and A-2

85. As far as A-1 Jagdeo Singh and A-2 Gurdeep Singh are concerned the case of the prosecution has to be considered *de hors* the electronic evidence produced i.e., the CDRs of the mobile phones stated to have been used by each of them.

86. The specific case of the prosecution is that at around 7.30 pm on 23rd March 2007 both the accused came near the public toilet Patparganj Road at Ganesh Nagar Crossing. According to the prosecution, the motorcycle was driven by Gurdeep Singh (A-2) who was carrying a black colour bag on his shoulder. Jagdeo Singh (A-1) was the pillion rider. A-2 took out a polythene bag from the black colour bag that he was carrying and handed it over to A-1. A-2 remained near the motorcycle and A-1 stood at the Ganesh Nagar Crossing. At that point of time, both were apprehended.

87. The members of the raiding team who were present at the spot and have deposed in this behalf are SI Harbir Singh (PW-1), SI Ramvir (PW-4), HC Ajay Kumar (PW-10) and Inspector Anil Dureja (PW-16) who was heading the raiding team. Upender Solanki (PW-17) reached there after the alleged arrest of A-1 and A-2.

88. The case of the prosecution is that from the polythene bag carried by A-1, two packets of 1 kg each of heroin was seized. Also from the personal search of A-1, PW-1 recovered one pistol, 1 magazine and 18 live cartridges. From the back bag carried by A-2, two packets of 1 kg each of heroin were recovered. Thereafter, PW-17 conducted personal search of both the accused, wherein he recovered from A-1, Rs. 28,740 consisting of 27 currency notes of Rs. 1,000 denomination and from A-2 Rs. 2,025 consisting of two currency notes of Rs. 1,000 denomination.

89. The third set of recoveries were made from the personal search of both the accused. A-1 was found to be carrying two mobile phones bearing numbers 9811328172, 9873836607. A-2 was carrying two mobile phones 9999579926 and 9871060613. A perusal of the trial Court judgment shows that extensive reliance has been placed on the intercepted telephone conversations which were produced by the police with the supplementary chargesheet. The trial Court reproduced the intercepted conversations in paras 43 and 44 and also relied upon the evidence gathered from the intercepted conversations which were recorded in the CDs in paras 46 to 51.

90. If this entire evidence is kept out, then it appears that the judgment of the trial Court on the remaining part of the evidence is at best sketchy.

Section 42 NDPS Act

91. On the aspect of arrest of A-1 and A-2, the genesis of the case assumes significance. Compliance with Section 42 NDPS is thrown into doubt on account of the fact that in the supplementary charge sheet the

prosecution has come up with the theory that the information regarding the possible handing over of narcotics by A-1 and A-2 to a Nigerian was chanced upon while tapping the mobile conversations. However, this was not how the case was projected when the first charge sheet was filed. There it was stated that it was the basis of an information given by a secret informer to Inspector Anil Dureja. As far as this contradiction is concerned, the trial Court simply states that PW-1 explained that on the basis of the intercepted conversations he gave some information to Anil Dureja in respect of the activities of A-1 and A-2. This is very different from the secret informer giving that information to Anil Dureja.

Compliance with Section 50 and the evidence of the handwriting expert

92. The compliance with the requirements of Section 50 NDPS Act also appears to be in doubt. In this case, the search was not confined to the bags carried by the accused but also their person. In fact the fake currency, arms and ammunition and the mobile phones were recovered as a result of the personal search. It is the case of the prosecution that Section 50 NDPS Act was duly complied with by serving on both of them notices prior to their search. This has been seriously disputed by both accused.

93. It must be recalled that the decision of the Supreme Court in ***Vijaysinh Chandubha Jadeja*** (supra) has emphasised that there is no notion of 'substantial compliance' as regards the mandatory requirement of Section 50 NDPS Act. Failure to comply with that provision renders the recovery of the illicit article suspect and "vitiates the conviction" based on such recovery. It is in this context that the plea of A-1 that his signatures on

the Section 50 notice and other documents like seizure memo etc were forged assumes significance.

