

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 334 of 2013**

Satish Tripathi S/o Late Arunesh Tripathi Aged About 31 Years R/o
Rajendra Nagar Ambikapur , P.S. Gandhi Nagar, Distt. Surguja C.G.

---- Appellant

Versus

State Of Chhattisgarh S/o Through - P.S. Gandhi Nagar , Distt.
Surguja C.G.

---- Respondent

And**CRA No. 362 Of 2013**

Ganesh Dutt Mishra S/o Ravishankar Mishra Aged About 43 Years R/o
Sriram Colony Rauja , Gijipur (U.P.)

---- Appellant

Vs

State Of Chhattisgarh S/o Through - P.S. Gandhi Nagar , Distt.
Surguja C.G.

---- Respondent

And**CRA No. 461 Of 2013**

Mannu Singh @ Gyanendra Singh @ Manvendra Singh @ Abhishekh
Singh S/o Dinanath Singh Aged About 26 Years R/o Sheetal Dawni,
Bansdih Road, Baliya (U.P.)

---- Appellant

Vs

- State Of Chhattisgarh Through Distt. Magistrate, Surguja Distt.
Surguja C.G.

---- Respondent

And**CRA No. 468 Of 2013**

- Maghavendra Pratap Singh @ Pankaj Singh (in evidence mentioned
as Madhvendra Pratap Singh), S/o Harihar Pratap Singh Aged About
25 Years R/o Bank Colony Navapara , Ambikapur , P.S. Gandhi Nagar,
Distt. Revenue Sarguja C.G.

---- Appellant

Vs

- State Of Chhattisgarh S/o Through - District Magistrate , Sarguja ,
Distt. Sarguja C.G.

---- Respondent

And

CRA No. 972 Of 2013

- Sunil Paswan @ Yadav @ Bhola S/o Ganesh Paswan Aged About 21 Years R/o Dubli, Ps Bansdih, Distt. Balia (U.P.) Presently R/o At Rajdevpur, Dehati, PS Kotwali, Gazipur, Distt. Gazipur (U.P.)

---- Appellant

Vs

- State Of C.G. Through Distt. Magistrate Surguja Distt.Surguja C.G.

---- Respondent

For appellants: Mr. Arvind Singh, Adv. in Cr. No. 461/2013
Cr.A. No. 968/2013, Cr.A. No. 972/2013.
For appellants: Ms. Madhunisha Singh in Cr. A. No. 334/2013,
Cr.A. No. 362/2013
For Respondent/State : Mr. Vivek Sharma, Dy. Govt. Advocate.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Chandra Bhushan Bajpai

C A V JUDGMENT

Per Chandra Bhushan Bajpai, J

14/1/2016

1. By this judgment, Cr. A. No. 334/2013, Cr.A. No. 362/2013, Cr.A. No. 461/2013, Cr.A. No. 468/2013 and Cr.A. No. 972/2013 (total five appeals) arise out of the judgment dated 25-3-2013 passed in Sessions Trial No. 76/2010 and Sessions Trial No. 166/2010 by the 1st Additional Sessions Judge, Ambikapur, Distt. Sarguja are being disposed of. By the impugned judgment, the appellants have been convicted and sentenced as mentioned in following chart :-

Name	U/S 302/120B, IPC			U/S 201 (PART 1)/120B, IPC			U/S 25(1)(1-B)a, Arms Act		
	Sentence	Fine Rs	In default	Sentence	Fine Rs	In default	Sentence	Fine Rs.	Default
Madhvendra Pratap Singh@ Pankaj Singh	Life imprisonment	1,000	6 months RI	7 Yrs RI	1,000	6 months RI	3Yrs RI	1,000	6 months RI

All the sentences are directed to run concurrently.

Sl.	Name	U/S 302/120B, IPC			U/S 201(part 1)/120, IPC		
		Sentence	Fine	In default	Sentence	Fine	In

			Rs.			Rs.	default/RI
1	Sunil Paswan	Life imprisonment	1000	6 months	7 years	1000	6 months
2.	Siddhkant @ Pappu Tiwari	Life imprisonment	1000	6 months	7 years	1000	6 months
3.	Mannu Singh @ Abhishek Singh	Life imprisonment	1000	6 months	7 years	1000	6 months

All the sentences are directed to run concurrently.

Sl.	Name	U/S 212(part 1), IPC			U/S 201(part 3)/120, IPC		
		Sentence	Fine Rs	In default	Sentence	Fine Rs.	In default/RI
1.	Satish Tripathi	5 yrs RI	1000	6 months	1 year	500	3 months RI

All the sentences are directed to run concurrently.

S.	Name	U/S. 212 (part 1), IPC			
		Sentence	Fine Rs.	In default	
1.	Ganesh Datt Mishra	5 years RI	1000	6 months RI	

Co-accused Akhileshwar Pratap Singh @ Lalit Singh has been acquitted by the trial Court in ST No. 76/2010 for charges under Section 212 of the IPC.

Convicted co-accused Siddhkant Tiwari @ Pappu Tiwari was absent at the time of pronouncement of judgment in ST No. 76/2010 as per para 140 of the judgment. The trial Court has convicted and sentenced him along with other convicted co-accused persons under the provisions of Section 353(3) of the Cr.P.C. He has not surrendered after pronouncement of judgment to serve the sentence before the trial Court instead he has preferred Cr.A. No. 458/2013 (Siddhakant Tiwari @ Pappu Tiwari -v- State of CG) which was dismissed on 10-2-2015 by this Court.

2. Brief facts of the case are that on 26-9-2009 at about 7 pm, P.W. 1 Ashish Kumar lodged an unnumbered merg intimation at District Hospital, Ambikapur stating that his uncle Gowardhan Agrawal deals in coal and on 26-9-2009 evening at 6.45 pm when he was returning to his home from his office behind BTI, in the road near the house of one Ambikeshwar Tiwari, Advocate, two unknown persons on a motorcycle fired at him by pistol as a result of which he sustained injury over left side of abdomen and right arm.

