

\$~R-20, 21, 22

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 29th February, 2016*

+ **CRL.A. 464/2014**

ANWAR

..... Appellant

Through : Mr. R. M. Tufail, Mr. Farooq Chaudhary, Mr. Vishal Raj Sehijpal and Ms. Meenakshi Joshi, Advocates.

versus

STATE

..... Respondent

Through : Ms. Anita Abraham, APP for State.

+ **CRL.A. 467/2014**

AKBAR

..... Appellant

Through : Mr. R. M. Tufail, Mr. Farooq Chaudhary, Mr. Vishal Raj Sehijpal and Ms. Meenakshi Joshi, Advocates.

versus

STATE

..... Respondent

Through : Ms. Anita Abraham, APP for State.

+ **CRL.A. 468/2014**

SHAUKAT PASHA

..... Appellant

Through : Mr. R. M. Tufail, Mr. Farooq Chaudhary, Mr. Vishal Raj Sehijpal and Ms. Meenakshi Joshi, Advocates.

versus

STATE

..... Respondent

Through : Ms. Anita Abraham, APP for State.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J. (ORAL)

1. All the three appeals arise out of a common order dated 14.02.2014 and order on sentence dated 13.03.2014 by which all the three

appellants had been held guilty and convicted under Section 302/34 of the Indian Penal Code and sentenced to undergo imprisonment of life and fine of Rs. 20,000/- each, in default of payment of fine, further simple imprisonment for one year.

2. All the three appeals have been heard together and are being decided by a common judgment.
3. The case of the prosecution before the learned trial court was that on 21.3.2009 at 6.00 p.m., an information was received in Police Station Jamia Nagar about a person having been injured in firing and lying at N-68, Batla House, near Khalil-Ul-Lah Mosque, New Delhi. The said information was recorded as DD No.21A. The information was sent to SI Ramjeet through Ct.Raj Kumar. Since Inspr.Amrit Raj was also present in the Police Station copy of DD No.21A was given to him for further action. Inspr.Amrit Raj along with SI Kameshwar Prasad, HC Qurban Ali, HC Virpal, Ct.Dhir Singh and Ct.Harender reached at spot. SI Ramjeet Singh and Ct.Raj Kumar were present at the spot, besides other public persons. The Police team found that one person, namely, Abdul Hafeez Khan, drenched in blood was lying in a vacant plot, in front of property no.N-85. He was having bullet injuries on his person. His wounds were bleeding and a lot of blood spread on the ground. One used cartridge, on the bottom of which KF 8 mm was engraved, was lying at some distance of the injured. The injured was removed to Holy Family Hospital in official Gypsy by HC Qurban Ali and Ct.Krishan Pal. IO collected the MLC of injured. The injured was shifted to ICU Ward. The treating Doctor declared the injured unfit for giving statement. HC Qurban Ali informed the IO that the injured had

disclosed to him that Shaukat Pasha, Akbar Amroha, Rizwan and Anwar had fired at him. This statement was heard by Constable Krishan Pal. The injured succumbed to his injuries.

4. During investigation, all the accused persons were apprehended, who admitted their guilt in their disclosure statements. A charge sheet was filed against all the accused persons under Section 302/34, 212 and 216 of the IPC read with Sections 27/54/59 of the Arms Act. Accused Zahir, was discharged while the accused Akbar, Anwar and Shaukat Pasha were charged for the offence punishable under Sections 120B/302 of the IPC or alternatively under Sections 302/34 of the IPC vide order dated 30.8.2010 passed by the trial court. All of them pleaded not guilty and claimed trial.
5. In support of its case, the prosecution has examined 29 witnesses. Statements of the accused persons were recorded under Section 313 of the Cr.P.C. Although the accused persons, Akbar and Anwar, did not examine any witness in their defence but the accused, Shaukat Pasha, sought two days' time to give list of his witnesses, however, he failed to do so nor any evidence was led by him.
6. Mr. R. M. Tufail, learned counsel appearing for the appellants submits that there are various inconsistencies in the story of the prosecution, there are material contradictions and improvements in the statements of the witnesses and the judgment so passed has resulted in gross miscarriage of justice. Counsel further submits that the trial court has relied upon the testimony of HC Qurban Ali (PW-18) which is not reliable for the reason that having regard to the bullet injuries suffered by the deceased, it was highly improbable that he was in a position to