94. Para 54 of the trial Court judgment deals with evidence of the handwriting expert Mr. T. Joshi of CFSL, Chandigarh examined as CW-1. A-1's specimen writings and signatures were collected and sent to CW-1 for examination. It is not in dispute that the questioned signatures were Q-1 to Q-11 and the specimen writings signatures were S-1 to S-4, AS-1, AS-2. CW-1's opinion recorded in his examination-in-chief, is as under:

“All the characteristic features as occurring in the questioned writing marked Q-1 to Q-11 are not being collectively and similarly accounted for from the standard writing marked S-1 to S-4, AS-1 and AS-2. As such, it is not been possible to link the authorship of the mark Q-1 to Q-11 with the standard writing S-1 to S-4, AS-1 and AS-2.”

95. CW-1 further categorical stated “I could not link the authorship of questioned writing Mark Q-1 to Q-11 with the standard writing Mark S-1 to S-4, AS-1 and AS-2”. In his further cross-examination he stated that “the writing features that were observed in the questioned writings were not observed in the standard writing as we consider the strokes, curvatures, alignment and other parameters were different in the questioned and standard writings but one of the parameter, i.e., pressure could not studied from the questioned signature and meaning thereby the writing features of questioned documents and standard writing could not be linked.” When asked to elaborate what was the parameter which was lacking, he clarified “The parameter was the greater pressure in the

questioned writing not in the standard writing and the same cannot be asked from the agency.”

96. When he was questioned by the APP whether there was a possibility that the questioned documents were written deliberately by the author, he answered “from the questioned signature it cannot be assessed that these have been deliberately distorted.”

97. On a reading of the evidence of the handwriting expert, it is not possible to rule out the defence taken by A-1 that the signatures on the seizure memo and the recovery memo were not his. The trial Court negated the contention that the investigating officials would deliberately forge the signatures of A-1. The logic of the trial Court was that it was unlikely that an IO seeking to forge the signatures of accused would “instead of making an effort to copy his signatures in a fluent manner, would deliberately make his signatures with great pressure.” This is purely a surmise since the burden was entirely on the prosecution to show that the signatures on the seizure memo, recovery memo and the inspection memo etc., were in fact only of A-1 and no one else. On his part A-1 has probablised his defence that those signatures were not his. The evidence of CW-1 is more than sufficient to probablise that defence. It was for the prosecution to explain under what circumstances different signatures, other than those of A-1, appeared on those documents.

98. The trial Court took exception to both A-1 and A-2 tearing up the notices under Section 50 NDPS Act that were served on them. They had admitted to doing so when their statements were recorded on 15th March

2008. However, this did not relieve the prosecution from showing that the signatures on the other documents, i.e., the seizure memo, recovery memo and the inspection memo etc. were that of A-1. In this context, the plea of the accused that they were subject to torture while in custody assumes significance.

Evidence of torture of A-1 and A-2

99. The plea of A-2 is that he was picked up from Gurudwara Sheesh Ganj forcibly and his motorcycle was also picked up from the parking area. He examined Pargat Singh (DW-2) to prove this plea. He also has alleged as being tortured by the police while in custody. In respect of that plea he examined Dr. Anand Kumar (DW-1).

100. On the aspect of torture of both A-1 and A-2 while in custody, the trial Court failed to appreciate the evidence in that regard. It merely called for a report and directed the Police Commissioner to hold an enquiry to determine who the erring police officials were and thereafter to take necessary action against them.

101. The trial Court overlooked the fact that normally the accused is unable to produce any direct evidence to make the good the plea that he was tortured in the police custody. In this case however apart from taking the plea in his statement under Section 313 Cr PC that he was tortured in the police custody he also produced a defence witness Dr. Anand Kumar, Medical Officer in Tihar Jail (DW-1). DW-1 produced the medical record of A-2 (Ex.DW-1/A) when A-2 was first examined on his admission to jail on 4th April 2007. He categorically stated “on examination, pattern

bruises were found present over the left of the back and he was prescribed medication for the pain. As per the in and out register record, this accused was examined by then medical officer Dr. Rakesh. The relevant pages of the said register has been brought by me today and are Ex.DW1/B”. He was not shaken in his cross-examination. He further clarified “The first medical examination of an accused admitted in jail is conducted immediately on the entering of the accused in the jail premises and he is not allowed to go inside the jail premises without the said examination and therefore the injuries mentioned on the first examination record of an accused cannot ever be received by him inside the jail.”