He was taken to the District Hospital, Ambikapur by Prabodh Minj, Mayor in his Scorpio vehicle along with one P.W. 3 Kailash Agrawal and driver Ilias where during treatment Gowardhan Agrawal succumbed to the injuries at about 8.32 pm. He further stated that the deceased was being threatened for money over mobile phone. He expressed his doubt that those persons would have killed him. After unnumbered merg, P.W. 1 Ashish Agrawal also lodged unnumbered FIR to Gandhi Nagar Police at 10 pm at District Hospital, Ambikapur wherein he stated that his uncle Gowardhan Agrawal, the deceased was engaged in coal business. At about 1 ½ month ago unknown persons threatened him over mobile phone for serious consequences and demanded money. His uncle informed about it to him and the family members. On 26-9-2009 at about 6.45 p.m. he had closed the office and gave key to the deceased. His uncle asked him to go to depot. He went to the depot situated at Bhagwanpur and the deceased in his Hero Honda Super Splendor motorcycle was going to his home at Navapara. P.W. 10 informed him that his uncle was shot at about 7 pm evening. When he reached to the spot he saw many persons and came to know that his uncle was taken to the District Hospital, Ambikapur by P.W. 24 Prabodh Minj, Mayor in his Scorpio vehicle along with his driver Ilias and P.W. 3 Kailash Agrawal. Then he reached to the hospital and saw bullet injury on his abdomen on left side and also on right arm. At about 8.32 pm in the night, Gowardhan Agrawal breathed his last. He further intimated that when his uncle was on the road behind BTI near the house of one Ambikeshwar Tiwari, Advocate two unknown persons fired at him from pistol and the incident was seen by nearby people Lagharam Soni, Sudarshan Soni, Ramesh Mittal. He expressed his doubt that the persons who demanded money and threatened his uncle would have shot dead his uncle. Police during inquiry after giving notice to the witnesses by Ex. P-4 conducted inquest vide Ex. P-5. Thereafter, police sent the body of the deceased for post mortem. P.W. 16 Dr. K.R. Tekam conducted autopsy on 27-9-2009 and opined that the death may be homicidal in nature.

3. The unnumbered merg was registered as Ex. P-38 by Gandhi Nagar police. FIR was also registered under Crime No. 308/09 Ex. P-37. All the accused persons were arrested as per the chart given below:-

1.	Sunil Paswan	12-10-2009
2.	Pankaj Singh	12-10-2009
3.	Pappu Tiwari	31-10-2009
4.	Abhishek Singh	5-2-2010
5.	Satish Tripathi	13-2-2010
6.	Ganesh Datt Mishra	Granted anticipatory bail

4. Appellant Sunil Paswan gave disclosure statement Ex. P-13 on 12-10-2009. No property was seized from appellant Sunil Paswan. Appellant Madhvendra Pratap Singh gave his disclosure statement on 12-10-2009 Ex. P-15 on the basis of which, two 9 mm pistol, one empty magazine, 33 live cartridges and 9 mm pistol cleaning tools, two black colour towels, two goggles of plain glass were seized vide seizure memo Ex. P-14. Police also seized from appellant Madhvendra Singh vide seizure memo Ex. P-10 one lock along with key. Appellant Mannu Singh gave his disclosure statement Ex. P-24 on the basis of which police recovered one Nokia mobile - 1600 hand set from rented house bearing IMEI No. 353222033440410 vide Ex. P-25. Appellant Satish Tripathi gave his disclosure statement Ex. P-26 on 13-2-2010 on the basis of which police recovered one Samsung mobile hand set IMEI NO. 35659102155407/4 vide Ex. P-27. During investigation from P.W. 1 Ashish Agrawal one Nokia mobile hand set of deceased in which a bullet was embedded, one office bag, another mobile hand set were seized vide Ex. P-6. During inquest, the bullet embedded in the shirt of the deceased was also seized vide Ex. P-7. The seized articles were sent for chemical analysis to the FSL Raipur. Vide report Ex. P-51 the FSL confirmed presence of blood over the bullet, clothes of the deceased and the soil. Vide Ex. P-54, metal copper jacketed test was noticed positive. A hole was noticed in the clothes. It was reported that both the pistols were in operational condition and there was fire from both the pistols. Article EB1 and EB2 are fired bullets of 9mm caliber. Also the 33 cartridges were live cartridges out of them 6 were successfully fired from the pistol sent for examination. Shirt & baniyan are pierced due to blow of copper jacketed bullet. Copper jacketed bullet marks are found over mobile set. In the serological examination, presence of human blood was confirmed on underwear and baniyan. In other articles blood stains were disintegrated and their origin could not be determined. The articles were sent to Central FSL. After examination the

CFSL vide Ex. 59 opined that both 9 mm pistols were test fired and found in working order and out of 27 live cartridges, 4 cartridges were randomly selected and test fired through both the pistols and on test firing all the 4 cartridges were found to be live. It is further opined that articles B-1 and B-2 had been fired through the 9 mm pistol sent for analysis and they could not have been fired through any other firearm because every firearm has its own individual characteristic marks.

5. After due investigation, charge sheet was filed against accused persons. Learned trial Court framed the charges as per following chart:-

	Name	IPC	Arms Act
1.	Sunil Paswan	302/120, 201/120/B	25(1)(1B)(a), 27(1)
2.	Pankaj Singh	302/120, 201/120/B	25(1)(1B)(a)
3.	Pappu Tiwari	302/120, 201/120/B	
4.	Abhishek Singh	302/120, 201/120/B	25(1)(1B)(a)
5.	Satish Tripathi	212	
6.	Akhileshwar Singh	212	
7.	Ganesh Datt	212	

6. So as to hold the appellants guilty, the prosecution has examined 29 witnesses and the statements of accused persons were also recorded under Section 313 of the Code of Criminal Procedure (in brevity 'Cr.P.C.') in which they denied the circumstances appearing against them, pleaded innocence and false implication in the crime in question.

7. One defence witness D.W. 1 Rajesh Gupta has also been examined who has stated that he is not having any agency of any mobile company and he has not sold SIM card and no register is seized from him.

8. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment while acquitting co-accused Akhileshwar Pratap Singh of the charge under Section 212 of IPC, has convicted and sentenced appellants as mentioned in para 1 of this judgment.

9. Learned counsel for the appellants submitted that homicidal death of the deceased on account of fire arm injury is not in dispute. There is no eye-witness to the incident. The case of the prosecution is based on circumstantial evidence only. The witnesses of memorandum and seizure

P.W. 6 Naresh Mandal and P.W. 7 Avinash Tirki have not supported prosecution story. Basis of conviction is mentioned in para 41 onwards. The appellants were held guilty on the basis of provisions of Sections 10 and 30 of the Indian Evidence Act, 1872. There is no prima facie evidence regarding conspiracy. The provable portion of the memorandum under Section 27 of the Evidence Act may only be held proved under Section 30 of the Evidence Act. If any information to the police was proved as true then only, the information may be held as proved. To record a statement under Section 27 of the Evidence Act, the person has to be in custody of the police.

10. It is further contended that there is no legal evidence to convict the appellants. The court below after considering the memorandum under Section 27 of the Evidence Act of all the appellants coupled with the information mentioned in the statement held those informations as confession. At the best appellant Madhvendra Pratap Singh @ Pankaj Singh can be held guilty under Section 25 of the Arms Act as pistol has been recovered from him. As per prosecution story appellant Sunil Paswan and appellant Mannu Singh @ Abhishek Singh are the main culprit and when demand of money from the businessman engaged in coal business was not fulfilled, to establish the terror both of them have killed deceased Gowardhan Agrawal. As there is no call detail proved by the prosecution, the requirement of Section 65(B) of the Evidence Act is not complied with and proved. This court has to examine whether the provisions of Sections 10 and 30 of the Evidence Act are applicable to the present case or not.

