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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRIMINAL APPEAL NO.227/2015

Reserved on: 4th December, 2015

Date of decision: 15th March, 2016

STATE

..... Appellant

Through: Mr. Varun Goswami, APP for State,
Mr. Anshul Mittal and Mr. Vipin K. Mittal,
Advocates for the /complainant.

versus

MAHENDER SINGH

..... Respondent

Through: None.

CORAM:

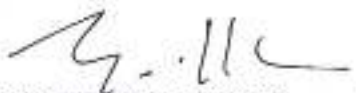
HON'BLE MR. JUSTICE SANJIV KHANNA

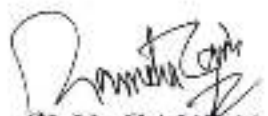
HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J.

For detailed order see Criminal Appeal No.849/2013, *Rohit*

Sehrawat Vs. State pronounced today.


(SANJIV KHANNA)
JUDGE


(R.K. GAUBA)
JUDGE

MARCH 15th, 2016

NA

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRIMINAL APPEAL NO. 849/2013Reserved on: 4th December, 2015Date of decision: 15th March, 2016**ROHIT SEHRAWAT****.....Appellant**

Through: Mr. N. Hariharan, Sr. Advocate
with Mr. Sudhir Nagar, Mr. Siddharth
S. Yadav, Mr. Sahil Paul, Mr. Amartya
Kanjilal and Mr. Vijay Kasana, Advocates

versus**STATE****..... Respondent**

Through: Mr. Varun Goswami, APP for State.
Mr. Anshul Mittal and Mr. Vipin K. Mittal,
Advocates for the /complainant.

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CRIMINAL APPEAL NO. 227/2015**STATE****..... Appellant**

Through: Mr. Varun Goswami, APP for State.
Mr. Anshul Mittal and Mr. Vipin K. Mittal,
Advocates for the /complainant.

versus**MAHENDER SINGH****..... Respondent**

Through: None

CORAM:**HON'BLE MR. JUSTICE SANJIV KHANNA****HON'BLE MR. JUSTICE R.K. GAUBA****SANJIV KHANNA, J.**

1. The judgment under challenge dated 7th June, 2013, convicts Rohit Schrawat for murder of Bhagat Raj and offences under Section 201 of the Indian Penal Code, 1860 (IPC for short) and Section 27 of Arms Act, 1957. The same judgment acquits Mahender Singh, father of Rohit Schrawat, from the charge of conspiracy under Section 120B and other provisions of the IPC.
2. By the order on sentence dated 7th June, 2013, Rohit Schrawat has been sentenced to imprisonment for life, fine of Rs.10,000/- and in default of payment of fine to undergo simple imprisonment for two years for the offence under section 302 IPC; rigorous imprisonment for five years, fine of Rs.5000/- and in default of payment of fine to undergo simple imprisonment for six months for the offence under section 201 IPC; and rigorous imprisonment for three years, fine of Rs.5000/- and in default of payment of fine to undergo simple imprisonment for three months for the offence under Section 27 of the Arms Act.
3. Undisputed facts proved and not under challenge are first noticed. It is accepted that Bhagat Raj had suffered and died a homicidal death as a result of fire arm injuries on 30th May, 2008. Dr. Bhavna Jain (PW-23) has deposed that on 30th May, 2008 at about 12.35 P.M., Bhagat Raj was brought to the casualty ward of Baba Saheb Ambedkar Hospital, Rohini (BSA Hospital, for short) and was resuscitated and referred to Senior Resident Surgery. Dr. Anil Kumar Rawat (PW-28) of Saroj Hospital, Rohini has deposed that Bhagat Raj was referred to the said hospital from the BSA Hospital with alleged history of