talk. Counsel for the appellants further contends that the testimony of HC Qurban Ali is also not reliable for the reason that according to HC Qurban Ali, the statement made by the deceased named the appellants herein which was also heard by Driver Krishan Pal, who could not have heard the statement, if any, made by the deceased as he was concentrating on the road. Mr. Tufail contents that HC Qurban Ali (PW-18) is not a reliable witness as according to him he had removed the injured to the hospital but his clothes were not seized and it is highly improbable that a person who had removed the victim to the hospital with three gunshot injuries, blood would not be smeared on his clothes.

7. Counsel further submits that the trial court has placed reliance on the testimony of Asma (PW-13) who claims that she received a call from her husband that Akbar and Rizwan had shot him which fact according to the prosecution was supported by Smt. Mehar (PW-7). Counsel contents that there is no evidence on record to suggest that the victim was either in a position to speak to his wife neither any telephone has been seized nor the call records have been proved of PW-13 that she had received a phone call from the phone of her husband (since deceased). Additionally, counsel contents that it is highly improbable that the deceased did not disclose the names of his assailants to the independent witness Constable Rahish Hasan (PW-11) who had called the PCR and was in no way connected to the investigation in the matter.
8. Mr. Tufail has also drawn the attention of the court to the MLC which was recorded by Dr. Anjana Kharbanda (PW-10). As per the MLC the

patient was unfit for statement at 7.30 PM. Additionally, it is pointed out that when the injured reached the hospital and the MLC was prepared, it was noted that the patient was conscious but drowsy, pulse was in palpable, BP was not recordable and in her testimony PW-10 had stated that the patient was opening the eyes on verbal command but was not responding. She has further testified that punctured wound over occipital region as mentioned in the MLC Ex. PW-8/DC may affect the motor and sensory nervous system if the injury extend up to the brain. During cross examination this witness has also testified that if the BP and pulse of the patient is not recordable he would not be fully conscious. Relying on the testimony of PW-10, Mr. Tufail, thus, contends that it was impossible for the victim to have spoken a word leave alone make a phone call and inform his wife the names of his assailants or make a statement to PW-18.

9. Ms. Anita Abraham, learned APP for State submits that they were not one but two dying declarations in this case. The first dying declaration was made by the victim to HC Qurban Ali (PW-18). There is nothing on record to suggest that there was any enmity between HC Qurban Ali (PW-18) and the appellants thus, the testimony of HC Qurban Ali (PW-18) is reliable. Learned APP further submits that the utterances of the victim were made within the hearing range of Driver Krishan Pal and thus the testimony of HC Qurban Ali (PW-18) is fully corroborated by the testimonies of Krishan Pal (PW-19), Asma (PW-13) and Smt. Mehar (PW-7) as Asma (PW-13) had informed Smt. Mehar (PW-7) about the names of the assailants as informed to her by her husband. Both Asma and Mehar claim to be the wives of the

deceased and even the call was received on the phone of Asma in the presence of Mehar.

10. Learned APP further submits that merely because the clothes of HC Qurban Ali (PW-18) were not seized that by itself would not make his testimony to be unreliable.
11. Counsel also submits that merely because the statement of HC Qurban Ali (PW-18) was not recorded on the same date cannot gain much importance in view of the fact that the FIR which was registered on the same day, the appellants herein stand named therein. Additionally, the copy of the FIR was forwarded to the *Ilaka* Magistrate at 10:15 p.m.
12. We have heard the learned counsel for the parties, carefully examined the record of the trial court and considered the rival submissions made by the learned counsel for the parties.
13. In this case, the prosecution has placed strong reliance on the testimony of HC Qurban Ali (PW-18), Asma (PW-13) and Ct. Krishan Pal (PW-19) to bring home the guilt of the appellants.
14. HC Qurban Ali (PW-18) has testified that on 21.03.2009 he was posted at Police Station Jamia Nagar and on receipt of DD No. 21-A he along with Inspector (Investigation) and others reached the gali of H. No. 85, Batla House and an injured person was found lying in a vacant plot, he was bleeding and one empty cartridge was also found at some distance. He deposed that he along with Driver Krishan Pal had taken the injured to Holy Family Hospital in a Gypsy, on the way to the hospital, the injured had told his name as Abdul Hafiz S/o Abdul Wahid Khan and also informed him that one Akbar Amroha,

Shaukat Pasha, Rizwan and Anwar had shot him thereafter he expired and his dead body was shifted to Mortuary at Holy Family Hospital. He further deposed that Inspector (Investigation) along with Ct. Ram Pal also reached Holy Family Hospital.