102. Dr. Anand Kumar Chopra, Medical Officer in Central Jail 1 in Tihar Jail was examined by A-1 as DW-5. He produced the medical record of A-1 (Ex. DW5/A). He deposed that “As per the said medical record, the accused Jagdeo was first examined on his admission to jail on 4th April 2007 and had complained that he had been beaten by police on 2nd April 2007 and that he had pain over his whole back. On examination, **pattern bruises were found present over the whole back, left arm upper and lower, left thigh, and the legs and he was prescribed medication for the pain**”. (emphasis supplied)

103. Nothing significant was elicited by the APP in the cross-examination of DW-1 and DW-5 to discredit their testimony. The Court concludes that both A-1 and A-2 have probablised their version that they were subjected to torture in police custody. Consequently, their so-called confessional statements could hardly be taken to be voluntary. The defence evidence ought not to have been overlooked while assessing the

story of the prosecution about both A-1 and A-2 being apprehended from the spot i.e., outside the public toilet near Patparganj.

Contradictions in evidence of PWs as to the place of arrest

104. In para 56 of the trial Court judgment, the various contradictions pointed out in the statements of the prosecution witnesses have been dismissed by holding that it has no major significance which goes to the root of the matter. These inconsistencies pertain to certain important aspects regarding the place from where both the accused A-1 and A-2 were apprehended.

105. According to the prosecution both the accused were intercepted when they were outside the public toilet near Ganesh Nagar crossing. This implied that they had come from the Laxmi Nagar side. However, none of the witnesses had spoken in one voice on this aspect. It has been pointed out that Anil Dureja (PW-16) in his cross-examination stated that the deployment of the police personnel was near the Mother Dairy on both sides. He did not remember what the distance was between the Ganesh Nagar chowk and the Mother Dairy. The distance between the Laxmi Nagar bridge and the Mother Dairy is stated to be 150 meters. The distance between the toilet at Ganesh Nagar and the Mother Dairy is almost 50 meters. If the police personnel were deployed within 10-15 meters on Mother Dairy then it is clear that they were not at the spot where the two accused were. PW-10 on the other hand stated that he had taken the position near the 'roundabout' near Mother Dairy. There was in fact no roundabout within 50 meters from the bridge. Even PW-1 talks about taking position near the crossing of the *gol chakkar* after getting

down from the over bridge. There is no *gol chakkar* at that spot. The site plan filed by the prosecution does not show any *gol chakkar*.

106. The further contradictions are that while PW-1 stated that both the accused came to the place from the Laxmi Nagar side, PW-4 stated that they came from the Shakarpur side. Even if both Shakarpur and Laxmi Nagar bridge are on the same side, this is contradicted by PW-10 who states that they approached the place from the Patparganj side which is opposite to the Laxmi Nagar side.

Recoveries doubtful

107. It is also clear that with respect to the recovery of three things from the personal search of the accused i.e. fake currency notes, the mobile phones and the pistol and live cartridges, the seizure and recovery memos had to be proved beyond reasonable doubt by the prosecution. With the signatures of A-1 on the said documents not being proved beyond reasonable doubt the prosecution has been unable to establish whether the seizures took place in the manner indicated.