gunshot wounds. On examination, his condition was found to be very serious, pulse and BP were not recordable. He was operated upon by PW-28 and his team of doctors, but could not be saved and was declared dead at 3.30 P.M. on 30th May, 2008. Post-mortem on the dead body of Bhagat Raj was conducted by Mr. V.K. Jha (PW-25) on 30th May, 2008 and he has referred to five wounds, namely:- (i) lacerated penetrating wound on the chest with tattooing as a result of firearm injury, which he has described as entry wound caused by a firearm; (ii) lacerated punctured wound on the right dorsum of the hand without burning, singing or tattooing; (iii) lacerated but perforated wound on the base of the little finger, which was an exit wound of injury No. 2; (iv) lacerated punctured wounds below the right knee joint with tattooing, but without burning and singing described as entry wound of the fire arm and (v) lacerated perforated wound opposite injury No. 4. On exploration, the bullet, which had resulted in injury No. 1 was recovered between L-1 and L-2 vertebra. The said bullet had lacerated the muscle in the fifth inter-costal space extending into the chest cavity rupturing the right plura, etc. The cause of death was the combined effect of asphyxia and hemorrhage shock upon fire arm injury no.1, and the said injury was sufficient to cause death in the ordinary course of nature. We shall be referring to the post-mortem report, Exhibit PW-25/A, subsequently.

4. It is also established beyond doubt that Bhagat Raj had suffered the said fire arm wounds in the office of M/s Rohit Associates,

located at Plot No. 291, Pocket-8, Sector 24, Rohini between 12:00 to 12.30 PM on 30th May, 2008. The said injuries had caused the blood to spill at two places on the floor next to the main entrance door, and the main office table. [See scaled and un-scaled site plan marked Ex.PW30/A and Ex.PW2/E, respectively and the photographs marked Ex. PW21/1 to 21/10].

5. Other facts established beyond the pale of doubt pertain to the recoveries of two fired cartridges and one fired lead from the office of Rohit Associates, seized vide Memo dated 30th May, 2008 marked Ex.PW-2/B and 2/C. Recovery of fired cartridges and lead from the said office is as deposed and affirmed by Suraj Bhan (PW-2), HC Mahender Singh(PW-21), SI Satpal (PW-22), SI Deepak Malik(PW-32) and Mahender Singh(PW-35), vide documents marked Ex. PW-2/B and Ex PW-2/C. The ballistic report (Ex.Pw39/A) by K.C. Varshney (PW-39) opines that the two fired 7.65 mm cartridges cases (Ex.P6 and Ex.P7) had identical markings and therefore were fired from the same fire arm and that the fired bullet or lead (Ex.P8) recovered from the office of Rohit Associates and the fired bullet (projectile) recovered from the body of the deceased at the time of post mortem (Ex.PW32/P-1), correspond to the 7.65mm cartridge. (K.C. Varshney (PW-39)'s claim in the report Ex.PW39/A that the two projectiles had been fired from an improvised firearm, is a disputed assertion. This controversy has been examined.)
6. The primary and core issue for consideration is whether Rohit Sehrawat was the perpetrator, who had caused the firearm

injuries. To prove this imputation, the prosecution relies upon the first informant and statedly the eye witness, Suraj Bhan (PW-2). Suraj Bhan (PW-2) states that on 30th May, 2008 at about 12 noon, Bhagat Raj, son of his uncle Randhir Singh, had come to his shop and was disturbed on account of disputes between him and Rohit Sehrawat and his father Mahender Singh regarding purchase of land at Panchkula as inspite of having made the entire payment, the documents had not been furnished. Bhagat Raj had been promised that he would get double the amount invested. Bhagat Raj on receiving a call from Rohit Sehrawat, had proceeded outside to converse. Bhagat Raj had thereafter stated that they would go to the office of Rohit Sehrawat at Pocket 8, Section 28, Rohini. Suraj Bhan (PW-2) and Bhagat Raj went to the office of Rohit Sehrawat and had parked the car in front of the office. Bhagat Raj had moved towards the office, while PW-2 was locking the car and was at a distance of 20-25 feet. The moment Bhagat Raj entered the office, Rohit Sehrawat fired. In all, three shots were fired, which had hit Bhagat Raj on his right hand, right leg and chest on the left side. Bhagat Raj fell down. Rohit Sehrawat, who was armed with the pistol, managed to flee from the office and since he was armed, PW-2 did not apprehend him. PW-2 took Bhagat Raj to the BSA Hospital and informed wife of Bhagat Raj about the incident on telephone. Relatives of Bhagat Raj reached the said hospital and from there Bhagat Raj was taken to Saroj Hospital in an ambulance. The police came to Saroj Hospital and had recorded PW-2's statement,

Exhibit PW-2/A, which became the substratum of the FIR. Bhagat Raj expired the same day at about 3 P.M.