11. It is next contended that as per prosecution case death of the deceased by fire from pistol of appellant Madhvendra Pratap Singh @ Pankaj Singh was proved but the court has to see whether the said pistol has been recovered from appellant Madhvendra Pratap Singh @ Pankaj Singh or not. Since this is the only evidence, hence it has to be scrutinized carefully as the witnesses of seizure of pistol from appellant Madhvendra Pratap Singh @ Pankaj Singh have turned hostile. It is only P.W. 23 J.S. Saggu, the investigating officer who has proved the seizure. The said fact has to be appreciated minutely. It is further submitted that as per prosecution story, appellant Mannu Singh @ Abhishek Singh and appellant Siddhkant Tiwari are author of the crime. At their insistence, appellant Sunil Paswan had brought the arms and after the incident, those pistols, cartridges and

other articles were seized from appellant Madhvendra Pratap Singh @ Pankaj Singh. Witnesses of seizure have turned hostile. Only the seizure memo Ex. P-10 of recovery of lock and key of the rented house of appellant Mannu Singh has been supported by the witnesses. The investigating officer P.W. 23 J.S. Saggi recorded all the memorandums under Section 27 of the Evidence Act and the seizure memo and supported them. P.W. 14 Rahul Tiwari, inspector of police has seized register from DW 1 Rajesh Kumar Gupta vide Ex. P-30 and supported the same.

12. Learned counsel further contended that seizure of two pistols and cartridges on the basis of the memorandum given by appellant Madhvendra Pratap Singh @ Pankaj Singh and report of the FSL and CFSL are the basis of conviction of appellant Madhvendra Pratap Singh @ Pankaj Singh. P.W. 6 Naresh Mandal and P.W. 7 Avinash Tirki are witnesses of memorandum and seizure recorded after 4-5 months and they have turned hostile. Allegation by the defence that both these witnesses had signed all the papers on the same day may be taken as true. P.W. 17 Manohar Yadav is the witness of seizure Ex. P-13 and has not supported the prosecution case. Only P.W. 14 Rahul Tiwari has supported Ex. P-13 but when call detail is not proved then memorandum and seizure are not relevant and cannot be made basis of conviction. If the seizure is taken to be proved for the sake of argument, even then the appellants may not be held guilty. No crime regarding conspiracy prior to 26-9-2009 is proved. Prosecution has failed to establish that appellant Mannu Singh alias Abhishek Singh and appellant Sunil Paswan prior to the incident were seen at Ambikapur. It is also not proved that all the appellants assembled at Ambikapur. To prove the conspiracy, memorandum is not sufficient as there is no prima facie evidence regarding sharing the common intention to murder.

13. It is further submitted that the mobile hand set seized from the rental house of appellant Mannu Singh is not produced during evidence. P.W. 23 J.S. Saggi in his cross-examination in para 77 has deposed that seized hand set of Nokia model No. 1600 as per seizure memo Ex. P-25 is not with the property deposited in the court, the same may be at police station, thereby the seizure from Mannu Singh vide Ex. P-25 is of no relevance. SIM Card is destroyed but the record of issuance of SIM will remain. Prosecution has to prove as to in whose name the SIM was issued. Hence appellant

Mannu Singh cannot be convicted on the basis of the memorandum Ex. P-24 and seizure memo Ex. P-25. The Court has to examine whether there is sufficient evidence under Section 201 of the IPC against appellant Mannu Singh or not. Witnesses of the seizure are the same who were witness in other memorandum and seizure. The police repeatedly called them and obtained their signatures. Under Section 100 of the Cr.P.C. witness of close place may be made witness for seizure. Learned counsel for the appellants further submitted that if the alleged seizure is admitted only on the basis of the statement of IO and if it is made the basis of conviction of the appellants then on the basis of the report of FSL and CFSL, the memorandum and seizure and other evidence are required to be appreciated with due caution and care.

14. Learned counsel for the appellants further submitted that in the inquest Ex. P-5, it is mentioned that bullet of .32 caliber is embedded in the shirt. It is pertinent to note here that the seized bullet found in the shirt of the deceased was not of 9 mm instead it was of .32 caliber. Hence diameter of both the bullets are different. Appellant Madhvendra Singh cannot be convicted on the basis of those evidence in presence of this material contradiction regarding the diameter of the bullet recovered. Learned counsel for the appellants also submitted that as per statement of P.W. 1 Ashish Agrawal at the time of MLC, clothes of the deceased were removed. If this is taken to be correct then there is no question of shirt and baniyan with the body of the deceased embedded with bullet. It is submitted that as the prosecution has to prove its case beyond all probable doubt, in the presence of above major discrepancies, appellant Madhvendra cannot be convicted.

15. Learned counsel further submitted that vide order dated 3-3-2015 this court ordered for recording of additional evidence under Section 391 of the Cr.P.C. and in compliance of the order, the court below has recorded secondary evidence in respect of Ex. P-59-C by calling concerned witnesses and after providing opportunity of cross-examination to the parties and to examine the appellants additionally under Section 313, Cr.P.C. record was ordered to be returned back to the court.

16. Learned counsel submitted that the report of the expert is for help of the court and expert has to explain the basis of his report. The expert

evidence is an evidence under Section 45 of the Evidence Act. Statement of the expert is merely advisory. Since no microscopic photograph is adduced with report of CFSL hence the expert's opinion cannot not accepted. It is further submitted that the IO has not recorded the memorandum and seizure in his own hand writing. There is no seal impression over the seizure memo which goes to show the arms were not sealed. He further submits that fact of the bullet being embedded in the mobile screen is suspicious. There is no evidence that after seizure of bullet found in the shirt and baniyan of the deceased as to where the same was kept for 15 days. After 15 days of recovery of bullet pistol was seized and after 48 days the same was sent for chemical examination. The constable who took the article to FSL and who was initially given the duty of taking those articles to FSL was not examined by the prosecution. If those live cartridges were test fired then how the total 33 cartridges were noticed by the District Magistrate for granting sanction for prosecution under the Arms Act. As there is delay in sending the articles to FSL and CFSL it is doubtful whether same article were sent for examination. It is further submitted that the articles were sent to the FSL Raipur through constable Atul Mishra who is not examined. The person who took other articles to FSL Raipur are also not examined.

17. Learned counsel for the appellants placed reliance on **the State of Gujarat -v- Adam Fateh Mohmed Umatiya and others**¹ wherein Hon'ble Apex Court has held that bulge marks on test cartridges and bulge marks on the empty cartridges were similar but not the same and cannot establish that the empty cartridges were of the shape of an eye. The expert witness did not take the composite photographs of the empty cartridges superimposed by the test cartridges. The photographs which were taken were not taken in the same condition of light.