15. During cross-examination, he testified that the area was congested area and rickshaws were also plying in the gali which was about 12/13 feet-wide. The gali comprises of houses of two storied and three storied. He also testified in cross-examination that many persons were present in the gali. He also stated in the cross-examination that when they were on the main road to the Holy Family Hospital, at that time the injured told him the names of the persons who had caused injuries to him but he had not told the names of the assailants when he was put in the vehicle or when they were in the gali. He testified that he was sitting on the back side of the Gypsy on the seat behind the seat of the co-passenger on the front. The injured was sitting with him as he was holding him and there were marks of bullet injuries and they were bleeding. He did not either write down what the injured had told him nor he told the doctor what the injured told him neither he furnished the information which the injured had given him on the wireless. He had also not informed the Duty Constable (on duty) at the hospital what the injured had told him neither he informed the Senior Officers telephonically.
16. The other important witness is Ct. Krishan Pal (PW-19). He has supported the testimony of HC Qurban Ali (PW-18) to the extent that he was on duty on 21.03.2009 and received DD No. 21-A. He had accompanied others to the place of incident. He along with HC

Qurban Ali (PW-18) had taken the injured to the Holy Family Hospital. On the way he had told HC Qurban Ali (PW-18) that one Shokat Pasa, Rizwan, Anwar and Akbar had shot him.

17. In the cross-examination, Ct. Krishan Pal (PW-19) further testified that :

“While I was driving the Gypsy, my attention was towards the vehicles and pedestrians on the road in front of me. I was more eager to reach hospital as early as possible. I did not care to notice shops in the gali from where the injured was picked up. It is correct that I did not care to notice any shops in the gali as my attention was to avoid any collusion with the pedestrians or the vehicles in the gali. I had to blow the horn as well as the siren to dispel the pedestrians and the vehicles in front of my vehicle so that I could reach as early as possible. The siren fitted in the Gypsy was of the same type as is used in an ambulance. It makes a lot of sound. HC Qurban Ali was sitting on the back side with the injured. HC Qurban Ali and myself were in uniform. I do not know whether HC Qurban Ali was having any service revolver with him or not. HC Qurban Ali had told me what the injured had told him. Again said, HC Qurban Ali had also told me what the injured had told him and I had also heard the conversation between HC Qurban Ali and the injured.”

(emphasis added)

18. Ct. Krishan Pal (PW-19) had volunteered to state that he had heard their conversation but it was clarified by HC Qurban Ali later on and also in the hospital what the injured had told him as he was not able to hear clearly what the injured was saying. He had also deposed that they were in the gali itself when the injured had told HC Qurban Ali that he had been injured by the appellants.
19. Asma (PW-13) has also testified that she was the first wife of the

injured. The second wife of her husband Smt. Mehar was also residing with her and her husband. Around 6.00/6.15 pm she had received a telephone call on her mobile phone no. 9810795398 from her husband informing her that he had been shot by one Akbar and Rizwan in Batla House, he had sustained three bullet injuries, he was unable to speak properly. She was then informed by one Heena that her husband was taken to Holy Family Hospital. When she was cross-examined by the PP, she stated that she was not giving the names of Shokat Pasa and Anwar as she had been threatened by the accused persons not to disclose their names in court. During cross-examination, she was unable to recollect the mobile number of her husband. She had also stated that she had not kept the number of her husband in writing and she was unable to find out from anywhere about the mobile number of her husband late Abdul Hafiz Khan.