7. The trial court in the impugned judgment has disbelieved and not accepted that Suraj Bhan (PW-2) and deceased Bhagat Raj had together gone to the office of Rohit Associates, and that PW-2 had taken Bhagat Raj to the BSA Hospital. The reasons given by the trial court in the impugned judgment, which are highlighted and also relied upon on behalf of Rohit Sehrawat are:-

- (i) As per the MLC, Exhibit PW-20/DA, Bhagat Raj was brought to the BSA Hospital by one Raj Kumar whose parentage, address and telephone No. 9350367919 was recorded. The said Raj Kumar was not interrogated by the police and did not appear as a witness. Suraj Bhan (PW-2) was not the recorded person who had brought Bhagat Raj to the BSA hospital.
- (ii) PW-2 did not use his own mobile phone for making any call to the local police or the Police Control Room or to call wife of the deceased.
- (iii) In Exhibit PW-2/A, Suraj Bhan (PW-2) did not aver that he had used Bhagat Raj's mobile phone to make the call to his wife and not his own mobile phone.
- (iv) PW-2's narration that he had forgotten his own mobile phone when he and Bhagat Raj had gone to the office of Rohit Associates was make-belief and false.



- (v) Vikas Dabas (PW-20) and not Suraj Bhan (PW-2), had taken discharge from the BSA hospital. Vikas Dabas (PW-20) in his handwriting had written on the MLC Exhibit PW-20/DA that "they do not want to get treatment in the said hospital- *"Hum yahan par eelaj nahin karwana chahte"*. This suggests that PW-2 was not in picture or present till Bhagat Raj was taken to the Saroj Hospital.
- (vi) The MLC Ex. PW-20/DA does not mention or name Rohit Sehrawat as the perpetrator. Had Suraj Bhan (PW-2) taken Bhagat Raj to the BSA hospital and was an eye witness, he would have disclosed the name of the perpetrator to the doctors, who in turn would have recorded the perpetrator's name in the MLC.
- (vii) As per PCR form, PW-40/T21 dated 30th May, 2008 recorded at 12:59:26, the injured was admitted to Saroj Hospital by one Ravinder Mathur and the said witness has not been examined.
- (viii) Narender Singh (PW-13) had made a call to the Police Control Room. Thereupon, PCR team had reached the Saroj Hospital. The PCR form PW 40/T-21 does not mention that PW-2 was present.
- (ix) Row No. 5 in the crime team report Ex.PW-22/A does not mention the name of the complainant and was left blank. The crime team had inspected the site between 4 and 4.30 P.M., and if Suraj Bhan (PW-2)

was the complainant, his name should have been mentioned in row No. 5.

- (x) Scaled site plan marked Exhibit PW-30/A and unscaled site plan Exhibit PW-2/E as per the prosecution version, were prepared on the pointing out of Suraj Bhan (PW-2). As per the said site plans and Suraj Bhan (PW-2), Rohit Sehrawat was sitting on his revolving chair and had fired three shots. Contrary to PW-2's deposition: (a) only two empty cartridges and one fired lead were recovered from the crime scene; (b) scaled site plan Exhibit PW-30/A mentions a bullet like mark on the wall behind the chair where Rohit Sehrawat was sitting; (c) the distance between the revolving chair and the entry point to the office was more than five meters. Tattoo marks were visible on injury Nos.(i) and (iv) as per Dr.V.K. Jha (PW-25) and, therefore, the said injuries were caused from a shorter distance of 1-2 feet.
- (xi) Prosecution has failed to examine neighbours, who had offices/shops in the same market at Pocket 8, Section 24, Rohini. Employees/servants of Rohit Sehrawat were also not examined.
- (xii) There was a delay in dispatching the FIR to the Magistrate. The Magistrate had received the FIR at 10 A.M. on 31st May, 2008, whereas the incident had taken place at 12 noon.