18. Reliance is further placed on **Jayendra Saraswati Swamigal -v- State of T.N.**² wherein the Hon'ble Apex Court has held that evidence of act and statement made by one of the conspirators in furtherance of common object is admissible only if prima facie evidence of existence of conspiracy is first given and accepted therefore, there should first be prima facie evidence that the present was a party to the conspiracy before his acts or statement can be used against his co-conspirator.

1 1971 (3) SCC 208

2 (2005) 2 SCC 13

19. Reliance is further placed on **Ramesh Chandra Agrawal -v- Hospital Ltd. and others**³ wherein the Hon'ble Apex Court while dealing with Section 42 of the Evidence Act regarding opinion of expert held that the opinion of the expert may be seen as advice and it is the duty of the expert to place all material used for analysis so as to a judge may decide the same after his independent conclusion.

20. It is submitted that in **Mirza Akbar V. King Emperor** ⁴ correct import of section 10 IEA was explained by the judicial committee of Privy Council, wherein it was held that :-

“The words of section 10 are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out of the conspiracy, after it has been completed. The words ‘common intension’ signify a common intension existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intension, once reasonable ground has been show to believe its existence. But it would be very different matter to hold that any narrative or statement or confession made to a third party after the common intension or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is than no common intension of the conspirators to which the statement can have reference”.

21. He placed reliance in **State (NCT OF DELHI) VERSUS Navjot Sandhu alias Afsan Guru** ⁵(Para50) wherein Hon'ble Apex Court has held that :

“We are, therefore, of the view that having regard to all these weighty considerations, the confession of a co-accused ought not be brought within the sweep of Section As a corollary, it follows that the confessions of the 1st and 2nd accused in this case recorded by the police officer under Section are of no avail against the co-accused or against each other. We also agree with the High Court that such confessions cannot be taken into consideration by the Court under Section 30 of the Indian Evidence Act. The reason is that the confession made to a police officer or the confession made while a person is in police custody, cannot be proved against such person, not to speak of the co- accused, in view of the mandate of Sections 25 and 26 of the Evidence Act. If there is a confession which qualifies for proof in accordance with the provisions of Evidence Act, then of course, the said confession could be considered against the co-accused facing trial under

³ 2009(9) SCC 709

⁴ AIR 1940 PC 176-(AIR p. 177)

⁵ (2005)11 SCC 600

POTA. But, that is not the case here.”

22. Reliance is also placed in **SALIM AKHTAR alias MOTA versus STATE OF UP⁶-(Para 10)** wherein Hon’ble Apex Court has held as under

“10. So far as the disclosure statement of the appellant is concerned, the same was admittedly made to police personnel and only that part of the statement would be admissible which is permissible under Section 27 of the Evidence Act. The scope of this provisions was explained by the Privy Council in the well known case of Pulukuri Kottaya and Ors. v. Emperor (AIR 1947 PC 67), wherein it was held that it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to this fact. Information as to the past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Therefore, what is admissible is the place from where the polythene bag containing pistol and other articles was allegedly recovered. The fact that some terrorist organisation had given the pistol and other articles to the appellant or its use would not be admissible.”

23. Reliance is further placed on **MOHMED INAYATULLAH V. THE STATE OF MAHARASHTRA⁷-(Para 15)** wherein Hon’ble Apex Court has held that:

“ having cleared the ground, we will now consider, in the light of the principles clarified above, the application of the section 27 to this statement of the accused. The first step in the process was to pin point the fact discovered in consequence of this statement. Obviously, in the present case, the threefold fact discovered was: (a) The chemical drums in question, (b) the place, i.e. The musafirkhana, Crawford Market, Wherein they lay deposited, and (c) The accused’s knowledge of such deposit. The next step would be to split up the statement into its components, and to separate the admissible from the inadmissible portions. Only those components or portions which where the immediate cause of the discovery would be legal evidence and not the rest which must be excised and rejected. Thus processed in the instant case, only the first part of the statement,viz.,”I will tell the place of deposit of the three chemical drums “Was the immediate and direct cause of the fact discovered. Therefore,this portion only was admissible under section 27.The rest of the statement,namely,”Which I took out from the Haji Bandar on 1st August”, constituted only the past history of the drums or their theft by the accused ;it was not the distinct and proximate cause of the discovery and had to be ruled out of evidence all together.”

24. Reliance is further placed on **Prabhu V. STATE OF UP⁸ (PARA 9)** in

⁶(2003)5 SCC 499

⁷ (1976)1 SCC 828

⁸AIR 1963 SC 1113(F.B.)

which Hon'ble Apex Court has held as under:-

"The main difficulty in the case is that the evidence regarding the recovery of bloodstained axe and bloodstained shirt and dhoti is not very satisfactory and the courts below were wrong in admitting certain statements alleged to have been made by the appellant in connection with that recovery. According to the recovery memo the two witnesses who were present when the aforesaid articles were produced by the appellant were Lal Bahadur Singh and Wali Mohammad. Lal Bahadur Singh was examined as PW 4. He did give evidence about the production of bloodstained articles from his house by the appellant. The witness said that the appellant produced the articles from a tub on the eastern side of the house. The witness did not, however, say that the appellant made any statements relating to the recovery. Wali Mohammad was not examined at all. One other witness Debi Baksh Singh was examined as PW 3. This witness said that a little before the recovery the SI of police took the appellant into the custody and interrogated him; then the appellant gave out that the axe with which the murder had been committed and his bloodstained shirt and dhoti were in the house and the appellant was prepared to produce them. These statements to which Debi Baksh (PW 3) deposed were not admissible in evidence. They were incriminating statements made to a police officer and were hit by sections 25 and 26 of the Indian Evidence Act. The statement that the axe was one with which the murder had been committed was not a statement which led to any discovery within the meaning of section 27 of the Evidence Act. Nor was the alleged statement of the appellant that the bloodstained shirt and dhoti belong to him a statement which led to any discovery within the meaning of section 27."

25. Further reliance is placed in para 107 of **STATE (NCT OF DELHI) versus NAVJOT SANDHU alias Afsan Guru- (supra)** in which it was held as under:

"In *Ajay Aggarwal V. UOI* (1993) 3 SCC 609 While discussing the question whether the conspiracy is a continuing offense, the following pertinent observations were made by K. Ramaswamy, J., Speaking for the bench at Para 11 (SCC p. 618)
"Conspiracy to commit a crime itself is punishable as a substantive offense and every individual offense committed pursuant to the conspiracy is separate and distinct offense for which individual offenders is liable to punishment, independent to the conspiracy."

26. Reliance is also placed on **STATE OF RAJASTHAN V. DAULAT RAM⁹** in which it is held that:-

"Prosecution failing to prove beyond reasonable doubt all the links, starting from seizure of opium till the handing over of the samples to public analyst- possibility of samples being changed or tempered with during the period it changed several hands till its reaching the public analyst, held, cannot be ruled out."