20. We may note that it is only in her cross-examination this witness has testified that after receiving the call from Hafiz, she immediately came to Mehar at the first floor and told her about the incident.
21. Smt. Mehar (PW-7), second wife of the deceased has also supported the prosecution to the extent that around 6:00pm a phone call was received from her husband at the phone of Asma (PW-13) who had told Asma that he had received bullet injuries. During cross-examination by the PP, she denied that she had ever made a statement to the police and named the appellants.
22. We also deem it appropriate to discuss the testimony of Rahish Hasan (PW-11). The testimony of this witness gains importance as he was an independent witness although he was working as a Constable in Delhi

Police. He testified that on the fateful day i.e. on 21.3.2009 he was going towards Khali-Ul-Lah Masjid from his house and when he reached in front of N- 85, Batla House, in the vacant plot, he noticed that a person was lying in an injured condition and was bleeding. This witness gave information regarding this to the police on 100 number PCR. The IO of the case had met him and made enquiry from him. During cross-examination, this witness testified that he did not ask the name of the injured person from him. The injured person had talked to him and asked him to save him. He did not say anything else. He had stayed at the spot for about five minutes. The injured had not told him anything as to how he had sustained injuries. He had left the spot after the police reached the spot.

23. The MLC in this case was prepared by Dr. Anjana Kharbanda (PW-10) who testified as under :

“On 21.03.2009, I was working as CMO in Holy Family Hospital, New Delhi. On that day, one person namely Abdul Hafiz Khan was brought to the hospital with gunshot injury. The injured Abdul Hafiz Khan was medically examined by me and the MLC in this regard was prepared with details of injuries. The MLC is already Ex. PW-8/DC, bearing my signature at point X. The injured was conscious but drowsy.

In this case, there were following injuries:-

- (i) Punctured wound over occipital region, left side of cheek (mandibular region).*
- (ii) Punctured wound on right side of back with splinter hemorrhages over right side lower chest. The injuries were gun shot injuries.*

During examination of injured, the following was observed:

*Chest- bilateral air entry+
CVS- S-1 S-2 audible
P/A- Soft BS+
CNS- Conscious but drowsy
Bilateral pupils NS/NR*

*XXXXXXXXXX by Sh. L.K. Upadhyay, Ld. Counsel for
accused Shokat Pasa and Akbar.*

*The Patient was unfit for making statement because of his
injuries and condition. The patient was brought by PCR
constable. The address of the injured mentioned at point B on
Ex.PW-8/DC is in my handwriting. The file produced before
me was having the address of the injured and from the same,
I had copied it in the MLC Ex. PW-8/DC. It is correct that
there is a cutting on the time mentioned at point C on Ex.
PW-8/DC. The initial at point C-1 under the cutting does not
pertain to me. This cutting at point C was not done by me.
The patient was opening the eyes on verbal command but
was not responding. S-1 and S-2 mentioned in Ex. PW-8/DC
indicate heart sounds.*

*The punctured wound over occipital region as mentioned in
the MLC Ex. PW-8/DC may affect the motor and sensory
nervous system if the injury extend up to the brain.*

*The person accompanying the injured did not give the history
of the patient.*

*Court Ques : On what basis you have given the history of
the patient in the MLC Ex. PW-8/DC at point 'D' to 'D'.*

*Ans. I had mentioned the history of the patient at
point 'D' to 'D' on Ex. PW-8/DC as stated to me by the
constable who had brought the injured.*

Till the patient was shifted to ICU, no relative or acquaintance of the injured had come. I cannot tell the time when the patient was shifted to the ICU. It might have taken half an hour maximum from the time he was brought before me. Except the casualty card and MLC Ex. PW-8/DC, I had not prepared any other document regarding the patient. The casualty card contains the same history which I had mentioned in MLC Ex. PW-8/DC.

When the patient was brought to me, he was bleeding through the wound. My statement was not recorded in this case. I do not know who is the Investigating Officer of this case. The duty hours were from 2 pm to 8 pm on 21.03.2009.

XXXXXXXX by Ms. Sridevi Paniker (Amicus Curiae), Ld. Counsel for accused Anwar.

It is not necessary that if a patient is conscious, his BP and pulse would be recordable. Vol: it depends upon the condition of the patient. If the BP and pulse of a patient is not recordable, he will not be fully conscious."