8. We have examined the said contentions and would accept that there are lapses in the investigation, but this by itself, would not be a good ground or justification to discard and hold that the testimony of Suraj Bhan (PW-2) as an eye witness is a sham and the narration a falsehood. Deficiency in investigation would not stand in the way of the court in arriving at a finding of guilt if it is otherwise found to have been proved. (See paragraph 12 in *Mahendra Singh Vs. State of M.P.*, (2007) 9 SCC 796 and other decisions mentioned therein.) The MLC of Bhagat Raj at the BSA Hospital marked Exhibit PW-20/DA, records that the patient, i.e., Bhagat Raj was admitted to the said hospital at 12.35 P.M. and was discharged against medical advice at 12.55 P.M. Bhagat Raj's age, parentage and address have been recorded. This indicates that someone who knew Bhagat Raj had given the said details. The column relating to name of the relative and friend was left blank and not filled up. However, in the left side column, name of Raj Kumar, his parentage, address, telephone number were recorded. It is not necessary that names and details of all persons who bring the patient to the hospital should be recorded in the MLC. In *Pradeep Khatri Vs. State*, 2014(4) JCC 3003, a division bench of this Court has observed that doctors do hesitate in recording facts for they would have to depose in the criminal trial. Decision in CrI. A. No. 81/1997, *Kishan Pal Vs. State*, was distinguished on facts. Reference was made to *Pattipati Venkaiah Vs. State of A.P.* AIR 1985 SC 1715, to elucidate that doctors are not concerned with who has committed the

offence, for their primary effort and task is to save life and provide medical treatment. Thus it was irrelevant to the doctor, whether the person who had brought the injured, was an eye witness or whether he had or had not named the assailant. Non recording of the name of the assailant, when the deceased was brought to the hospital by a purported eye-witness, has to be examined along with other facts and the weight or evidentiary value attached to this fact would depend upon the factual matrix of each case. In general no principle of universal application would apply. This fact by itself would not be conclusively establish that the person who has brought the injured patient, was or was not an eye witness.

9. Suraj Bhan (PW-2) was not questioned about the presence and identity of Raj Kumar. To challenge PW-2's version on oath, he should have been asked and questioned about the said Raj Kumar. Exhibit PW-2/A, on the basis of which FIR in question No. 363/2008 was recorded, names Rohit Sehrawat as the perpetrator, who had fired at Bhagat Raj when Suraj Bhan (PW-2) along with Bhagat Raj had gone to his office. Rohit Sehrawat was sitting on his chair and had drawn his pistol to fire three shots. Initially, the FIR was recorded under Section 307 IPC and only after Bhagat Raj had died, it was converted into Section 302 IPC. ASI Paitu Oraon (PW-14) has deposed that one Constable Raman had brought the rukka sent by SI Deepak Kumar at about 3 P.M. and on this basis he got the FIR No. 363/2008 recorded on the computer and had made an endorsement on the rukka marked Exhibit PW-14/A. PW-14

had also recorded DD No. 23/A, marked Exhibit PW-14/C, which was recorded at 3.15 P.M.

10. SI Deepak Malik (PW-32) has stated that on 30th May, 2008, on receiving DD No.20, Police Post Budh Vihar, he along with Constable Raman had proceeded to the office of Rohit Associates and had seen blood lying near the entry gate. In the meanwhile, Head Constable Sukhbeer along with Constable Naresh and other police staff had also reached there after being informed that firing had taken place. The injured, they had learnt, had been taken to the BSA Hospital. PW-32 had proceeded to the BSA hospital and came to know that the injured had been shifted to Saroj Hospital by his family members. He had collected the MLC of Bhagat Raj from the BSA Hospital. On reaching Saroj Hospital, he found that Bhagat Raj was admitted to the ICU and on making inquiries, came across Suraj Bhan, the eye-witness. He had then recorded statement of Suraj Bhan marked Ex.PW-2/A and had sent the 'Rukka' for registration of FIR. On the same day, they learnt that Bhagat Raj had died and thereafter, investigation was taken over by the SHO Inspector Mahender Singh (PW-35). PW-32 in his cross-examination has stated that he had made a return call to the telephone number mentioned on DD No.20 and spoken to a person, who claimed that he was a brother of Bhagat Raj but had not asked his name. He was told that Bhagat Raj had been shot and was taken to Saroj Hospital. The witness did not know whether he had met the said person at the Saroj Hospital but claimed that he met Suraj Bhan, and

had later learnt that he had spoken to Suraj Bhan. PW-32 accepted that he had not interrogated or made inquiries about Raj Kumar. However, he affirmed that he had gone to the place of incident and Suraj Bhan (PW-2) was with them.