⁹(1980) 3 SCC 303

27. Learned counsel further placed reliance in **ANTER SINGH V. STATE OF RAJASHTHAN**¹⁰ (PARA 10) (F) wherein it was held that:

“No evidence as to when Bullets, recovered from dead body, were handed over to police by doctor-Empty cartridges, pistol, Bullets, etc. Sent to FSL on 12-5-1979-no explanation as to with whom the custody of bullets, cartridges and pistol remained till then-guilt not established”

28. Reliance is placed in the case of **AMARJIT SINGH alias Babbu V. STATE OF PUNJAB**¹¹ (PARA 7) it was held that

“The entire prosecution case, thus, clouded with number of infirmities which compel this court not to accept such an unworthy evidence. These infirmities have been brushed aside by the designated court by observing that since the model number of the revolver was noted down, the non-Sealing of the revolver or the handing over of the same to some other police officials or a private person, who has not been examined are of no consequence. We are unable to agree and subscribe to this view in a case of this nature. The non sealing of the revolver at the spot is a serious infirmity because the possibility of tempering with the weapon cannot be ruled out. The report of PW4 that the weapon is capable of being fired is insignificant since it cannot be said with certainty as to what was the condition of the weapon at the time of the recovery.”

29. Reliance is also placed in **THE STATE OF MAHARASHTRA V. PRABHU BARKU GADE**¹² (PARA 12) in which it was held that :

“.....There is no evidence on record to show that from the time the aforesaid articles were recovered and till the time , they were send to the chemical analyst , the gap being of more than 8 days , they were kept throughout in a sealed condition. It was obligatory on the part of the prosecution to lead link evidence to that effect. This was imperative because the possibility that the prosecution may have put human blood on the aforesaid articles during that interregnum, had to be eliminated before any reliance on the aforesaid recovery evidence could be placed.....”

30. Reliance is also placed in **THE STATE OF RAJASHTHAN V.MOTIA**¹³ (Para 7) in which it was held that –

“Learned council for Motia accused has raised a number of objections about this evidence against Motia. In the first place , he points out that there is no evidence to show that after the various articles had been recovered from the possession of Motia , they were kept sealed show that it was not possible for anyone to sprinkle blood stains on them while they were in the custody of the

¹⁰ (2004) 10 SCC 657

¹¹ (1995) Supp (3) SCC 217

¹² (1995) Cr.L.J.1432

¹³ (1955) Cr.L.J.835

police and before they were sent for examination by the chemical examiner. We must point out that this lacuna in the prosecution evidence is there. Whenever it is desired by the prosecution that certain articles , which have been recovered from accused persons are to be identified , or are to be sent to the Chemical Examiner for analysis it is necessary that the officer recovering the articles should immediately take steps to seal them and evidence should be produced that the seals were not tempered with till the identification is over , or till the articles were sent to the Chemical Examiner for analysis in the absence of such precautions it would always be open to the accused to say that the police later put human blood on the articles in order to implicate the accused. It is, therefore, necessary for the prosecution to produce evidence that steps were taken at once to seal the articles, and that from the time the articles came into possession of the police to the time they were send for identification before a Magistrate or for examination to the Chemical Examiner the seals remained intact.”

31. Thus it is submitted that applying the ratio laid down in above mentioned judgments it is crystal clear that in the present case there is no prima facie evidence on record to show that the appellants were party to a conspiracy. Moreover in the present case the confessions of appellants were recorded long after the murder when the conspiracy had culminated and, therefore, Section 10 of the Evidence Act is not attracted. Hence the prosecution has clearly failed to establish the charge U/s 302/120 B of IPC. The prosecution has failed to establish the guilt of the appellants beyond reasonable doubt.

32. On the other hand, learned counsel appearing for the State in all these appeals supporting the judgment of conviction and order of sentence argued that conviction of the accused/appellants is strictly in accordance with law and there is no infirmity in it. From accused Madhvendra @ Pankaj Singh, two 9mm pistol, 33 cartridges and other articles were seized. They were sent to FSL and further sent to CFSL also. In the screen of the mobile of the deceased and in the shirt of the deceased worn at the time of incident, bullets were found embedded and both the science laboratories gave report positive. P.W. 23 J.S. Saggi had supported the seizure of those articles. Though the attesting witnesses P.W. 6 Naresh Mandal and P.W. 7 Avinash Tirki turned hostile and not supported the prosecution case but admitted their signatures on the memorandum and seizure memo Ex. P-14. Hence the judgment of conviction against Madhvendra Pratap Singh alias Pankaj Singh is duly proved by the prosecution. It is submitted that as per seizure memo

Ex. P-10, lock and key of the rental house of accused Abhishek Singh were recovered from accused Madhvendra Pratap Singh alias Pankaj Singh. For this recovery, statement of P.W. 23 J.S. Saggu is acceptable as he is trustworthy and at his instance documents were written. Hence there is no doubt about the statement of P.W. 23 J.S. Saggu regarding recovery of those articles.

33. It is further submitted that the prosecution has duly proved its case under the provisions of Sections 10 and 30 of the Indian Evidence Act as the memorandum statements given by the appellants under Section 27 of the Evidence Act are considered to be proved confession affecting person making it and others jointly under trial for same offence and as the appellants entered into a conspiracy for the offence in reference to common design sufficiently proved with the memorandum seizure given by the appellants, the judgment of the court below is well founded, requires no interference. He placed reliance on **Madhu alias Madhuranatha and another -v- State of Karnataka**¹⁴ wherein Hon'ble Supreme court held in para 17, 18 and 19 as under:-

“17. Learned Counsel for the Appellants has vehemently argued that in some of the recoveries, though a large number of people were available, but only police personnel were made recovery witnesses. Thus, the whole prosecution case becomes doubtful.

18. The term 'witness' means a person who is capable of providing information by way of deposing as regards relevant facts, via an oral statement, or a statement in writing, made or given in Court, or otherwise.

In Pradeep Narayan Madgonkar and Ors. v. State of Maharashtra AIR 1995 SC 1930, this Court dealt with the issue of the requirement of the examination of an independent witness, and whether the evidence of a police witness requires corroboration. The Court held that though the same must be subject to strict scrutiny, however, the evidence of police officials cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigation or in the prosecution. However, as far as possible the corroboration of their evidence on material particulars should be sought.

19. Thus, a witness is normally considered to be independent unless he springs from sources which are likely to be tainted and this usually means that the said witness has cause to bear such enmity against the accused so as to implicate him falsely. In view of the above, there can be no prohibition to the effect that a policeman cannot be a witness or that his deposition cannot be relied upon if it inspires confidence.”

34. It is submitted that the present case is based on circumstantial

evidence i.e. memorandum and seizure of article along with report of FSL and CFSL that bullets found embedded in the shirt and screen of mobile of the deceased were fired from the 9 mm pistol seized from accused Madhvendra Pratap Singh @ Pankaj Singh, which goes to show that chain of circumstances is complete and with the application of sections 10 and 30 of the Evidence Act, prosecution has proved its case beyond all doubt against the appellants.