108. There is another aspect of the recoveries which has completely been missed by the trial Court. PW-16 has stated that he deposited the recoveries in the *malkhana*, whereas, PW-13 stated that he called the MHC(M) HC Mahavir Singh and handed over the articles to him. PW-17 states that he took out Rs.27,000/- from the sealed pullandas and kept back Rs.1740 there. In his cross examination, PW-17 states that

“It is correct that fact that the sealed envelope which was opened to take out the notes was preserved was not mentioned

in my records. I do not remember whether the envelop used by me for keeping the balance of Rs 1740 was the same envelope in which the original amount of Rs 28740 was kept. The witness now states that the same envelope was used for keeping the balance amount of Rs 1740 after taking out Rs 27000. It is correct that no description of the seal which was affixed on the said envelop has been mentioned in Ex. PW4/A. Even on 4th April 2007, I had not verified the contents of the case property but had only opened the pullandas of jamatalashi. I do not remember whether I had even broken the seal on the envelope containing the currency notes or I had managed to take out the notes without breaking the said seals. I do not remember whether I had resealed the envelope. I do not know how the remaining currency notes were kept. It is incorrect to suggest that no counterfeit currency was recovered from the accused”.

109. PW-17 fails to explain how he knew that Rs.27,000 which he had taken from there were the fake currency notes and that the rest of the amount was of counterfeit. Ms. Deepa, Assistant Director FSL Rohini (PW-17) stated that she received the notes (29 notes of 1000 each, 27 recovered from A-1 and 2 from A-2) in loose condition. This is again a serious lapse on the part of the prosecution.

110. While one mobile phone seized from A-3 was shown to belong to him, the prosecution failed to connect the mobile phones recovered from A-1 and A-2 with them. The relevant records show who the subscriber to the SIM was but not whose photo was on the customer application. Those subscribers were not examined as witnesses. It appears to the Court that the trial Court proceeded essentially on the basis of the intercepted conversations and the transcripts of those conversations and therefore overlooked the serious lacunae as far as the other evidence is concerned.

Key of the motorcycle not recovered

111. It is seen that the trial Court discarded the evidence of A-2 that the motorcycle was seized from the parking lot. It noted that in his bail application A-2 took a stand different from what he stated in his statement under Section 313 Cr PC. In his bail application, he claimed that up to the Lal Qila signal, he himself drove the motorcycle following SI Ramesh Sharma and thereafter he was forced to accompany them in a car. Finding these pleas to be to be contrary, the trial Court drew an adverse inference against him. The Court finds this approach of the trial Court to be an unsafe one to adopt in a criminal case where an accused has a fundamental right against self- incrimination. If the innocence and guilt of accused are to be decided on the pleas taken in a bail application, at a stage when evidence is still being gathered and not been produced or tested in Court, it would work to the extreme disadvantage of the accused. Contrary lines of defence during cross-examination in criminal cases are not unknown. The fact remained that the key of the motorcycle was not recovered. Apart from saying that it was perhaps thrown away by the accused, there appears to be no effort made to recover the key from near the place of interception. When viewed in the background of the totality of the prosecution case, this appears to be a significant lacuna.

Conclusion

112. Each of the above aspects when considered separately may not be sufficient by themselves to create a doubt about the case of the prosecution, but when viewed in totality, the prosecution evidence cannot be said to inconsistent with the innocence of the accused and point unmistakably to their guilt. In other words, the prosecution evidence,

when viewed collectively gives rise to more than a reasonable doubt and the benefit of that doubt must enure to the favour of the accused.

113. The Court accordingly sets aside the impugned judgment dated 21st December 2013 and order on sentence dated 30th January 2014 passed by the trial Court in SC No. 82 of 2008.

114. The three accused i.e. A-1 Jagdeo Singh, A-2 Gurdeep Singh and A-3 Sukhwinder Singh are acquitted of the offences they have been charged with and directed to be released forthwith unless wanted in any other case. As far as the present appeals are concerned, each of the Appellants shall, to the satisfaction of the trial Court, furnish bail bonds in the sum of Rs. 5000 each with one respective surety of like amount, which shall remain in force for a period of six months in terms of Section 437A Cr PC.

115. The appeals are accordingly allowed. The records be returned to the trial Court forthwith.

S. MURALIDHAR, J.

FEBRUARY 11, 2015

mg/rk/tp