11. Constable Raman (PW-34) affirms having visited the spot on 30th May, 2008 with SI Deepak Malik (PW-32) and then having reached the BSA Hospital, where they came to know that the injured had been shifted to Saroj Hospital. They had then proceeded to the Saroj Hospital and had met Suraj Bhan (PW-2), whose statement was recorded and 'Rukka' was handed over to PW-34 for registration of the FIR. They had collected the MLC of the deceased from the BSA Hospital.
12. Mahender Singh (PW-35) had also visited the place of occurrence and had reached the BSA Hospital, where they came to know that the injured had been shifted to Saroj Hospital for treatment by his family members. They had then proceeded to Saroj Hospital and found that the injured was 'unfit for statement' and was being treated for gunshot injuries. On making inquiries from SI Deepak Malik (PW-32), he learnt that the eye witness Suraj Bhan (PW-2) had made a statement and 'Tehrir' had been sent for registration of the FIR under Section 307 IPC. When they were about to leave the hospital with Suraj Bhan, they came to know that Bhagat Raj had expired. Thereafter, they reached the spot and site plan marked Ex.PW30/A was prepared. Crime Team was called and recoveries of two fired cartridges, one lead and shoes of Bhagat Raj were made. Suraj Bhan, the eyewitness was with them.

13. Narender Singh (PW-13) confirms the testimony and the fact that Suraj Bhan (PW-2) was an eye witness. PW-13 has deposed that on 30th May, 2008, when he was about to go to the office, he had learnt that Bhagat Raj had been shot and that he should immediately reach BSA Hospital, Rohini. Two others, Vikas and Sujit had also come to the hospital. Suraj Bhan (PW-2) had told him that Rohit Sehrawat had shot Bhagat Raj. They had shifted Bhagat Raj from the said hospital to Saroj Hospital. Narender Singh (PW-13) was in the ambulance with Vikas and Suraj Bhan (PW-2), when Bhagat Raj was taken to the Saroj Hospital. In his cross-examination, Narender Singh (PW-13) affirmed having seen Suraj Bhan (PW-2) at the BSA Hospital, as he had denied the suggestion that Suraj Bhan was seen for the first time only at the Saroj Hospital. Narender Singh (PW-13) affirms that he had got Bhagat Raj admitted to the Saroj Hospital and he was present with Bhagat Raj at that time. Other family members had also arrived at the Saroj Hospital.
14. It is correct that the crime team report marked Exhibit PW-22/A does not mention the name of the complainant and row No. 5 was left blank, but this does not mean that there was no complainant. It significantly does mention that FIR No. 363/2008 dated 30th May, 2008 had been registered under Section 307 IPC and the crime team was present at the spot from 4 to 4.30 P.M. The place where the crime was committed was certainly the office of Rohit Associates in Pocket 8, Sector 24, Rohini.

15. Testimony of Suraj Bhan (PW-2), that he had taken Bhagat Raj to the BSA Hospital in the Maruti Zen car of Bhagat Raj is corroborated from the blood stains, which were found on the car seat cover. Naresh Kumar (PW-29), Senior Scientific Officer has deposed that he had examined this vehicle, Maruti Zen HR-26H-3071, and blood was detected in the said white car and a portion of the seat cover was handed over for FSL examination as mentioned in report Exhibit PW-29/A. He identified the said two pieces of seat cover, which were blood stained and marked as Exhibit PW-31/1. The said witness was not cross-examined.
16. On the question of telephone numbers and whether Suraj Bhan (PW-2) had indeed made the phone call to the wife of Bhagat Raj about the incident, we would like to refer to the cross-examination of Suraj Bhan (PW-2) in which he has stated:

“It is correct that full name of Bhagat Raj is Bhagat Raj Solanki. It is correct that Narender is also having full name as Narender Solanki. (Vol. However, they both are usually called by initials i.e. Bhagat Raj and Narender only). I am having cordial relation with Narender and Randhir Singh and his family members. I used to talk to them frequently on mobile prior to the incident. I remember mobile number of Narender and Randhir Singh. Mobile number of Narender is 9312435085. Ambedkar Hospital is at a distance of 4 KMS from the office of Rohit. We reached hospital within 10 minutes. (Vol. We reached hospital by 12.30 PM approximately).

Q. I put it to you that on 30.05.2008 at 12:36:58 hours Narender informed you from his mobile i.e. 9312435085 at your mobile no.