24. The trial court has placed strong reliance on the testimonies of HC Qurban Ali (PW-18), Asma (PW-13) and also on the testimony of Ct. Krishan Pal (PW-19), while convicting the appellants, additionally the prosecution has also placed reliance on the testimony of Smt. Mehar (PW-7), second wife of the deceased.
25. The trial court has also reached the conclusion of guilt on the ground that the statement made by the injured to HC Qurban Ali (PW-18) was within the hearing range of Ct. Krishan Pal would be admissible in evidence as per Section 32 of the Indian Evidence Act, 1872. While relying on various judgments, the trial court has held that the dying declaration can be made orally or in writing. There is no specific

form of dying declaration and thus there was no reason to discard the testimony of HC Qurban Ali (PW-18) and Ct. Krishan Pal (PW-19). There was nothing on record to show that there was enmity between PW-18, PW-19 and all the appellants herein. Additionally, the trial court was of the view that both Asma and Mehar had also corroborated the testimonies of PW-18 and PW-19 as a phone call had also been made by the injured to Asma (PW-13) informing her that the appellants herein had shot him and the second wife of the injured Smt. Mehar was also residing in the same house and Asma had then informed Mehar. The trial court was also not impressed by the arguments that HC Qurban Ali (PW-18) had not informed either the IO or any other Superior Officer or sent a message on the wireless when he was in the Gypsy that the injured had disclosed the names of persons who had shot him. The trial court was also not impressed by the fact that HC Qurban Ali (PW-18) who had brought the injured to the hospital did not even inform the Doctor who prepared the MLC that the injured had been shot by the appellants herein.

26. There is no quarrel with the proposition that a dying declaration may be oral or in writing and there is no specific form of recording the dying declaration provided the statement so made is not on account of tutoring, it is not made under coercion or pressure. In short, while relying on a dying declaration, the Court must satisfy itself that the same is reliable and trustworthy.
27. In the present case, two basic issues would arise with respect to the dying declaration. Firstly, whether such a statement was made to HC Qurban Ali, PW-18; Ct. Krishan Pal, PW-19; and Asma, PW-13.

Secondly, was the victim in a position to make such a statement on account of the gun shot injuries? The second issue must be examined first. The injured had suffered the following injuries as per the medical evidence placed on record.

*“(i) an entry wound of firearm bullet on right side of back of thoraco-abdomen region,
(ii) an entry wound of firearm bullet on left side of back of head, posterior most aspect of scalp above back of the neck,
(iii) an entry wound of firearm bullet on right side of upper abdomen,
(iv) an exit wound on left cheek crescentic in shape and
(v) contusion abrasion of size 2.5 cm x 3 cm on left upper chest.”*

28. As per the MLC prepared by Dr. Anjana Kharbanda, PW-10, whose testimony has been reproduced in para 23 above and taking into consideration her evidence, a person who had suffered three gun shot injuries on the body, i.e. (i) an entry wound of firearm bullet on right side of back of thoraco-abdomen region, (ii) an entry wound of firearm bullet on left side of back of head, posterior most aspect of scalp above back of the neck, (iii) an entry wound of firearm bullet on right side of upper abdomen, (iv) an exit wound on left cheek crescentic in shape and (v) contusion abrasion of size 2.5 cm x 3 cm on left upper chest, more particularly one bullet injury which passes through the cheek of the injured, would have been in a position to use his mobile phone, talk to his wife, Asma, and inform her as to who had shot him. It is also virtually impossible for the injured to have informed HC Qurban Ali, PW-18, which was also heard by Ct. Krishan Pal. Having said that we would now examine the first

aspect of the matter i.e. whether the testimony of HC Qurban Ali, PW-18; Ct.Krishan Pal, PW-19; and Asma, PW-13, are reliable and trustworthy.