35. We have heard learned counsel for the parties and perused the material available on record.

36. In the present case Sections 10, 27 and 30 of the Evidence Act are said to be applicable. They are reproduced below:-

“10. Things said or done by conspirator in reference to common design-Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Section 27 -How much of information received from accused may be proved-provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offense, In the custody of a police officer, So much of such information, Whether it amounts to a confession or not, As relates distinctly to the fact there by discovered, May be proved.

Section 30. Consideration of proved confession affecting person making it and others jointly under trial for same offence

When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person makes such confession.

Explanation "Offence" as used in this section, includes the abetment of, or attempt to commit, the offence.

37. P.W. 1 Ashish Agrawal, nephew of deceased Gowardhan Agrawal is a witness of the fact that his uncle the deceased and other coal traders earlier to the incident received phone calls threatening them. As directed by his uncle, he went to Bhagwanpur depot then he was informed that his uncle was shot dead. He reached to the spot and thereafter went to hospital where he saw his uncle injured and later he died. He lodged unnumbered dehati

nalishi Ex. P-1, unnumbered merger intimation Ex. P-2 and he is witness of Patwari map Ex. P-3, inquest Ex. P-5. He also noticed a bullet inserted in the screen of the mobile of the deceased. He handed over the said mobile hand set along with bullet to the police which was seized vide Ex. P-6. P.W. 2 Vijay Agrawal, brother of the deceased reached to the hospital after receiving information and saw his brother injured and dead. He is a witness of inquest Ex. P-5 and seizure memo Ex. P-7. P.W. 3 Kailash Agrawal is a witness of seizure memo Ex. P-6, P-9, P-10 and P-11. He also reached to the hospital and saw his maternal uncle dead. He was informed regarding the incident by family members. P.W. 4 Sudarshan Soni was informed by one Suresh Prajapati regarding the incident. He also reached to the hospital and saw Gowardhan Agrawal dead. P.W. 5 Mahesh Agrawal, nephew of the deceased also went to hospital after receiving information of the incident. He is also a witness of Patwari map Ex. P-3, Panchnama P-3A, inquest notice Ex. P-4, inquest Ex. P-5 and seizure memo Ex. P-7.

38. P.W. 6 Naresh Mandal is a witness of memorandum statement Ex. P-13, seizure memo Ex. P-14, memorandum Ex. P-15, 16 and 17, seizure memo Ex. P-18 and P-19 and also witness of arrest memo Ex. P-20, 21, 22, 23. He turned hostile and admitted his signature but has not supported all memorandums and seizure memo. P.W. 7 Avinash Tirki is also a witness of memorandum and seizure and turned hostile, however admitted his signature and has said nothing against the appellants. P.W. 8 Dayashankar Gupta, Adv. is a witness of seizure memo Ex. P-7 by which the police seized a shirt of the deceased in which a bullet was embedded. He is also a witness of seizure of black bag of the deceased, two mobile handsets, out of which in one mobile a bullet was found. He is also a witness of seizure memo Ex. P-10 by which a lock and key of the rental room of accused Abhishek Singh was seized and also inquest Ex. P-5 and seizure memo Ex. P-11. P.W. 9 Gopal Krishna Agrawal is a witness of seizure memo Ex. P-28, admitted his signature but has not supported the contents of the same. P.W. 10 Ramu Prasad Soni reached to the spot and noticed Gowardhan Agrawal injured and he took him to hospital. P.W. 11 Vijendra Kujur, constable helped the prosecution for taking the dead body for post mortem and thereafter handed over the sealed packet containing clothes of the deceased to the in-charge, police station and the same was seized vide Ex. P-11. P.W. 12 Atul

Prasad Singh is a witness of Ex. P-28 seizure memo, admitted his signature but has not supported the contents of the seizure memo. P.W. 13 S.P. Tiwari, patwari prepared spot map Ex. P-3. P.W. 14 Rahul Tiwari, inspector seized the register from D.W. 1 Rajesh Gupta vide seizure memo Ex. P-30. P.W. 15 Dr. A.K. Bansal has admitted injured Gowardhan Agrawal in the hospital and after the death of the injured, he informed police vide Ex. P-31 about the same. P.W. 16 Dr. K. R. Tekam conducted autopsy and noticed following injuries:-

External examination

- i. A wound 1.2 cm x 1 cm blacking around it lateral aspect of middle 3rd of arm.
- ii. A wound with evorted margin at 3 cm below axilla on medial aspect of arm 1.2 cm x 1 cm.
- iii. A wound with inverted margin at 5 cm below Axilla 1.5 cm x 1.3 cm hematoma found on right side of mid axillary line upto abdomen.
- iv. A wound at mid clavicular line 14 cm below below left nipple 1.8 x 1.8 cm with evorted margin is inverted.
- v. A wound at below and lateral to right scapula 1.8 x 1.8 cm right 10th rib fractured with hamatoma to abdomen margin is inverted.
- vi. A wound at right renal angle 1 inches right to mid line at D12 hamotoma upto abdomen.

Internal examination

On liver punctured wound present at lateral on upper surface and medial on lower surface. Abdomen cavity filled with clooted blood. Right kidney ruptured and pale. Stomach punctured at two places. Spleen, lungs, brain pale. Both chambers of heart empty.

The autopsy surgeon opined that the mode of death was shock caused by multiple organ injury leading to cardiopulmonary arrest and the death may be homicidal in nature.

39. P.W. 17 Manohar Yadav has turned hostile and not supported the prosecution story. P.W. 18 Ashok Kumar Shukla, Divisional Engineer, mobile services gave email print out of the call details Ex. P-34 to Superintendent of Police, Sarguja. P.W. 18 is a witness of seizure memo Ex. P-9 seizure of

the blood stained soil and plain soil from the spot. P.W. 19 Ravishankar Toppo and P.W. 20 villiam Kujur are witnesses of seizure Ex. P-36, turned hostile. P.W. 21 Ashok Yadav is a witness of memo Ex. P-24 and seizure memo Ex. P-25, have turned hostile though admitted their signatures in the documents. P.W. 22 Tejnath Singh, sub-inspector has recorded the unnumbered FIR Ex. P-1 and unnumbered merg intimation Ex. P-2. Subsequently he registered the FIR as Ex. P-37 and merg as Ex. P-38. He also helped in initial investigation. P.W. 23- J.S. Saggu, the investigating officer has duly supported the prosecution case. P.W. 24 Prabodh Minj, the then mayor of Ambikapur while going through the place of incident saw Gowardhan Agrawal in injured condition and took the injured to the hospital. Injured Gowardhan Agrawal had told him that he was shot and also inquired about his bag which was with his nephew accompanying him. P.W. 25 O.P. Singh, Arms Clerk has duly proved the prosecution sanction Ex. P-57. P.W. 26 Kishore Mahta, Asstt. Sub Inspector had received the call detail Ex. P-48 and also printout the information given in email as Ex. P-57. P.W. 27 Bhargav Sharma Noddle Officer, Idea Cellular has proved Ex. P-48 call detail. P.W. 29 Anil Mishra, technician has turned hostile, not said anything against the appellants. PW 29 S.S. Badwal, Sr. Scientific Officer has proved the report Ex. P-59-A.