9313541661 and informed you about the incident and told you to reach at Ambedkar Hospital?

Ans. It is wrong. I was not carrying my mobile at that time.

It is correct that mobile number of uncle Randhir Singh is 9312223922.

Q. Is it correct that at on 30.05.2008 at 12:38:12 hours you telephoned from your mobile no.9313541661 and called up Randhir Singh on his mobile no.9312223922 to find out the details of the incident if he knew and talked to him for 46 and half seconds?

Ans. I did not make any such call (Vol. By that time I had reached at the hospital, my brother Joginder had reached there with my mobile. I had called up Randhir Singh before 12.00 noon before we left our shop for the office of Rohit).

It might be correct that I had made such call to Randhir Singh at 11:54:06 hours and talked to him for 506 seconds. At time of such call, Bhagat Raj was already there at my said shop. Bhagat Raj had come to my shop 5/10 minutes prior to 12.00 noon."

17. The aforesaid quotation refers to three mobile numbers: mobile number of Narender- 9312435085, Suraj Bhan- 9313541661 and of Randhir Singh- 9312223922. Suraj Bhan (PW-2) affirms having spoken to Randhir Singh at 11.54 on 30th May, 2008 from his mobile phone. PW-2 had forgotten to carry his own mobile phone when he and Bhagat Raj had gone to meet Rohit Sehrawat. PW-2's brother Yogender had subsequently brought PW-2's mobile phone to the Soraj hospital. At 12:36, PW-2 did not converse with Narender for at that time he was

not carrying his mobile phone. We would note and record that pointed and acute questions were put to the said witness in the cross-examination, but the same were answered with aplomb and candor, without hesitation and mincing of words. The clarity and conviction in the answers shows and reflects the true narration. In his earlier portion of the cross-examination, Suraj Bhan (PW-2) had also stated:-

“.....It is correct that after the incident I am stating for the first time that I had forgotten my mobile phone at my shop on that day.

.....I had not stated before the police at the time of my first statement that when Bhagat Raj had come to my shop, he had received a call from accused Rohit. I had not stated before the police that I had made a call at the house of Bhagat Raj and informed the wife of Bhagat Raj about the incident through the mobile of Bhagat Raj. I had not given that mobile of Bhagat Raj to the police. (Vol. I gave the same to Narender, elder brother of Bhagat Raj).”

18. To leave behind or forget one's mobile phone is not unusual or peculiar. It can happen with anyone. Suraj Bhan (PW-2) had given his own mobile phone number, which was mentioned in the first information Exhibit PW-2/A, the English translation of which would read as under:-

“Today around 12 noon, my cousin Bhagat Raj, son of my uncle Randhir came to me and he looked tense. Upon my questioning, he told me that Mahinder Singh was not giving him documents of the land (property) in Panchkula, which Mahinder had helped them purchase

whereas complete payment for the property had been made. From many days he had been saying that he will return the papers but since the last few days he turned dishonest and was unwilling to give the documents. And when yesterday Bhagat Raj asked for the documents from Mahinder's son Rohit, they threatened him that "ja nahi dete, jayda phadphadaya toh jaan se jaayega" (you will lose your life. if you create any hue and cry) but still asked for a meeting today. Bhagat Raj also asked me to go along with him to Rohit's office in Sector-24. I went along with him in his car to Rohit's Office (Rohit Associates) Plot No. 271, Pocket 8, Sector-24. After parking the car on the road, we moved towards the office, Bhagat Raj was walking in front and I was behind him. When Bhagat Raj stepped into the office, Rohit was sitting on his chair, facing towards him, he immediately drew his pistol out and started firing at Bhagat Raj. Rohit fired three shots at Bhagat Raj, out of which one hit into Bhagat Raj's chest. Consequently, Bhagat Raj fell to the floor. I got busy in handling him. In the meanwhile, Rohit ran away in his car. Immediately I put Bhagat Raj into the car and concurrently called up relatives and acquaintances and we reached Baba Saheb Ambedkar Hospital first and later we took him to Saroj Hospital, Rohini. Mahinder and his son Rohit had committed this heinous crime with the intention of not giving the documents of the property and with the intention of killing Bhagat raj. Legal action should be taken. Statement heard, it is correct."