29. In this case, the first person to reach the spot was PW-11. He was not connected with the present case although he was a constable in the Delhi Police but he was a passer by and he testified that when he had reached in front of Batla House, a vacant plot, he had noticed a person who was injured and was bleeding. It is PW-11 who had given the information regarding this to the police on 100 number and he waited at the spot till the arrival of the police and the IO of the case had met him and made enquiry from him. Since the first phone call was made to the police on 100 number by this witness, the presence of this witness stands fully established at the place of the incident. He confirmed that he had a mobile phone no. 9911545071. We may note that as per PW-11, during cross-examination, he stated that the injured did not tell the name but the injured had talked to him and asked him to save him. He had left the spot only after the police reached the spot. In all probability, if the injured had asked him to save him, the injured would have also informed him about the names of his assailants. Since he is an independent witness, his testimony gains importance.
30. Another aspect, which requires consideration is, according to Head Constable Qurban Ali (PW-18), after the injured was put in the Gypsy and when they reached the main road, the injured informed him within the hearing range of PW-19 the names of his assailants. Qurban Ali had testified that he was sitting on the back side on the Gypsy on the

seat behind the seat of co-passenger on the front.

31. According to Head Constable Qurban Ali (PW-18), after the injured was put in the Gypsy and when they reached the main road, the injured informed him within the hearing range of PW-19 the names of his assailants. Qurban Ali had testified that he was sitting on the back side on the Gypsy on the seat behind the seat of co-passenger on the front. Ordinarily, the police gypsies are not fitted with air-conditioners and are otherwise also did not have a hard roof. In effect, the windows of the Gypsy would not have been rolled up when the incident took place on 21.03.2009. A person who had suffered three gun shot injuries on the body, i.e. (i) an entry wound of firearm bullet on right side of back of thoraco-abdomen region, (ii) an entry wound of firearm bullet on left side of back of head, posterior most aspect of scalp above back of the neck, (iii) an entry wound of firearm bullet on right side of upper abdomen, (iv) an exit wound on left cheek crescentic in shape and (v) contusion abrasion of size 2.5 cm x 3 cm on left upper chest, more particularly one bullet injury which passes through the cheek of the injured could it be possible that PW-19 (Constable Krishan Pal) who was driving the Gypsy and according to his testimony his attention was towards the vehicles and pedestrians on the road in front of him as he was more eager to reach hospital as early as possible and he had to blow the horn and the siren to dispel the pedestrians and the vehicles in front of his vehicle and could have heard the utterances if at all they were made by a person who was seriously injured with gun shot injuries on the body as detailed above.
32. Another aspect which cannot be ignored in this case is a trained Head

Constable of the Delhi Police claims that the injured had informed about the names of the persons who had shot him but claims he did not inform his seniors, did not inform the doctor on duty, did not get his statement recorded under Section 161 Cr.P.C. on the day of the incident and did not inform his seniors from the Gypsy which was fitted with a wireless. For us to place reliance on the testimony of this witness and hold the appellants guilty on the testimony of this witness is not possible as it would be highly unsafe.

33. We are now left with the testimony of Asma (PW-13) who claims that she received a phone call from her husband. Neither the call details of Asma or the deceased have been proved neither the mobile phone of the deceased or Asma was seized, nor there is any evidence on record to show that Asma received a phone call from her husband on the fateful day between 6:00 p.m. to 7:00 p.m. Thus, it would be extremely unsafe to place reliance on the testimony of Asma (PW-13) who claims that she informed Mehar (PW-7). Moreover, having regard to the nature of injuries, it was not possible for the injured to have dialed the phone of the wife. In any case, Mehar has not supported the case of the prosecution as far as the names of the assailants are concerned.
34. We may also notice that Head Constable Qurban Ali had testified that he was sitting with the injured on the back seat of the Gypsy and he was held by him. It is virtually impossible that clothes of Qurban Ali could have escaped even a single spot of blood and despite his holding the injured person with three bullet injuries, one on the left side of cheek and the others on the right upper chest and who according to

this witness was bleeding. If he was holding the injured, it is impossible that his clothes would not have been smeared by blood, but his clothes were not seized and, in fact, the Trial Court goes on to say that is possible that he may not have got his clothes sustained with blood, which is not possible particularly when he was held by him.