40. Defence witness D.W. 1 Rajesh Gupta has deposed that the register Article A was not maintained in his shop and he never gave said register article A to the police.

41. Minute examination of entire evidence makes it clear that there is no eye-witness to the incident. Case of the prosecution rests on circumstantial evidence i.e. seizure at the instance of appellants and the reports of ballistic expert and report of CFSL and also the electronic evidence call detail. In the present case, evidence adduced against appellant Madhvendra Pratap Singh and other appellants are separable. Evidence adduced by the prosecution against appellants Sunil Paswan, Abhishek Singh, Satish Tripathi and Ganesh Datt Mishra will be considered separately and the evidence adduced against appellant Madhvendra Pratap Singh will be appreciated separately.

42. So far as evidence adduced against all appellants excluding Madhvendra Pratap Singh @ Pankaj Singh is concerned, as per

requirement of sub-section (4) of Section 65B of the Evidence Act in any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate is required doing any of the following things, that is to say,- it is required to issue a certificate doing any of the following things, that is to say, (a) identifying the electronic record containing the statement and describing the manner in which it was produced; (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer; (c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to 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) shall be evidence of any matter stated in the certificate; and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

43. In the absence of any such certificate whatever call details are adduced in the evidence cannot be said as legally admissible evidence under the requirement of Section 65B sub-section(4) of the Evidence Act thereby no importance can be given to the evidence adduced by the prosecution as electronic evidence i.e. call records. Barring this, so far as the memorandum and seizure of all above 4 appellants are concerned, the witnesses of memo Ex. P-24 and seizure P-25 by which at the instance of accused Abhishek Singh, mobile hand sets were seized in a hidden condition in the rental house occupied by said Abhishek Singh, have not supported them. For the sake of argument, if the seizure of a mobile hand set from a rental house is admitted even then in absence of any connecting call record legally admissible, the same memorandum and seizure cannot connect said Abhishel Singh with the offence. So far as the evidence against appellant Ganesh Datt Mishra is concerned, at the instance of this appellant, prosecution seized a Student note book in which name of sim purchaser was mentioned as per seizure memo Ex. P-30. The witness P.W. 19 Ravishankar Toppo and P.W. 20 Villiam Kujur have turned hostile and not supported seizure and also for the sake of argument if the same seizure Ex. P-36 is accepted as it is, even then the seizure of one Nokia mobile hand set and

SIM card cannot connect him with the offence in absence of any legally admissible evidence. The same proposition can also be made for appellant Satish Tripathi. At the instance of this appellant vide memo Ex. P-26 one Samsung mobile hand set has been seized vide seizure memo Ex. P-27. Merely seizure of Samsung mobile hand set as mentioned in Ex. P-27, in absence of any electronic record duly admissible cannot lead to an inference that appellant Satish is guilty for commission of the offence.

44. So far as evidence against accused Sunil Paswan is concerned, at the instance of this accused, memorandum Ex. P-13 was recorded on the basis of which nothing is seized from him. Based on the memorandum Ex. P-13 in absence of any other chain of circumstance i.e. seizure of any incriminating substance, this appellant also may not be held guilty for commission of the offence in question. As regards to what extent the information received from the accused may be proved, Section 27, Evidence Act, provides that when any fact is proved to as discovered in consequences of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. In the present case, no fact is discovered in consequences of the information received from the above 4 accused persons, hence no information said to be received for proving the facts can be said to be proved on the basis of the aforementioned memorandum and seizure at the instance of above 4 accused persons.

45. So far as provisions of Sections 10 and 30 of the Evidence Act are concerned, on the basis of memorandum given by said 4 appellants, there is no proved confession legally admissible in the matter. Nothing could be elicited to prove the conspiracy and also for causing disappearance of evidence of offence or for harboring offender whereby any of the appellants harbor for concealing a person to whom he knows or has reason to believe to be the offender with intention of screening him from legal punishment after the offence has been committed. After taking entire evidence into consideration, this court is of the view that conviction of accused Sunil Paswan, Abhishek Singh, Satish Tripathi and Ganesh Datt Mishra requires interference as there is no legally admissible evidence to connect them to this offence. In the present case, provisions of Section 10 and 30 of the

Evidence Act are not applicable looking to the entire facts.

46. So far as the evidence adduced against appellant Madhvendra Pratap Singh @ Pankaj Singh is concerned, nobody saw him committing the offence. The conviction of appellant Madhvendra Pratap Singh is solely based on circumstantial evidence i.e. memorandum Ex. P-15 and the seizure memo Ex. P-14 as the two 9 mm pistols, one empty magazine, 33 live cartridges, cleaning tools of pistol, two goggles of plain glass, two black colour towels were seized. Other incriminating circumstances are seizure of one office bag of the deceased, two mobile hand sets and one 9 mm fired bullet embedded into the mobile handset vide Ex. P-6 and vide seizure memo Ex. P-7, a fired bullet seized from the shirt of the deceased, the inquest Ex. P-5, memorandum of the Superintendent of Police, Sarguja Ex. P-41, receipt of FSL Ex. P-54, sanction of the District Magistrate for prosecution of the appellants under relevant provisions of the Arms Act, memorandum of Superintendent of Police, Sarguja Ex. P-49-A, the CFSL examination report Ex. P-59 and also FSL report Ex. P-51. As per this report in bullet article A and clothes of the deceased C-1, C-2, C-3 and C-4 presence of blood was confirmed. In the analysis in Ex. P-54 it is opined by the expert that both the pistols are in functional condition and earlier bullets have been fired by both the pistols. Article EB1 and EB2 are fired bullets of 9 mm caliber. Further 33 live cartridges are of 9 mm caliber out of which 6 cartridges were successfully fired during test and the article C-2 and C-3, i.e. shirt and baniyan of the deceased contain hole due to blow of copper jacketed bullet. The mobile set the deceased kept at the time of incident also suffered a dent mark by the copper jacketed bullet blow. In the FSL examination it is further opined that fired bullet article B sent along with both 9 mm pistol are required to be sent to CFSL Chandigarh to ascertain whether the said bullets were fired from the pistols article A-1 and A-2. In the serological examination, presence of human blood in underwear and baniyan of the deceased was confirmed. Blood stains in article 11 bullet, 12 ful pant, 13 shirt and 16 earth are disintegrated and their origin cannot be determined by the report of the CFSL Chandigarh Ex. P-59. It is opined that both the 9 mm pistols marked as Article A-1 and A-2 were test fired and found in working order. It is further opined that out of remaining 27 - 9 mm live Cartridges marked as L-1 to 27, 4 live cartridges were randomly selected and test fired through the pistol

marked as article A-1 and A-2 and the cartridges Article L-8, L-11, L-14 and L-26 were found alive. It is further opined that after examination and comparison those fired bullet Article B-1, B-2 have been fired through 9 mm pistol Article A-1. It is further opined that they could not have been fired through any other fire arm because every fire arm has its own individual characteristic marks. On the basis of above evidence and the other evidence like post mortem report Ex. P-32, merg Ex. P-2, Ex. P-38, FIR Ex. P-1 and P-37, inquest Ex. P-5 and other evidence regarding death of Goverdhan Agrawal, the prosecution has proved its case against Madhvendra Pratap Singh.