A studied reading of the said statement would show that it did not occur to Suraj Bhan (PW-2) or the recording officer that Suraj Bhan (PW-2) should be asked to give details as to how he had informed and intimated the family members of Bhagat Raj. The relevance of the fact that Suraj Bhan (PW-2) had used the

mobile phone of Bhagat Raj to make a call and inform his wife was not understood at that time. This aspect assumed importance subsequently when Suraj Bhan (PW-2) was questioned on the said aspect.

19. Deceased Bhagat Raj was using mobile phone No. 9350281179, which was issued to one Manohar Lal (PW-42). This witness, i.e., PW-42 has testified that he had sold the mobile phone instrument with SIM card No. 9350281179 to Bhagat Raj in March, 2005. He identified the consumer application form marked Exhibit PW-26/A. We would accept the said version and statement.
20. Raj Kumar (PW-26), Nodal Officer, Reliance Communication, produced the original customer application form marked Exhibit PW-27/A of Manohar Lal (PW-42) along with his ID proof in the form of voter card Exhibit PW-26/B and the call record details from 25th May, 2008 till 30th May, 2008 marked Exhibit PW-26/C. PW-26 had also proved the customer application form of Suraj Bhan (PW-2) for SIM No. 9313541661, Exhibit PW-26/D, ID No. Exhibit PW-26/E and the call record details from 5th May, 2008 to 30th May, 2008 marked Exhibit PW-26/F. PW-26 had produced the composite certificate under Section 65B of the Evidence Act, which was marked Exhibit PW-26/G. This witness was not cross-examined. The call record details marked Exhibit PW-26/C of telephone No. 9350281179 being used by Bhagat Raj and 9313541661, used by Suraj Bhan (PW-2) affirm and corroborate the testimony of Suraj Bhan (PW-2). On 30th May,

2008, at about 11.57 P.M., Bhagat Raj had received a call on his number 9350281179 from mobile No. 9811500024, which as noticed below, was being used by Rohit Sehrawat. Between 12.32 and 12.37 P.M. on 30th May, 2008, three calls were made one after the other from telephone No. 9350281179 to telephone No. 9873140066. The time mentioned in the MLC Exhibit PW-20/DA as to when Bhagat Raj was brought to BSA Hospital, is 12.35 P.M. Thus, these calls were made around the same time or just before Bhagat Raj was taken to the hospital. The CDR Exhibit PW-26/C would also reflect a time gap of about 20 minutes between 12.15 P.M. and 12.35 P.M. when no call was received or made on mobile No. 9350281179. This was the time when Bhagat Raj had suffered fatal injuries at the office of Rohit Associates.

21. CDR of mobile No. 9313541661 show that the phone was inactive between 12.13 P.M. and 12.36 P.M., again confirming and corroborating the testimony of Suraj Bhan (PW-2), that he was not carrying his mobile phone. The contention of the appellant that no telephone call was made to the police by Suraj Bhan (PW-2) is wrong. The police control room form marked Ex.PW40/T-21 refers to a call by Narender Sholanki at 12:59 from phone No.9312435086, but the call records of the telephone no. of Suraj Bhan (PW-2) No.9313541661 marked Ex.PW26/F also show phone calls to No.100, the first one being at 12:58 on 30th May, 2008. PW-2 has deposed that he had called the police from his own phone after he had reached the hospital. It is apparent that a call was made to the police by

PW-2 before the call by Narender Solanki. There were two subsequent calls to No. 100 at 1.44 and 1.48 P.M.

22. Anuj Bhatia (PW-27), Nodal Officer Vodafone Essar Mobile Services had proved the customer application form in the name of Rohit Sehrawat for the No. 9811500024, a copy of which was marked Exhibit PW-27/A and the CDR details from 30th May, 2008 to 11th August, 2008 marked Exhibit PW27/C. He had also proved customer application form of the acquitted accused Mahinder Singh for No. 9811122626, a copy of which was marked Exhibit PW-27/D and the CDRs from 30th May, 2008 till 11th August, 2008, which were marked as Exhibit PW-27/A. For the two CDRs, the certificates under Section 65B of the Evidence Act were marked Exhibit PW-27/G and PW-27/H, respectively. The CDR of telephone No. 9811500024 confirms conversations between Bhagat Raj and Rohit Sehrawat at about 11.55 and 11.57 A.M., which are in seriatim with the CDR of telephone No. 9350281179, Exhibit PW-26/C. Rohit Sehrawat had called Ravi Raj Chiller (PW-17), the gun dealer, on his telephone No. 9315451123 at 12.01 PM. He had made three calls to Mahender Singh, his father, on telephone number 9811122626 at 12.14, 12.24 and 12.27 P.M. Thereafter the phone was not used and became inactive.
23. This brings us to the deposition of Vikas Dabas (PW-20). As noted above, Vikas Dabas (PW-20) had made the endorsement on the MLC PW-20/DA that they wanted to shift Bhagat Raj to another hospital. Thus the presence of Vikas Dabas (PW-20) at the BSA hospital is established. Vikas Dabas (PW-20) was not