35. As per the MLC, the patient was conscious but drowsy, the pulse was not palpable and BP not recordable. We find it difficult to believe that a patient with such parameters would be in a position to make any statement to HC Qurban Ali or make a phone call to his wife.
36. In the case of ***Md. Faizan Ahmad @ Kalu v. State of Bihar***, reported at I (2013) DLT (CrL.) 914 (SC), the Supreme Court of India has cautioned that even if the offence is grave, the persons who are proved to be guilty must be dealt with a firm hand but the seriousness or gravity of the crime must not influence the Court to punish a person against whom there is no credible evidence. It was held as under:

“..... We have no manner of doubt that the offence is grave; the children were abducted and kept in a tunnel for over five months and anonymous calls were made for ransom. Accused whose involvement in such crimes is proved must be dealt with a firm hand, but the seriousness or gravity of the crime must not influence the Court to punish a person against whom there is no credible evidence. The trial Court, therefore, erred in convicting the appellant.”

37. It has further been held in ***Md. Faizan Ahmad @ Kalu*** (supra) as under:

“..... Criminal Courts recognize only legally admissible evidence and not farfetched conjectures and surmises. The High Court’s observation that there was a preconceived plan to

abduct the children would not be applicable to the appellant because there is nothing on record to establish that the appellant met the co-accused and planned a strategy to abduct the children and demand ransom. His case stands on a different footing from that of the other accused. The case of the other accused will have to be dealt with on its own merit. The High Court was carried away by the heinous nature of the crime and, in that, it lost sight of the basic principle underlying criminal jurisprudence that suspicion, however grave, cannot take the place of proof. If a Criminal Court allows its mind to be swayed by the gravity of the offence and proceeds to hand out punishment on that basis, in the absence of any credible evidence, it would be doing great violence to the basic tenets of criminal jurisprudence. We hope and trust that this is just an aberration.”

38. We also deem it appropriate to reproduce the observations made by the Supreme Court of India in the case of **Sarwan Singh Rattan Singh v. State of Punjab**, reported at AIR 1957 Supreme Court 637(1):

“..... It is no doubt a matter of regret that a foul cold-blooded and cruel murder like the present should go unpunished. It may be as Mr.Gopal Singh strenuously urged before us that there is an element of truth in the prosecution story against both the appellants. Mr.Gopal Singh contended that considered as a whole the prosecution story may be true; but between ‘may be true’ and ‘must be true’ there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence.”

39. In **Ramreddy Rajesh Khanna Reddy and Another v. State of A.P.**, reported at (2006) 10 SCC 172, this Court while reiterating the settled legal position, observed as under:

“It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the

pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well settled that suspicion, however grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. At this stage, we also deem it proper to observe that in exercise Crl. Appeal No. 1377/2011 Page 6 of 25 of power under Article 136 of the Constitution, this Court will be extremely loath to upset the judgment of conviction which is confirmed in appeal. However, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court and the High Court Bharat vs. State of M.P. [(2003) 3 SCC 106]. "

40. In the present case, for the reasons detailed above, we find the testimony of HC Qurban Ali, PW-18, and Ct. Krishan Pal, PW-19, to be unreliable and not trustworthy. We also find it virtually impossible for the victim to have picked up a phone and called up his wife, PW-13. Moreover, the evidence of PW-13 is unreliable as neither her mobile phone nor the mobile phone of the victim was seized nor examined nor the receipt of call was proved.
41. We find the evidence of an independent witness, Ct. Rahish Hasan, PW-11, to be reliable as he was the first person, who reached the spot. The testimony of PW-11 has remained unshaken in the cross-examination. PW-11 was the person, who called the Police and if the

victim was in a position to talk, he would have informed PW-11 the names of his assailants.

42. Based on the scientific evidence, we are of the considered view that the victim was not in a position to talk, as is evident from reading of the MLC, post-mortem report and also the testimony of the Doctor, who had recorded in the MLC that the blood pressure was not recordable, there was no pulse and the patient was opening his eyes only on verbal command but was not responding.
43. In our view, the prosecution has not been able to prove its case beyond any shadow of doubt. The disclosure statements are also not free from doubt.
44. Accordingly, the present appeals are allowed. The judgment and the order on sentence passed by the trial court are set aside. The appellants be released forthwith and their bail bonds be cancelled unless they are wanted in any other case.
45. Appeals stand disposed of.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

FEBRUARY 29, 2016

SC