47. Arguments of learned counsel for the appellant Madhvendra Pratap Singh in brief are that the witness of memorandum and seizure P.W. 6 Naresh Mandal and P.W. 7 Villiam Kujur turned hostile, in the inquest Ex. P-5, it is mentioned that a fired bullet of .32 caliber was entered in the shirt but the police seized 9 mm fired bullet along with shirt and baniyan of the deceased, bag and other articles including mobile hand set the deceased kept with him at the time of incident were presented by P.W. 1 Ashish Agrawal next day to the police, merely on the basis of statement of the investigating officer P.W. 23 J.S. Saggu, memorandum and seizure from the appellant cannot be accepted, article pistol and other cartridges were not sealed at the time of seizure and there is possibility of tempering it, they were sent after 48 days to the FSL. Further the constable who was given the duty to take the material to FSL was not examined. If 6 and 4 cartridges were test fired by the FSL or CFSL then how the District Magistrate noticed 33 cartridges. Prosecution has failed to prove that whatever articles were seized the same were sent for analysis. The empty cartridges were not recovered from the spot. Therefore prosecution has failed to prove the chain of circumstances against appellant Madhvendra Pratap Singh so as to connect him with the crime in question. It is also not proved that both the bullets were fired at the deceased. If the incriminating evidence is circumstantial evidence, then court has to examine minutely regarding those evidence as the circumstantial evidence is a weak type of evidence.

48. After minute examination of the statements of the witnesses of memorandum and seizure, though they have not supported the case of the prosecution but they have admitted their signature. The IO P.W. 23 J.S.

Saggu who recorded the memorandum and seizure at the instance of the appellant Madhvendra, in the cross-examination remained very firm on this point and nothing could be elicited as to discredit his statement regarding memorandum and seizure. In the considered view of this court, looking to the entire facts, memorandum and seizure made at the instance of appellant Madhvendra is proved beyond doubt. So far as mentioning of the fact regarding a fired bullet of .32 caliber in the shirt and baniyan of the deceased at the time of inquest and 9 mm in the report of expert, the police official conducting inquest is not expert to opine the diameter of the fired bullet. The same was duly seized, in the examination it was found as a fired bullet of 9 mm caliber pistol, therefore, no importance can be given to the difference of diameter mentioned in the inquest and in the expert report about the fired bullet. The seizure of the bag along with mobile hand set in which there was an embedded bullet in the screen from P.W. 1 Ashish Agrawal on his production next day cannot be held suspicious and doubted. For this no suspicion can be made on P.W. 1 Ashish Agrawal or P.W. 23 J.S. Saggu, IO. Further only due to non-mentioning of impression of seal, the concerned seizure memo cannot be doubted. So far as removal of shirt and baniyan from the body of the deceased during MLC is concerned, no question has been asked to the doctor conducting MLC and as in the inquest there was presence of baniyan and shirt and fired bullet, no doubt can be attached for the same. The argument that in absence of any acceptable and proper suggestion regarding delay in sending the articles for examination and looking to the possibility that same article were not sent, the prosecution story become doubtful, has no force. In the process of investigation, articles were duly seized, sent and the same were received by the FSL and CFSL in a sealed condition as mentioned in the report. Non-examination of the persons who had taken the articles to the laboratory is not important. As regards the argument that microscopic photograph were not filed along with the report, hence the report of the expert is not admissible, the expert of CFSL Chandigarh were duly examined and the defence had every opportunity to put questions and even as per relevant provisions of the Cr.P.C., the report of the expert is admissible. In the present case, expert was examined and looking to the entire report and other facts, no doubt can be raised about report Ex. P-59. The articles seized were safely kept in Malkhana and in absence of any reasonable

doubt about the same in the opinion of this Court, it can not be held that the delay was caused in sending the articles. The District Magistrate after due examination accorded sanction. Defence failed to demonstrate or level any reasonable doubt for the sanction order for prosecution under the Arms Act as after being satisfied regarding seizure of the fire arms and ammunition, the District Magistrate duly accorded sanction which cannot be held suspicious. So far as argument regarding non-recovery of empty cartridges are concerned, if any empty cartridge falls down even then looking to the open place of incident and other attending circumstances there are every possibility that the empty cartridges may not be traceable or thrown by concerned accused. So far as absence of any motive is concerned, motive is just an add to criminality, even otherwise in the absence of any proved motive, prosecution case cannot be doubted. The case laws cited by the appellant Madhvendra on entire appreciation of evidence is not useful or of any help to him as to raise any doubt about circumstantial evidence collected against him.

49. On due consideration, the prosecution has proved entire circumstantial evidence against the appellant Madhvendra. The circumstances are fully established consistent only with the hypothesis of the guilt of the accused and that is not explainable by any other circumstances except that appellant Madhvendra is guilty and the evidence collected by the prosecution is of the conclusive nature and tendency. The chain of evidence is complete, it shows that in all human probability the act must have been done by the accused. The Prosecution has duly proved that appellant Madhvendra had killed Gowardhan Agrawal and was also in possession of fire arm and cartridges in contravention of relevant provisions of Arms Act and had caused disappearance of evidence of offence committed by concealing the pistol, cartridges and other articles. The conviction awarded to accused Madhvendra does not call for any interference. The same is well founded.

50. In the result, Cr.A. No. 334/2013 (Satish Tripathi -v- State), Cr.A. No. 362/2013 (Ganesh Datt Mishra -v- State), Cr.A. No. 461/2013 (Mannu Singh -v- State) and Cr.A. No. 972/2013 (Sunil Paswan -v- State) are allowed. Appellant Sunil Paswan and Mannu Singh @ Gyanendra Singh @ Manvendra Singh @ Abhishbek Singh are reported to be in jail. They be

released forthwith if not required in any other case. Appellants Satish Tripathi and Ganesh Datt Mishra are reported to be on bail. Their bail bonds shall continue for a further period of six months as per requirement of Section 437-A of the Cr.P.C.

51. Cr.A. No. 468/2013 (Madhvendra Pratap Singh -v- State) is hereby dismissed. Since he is already in jail, no further order regarding his surrender etc. is required.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Chandra Bhushan Bajpai)
Judge