the first informant or the complainant, while he was certainly aware about the occurrence, and also the factum that Suraj Bhan (PW-2) as the first informant, had implicated Rohit Sehrawat for the firing and killing Bhagat Raj in his office. Vikas Dabas (PW-20) in his deposition, to negate the testimony of Suraj Bhan (PW-2), attributed a far greater and vital role to himself. PW-20 began his examination-in-chief, proclaiming that he had gone by bus to the office of Rohit Associates between 12:00 and 12:15 pm, where he saw a crowd assembled and that Bhagat Raj, whom he already knew, was lying in the injured condition near the gate. The said deposition by Vikas Dabas (PW-20) is not correct because CDRs of telephone No.9350281179 marked Ex.PW26/C indicate exchange of phone calls till 12:15 p.m. There are as many as six calls between 11:55 a.m. and 12:15 p.m. We would not rely upon this factum alone to disbelieve Vikas Dabas (PW-20)'s version for the simple reason, a witness may not exactly recollect the time. There are perceptive and fundamental reasons to disbelieve PW-20's credibility. We would list them. Vikas Dabas (PW-20) was cross-examined by the public prosecutor and in his cross-examination claimed that he had not seen or met Suraj Bhan (PW-2), Narender Singh (PW-13) or Sujit (PW-4) at the BSA hospital, and they had taken Bhagat Raj from the BSA hospital to the Saroj Hospital. This assertion of Vikas Dabas (PW-20) is unbelievable and dubious. Vikas Dabas (PW-20) professes that since he knew Bhagat Raj, he had taken the responsibility and made the endorsement on the

MLC, PW-20/DA, seeking discharge of Bhagat Raj against medical advice of the doctors at the BSA Hospital. Discharge against medical advice when Bhagat Raj was struggling for life, was a decision forth with danger, risks and grave consequences. Bhagat Raj was critical and doctors had advised and warned that he should not be shifted to another hospital. Bhagat Raj could have died on the way to a private hospital. Decisions to shift a patient against medical advice are taken by a close and responsible family member or a close friend, and not by an acquaintance or a known person. Doctors would not accept such requests by even a friend. Question of expenses payable for services of an ambulance and admission in the private hospital would arise. At this stage, we would like to reproduce in verbatim the cross-examination of Vikas Dabas (PW-20):

"XXXX by, learned Counsel
for both accused.

When I saw Bhagat Raj in injured condition outside the office of Rohit Associates, I called two persons from the crowd and with their help I put Bhagat Raj in his own car and took him to BSA Hospital. Those two persons also accompanied me to the hospital and remained with me at the time of admission of Bhagat Raj in the hospital. One of those two persons had talked with the doctor at the time of admission. I had tried to inquire from Bhagat Raj as to what had happened but he was not in any condition to tell anything. We remained at the hospital for 4-5 minutes and since he was taking long/deep breaths, we decided to take him to Saroj Hospital. At the request of the attending doctor, I had mentioned in the MLC that we are

taking away Bhagat Raj at our own responsibility. MLC Ex. PW-20/DA bears endorsement in this regard in my hand and bears my signatures and my thumb impression. Such portion is now encircled in red and Marked-X. I had also informed wife of Bhagat Raj telephonically that we are taking him to Saroj Hospital. Bhagat Raj was not able to state anything even on our way upto Saroj Hospital. Those two persons had accompanied me with Bhagat Raj till Saroj Hospital and none else. No relative of Bhagat Raj met us till we reached Saroj Hospital.

At Saroj Hospital, Bhagat Raj was taken to OT straightway and thereafter his relatives had reached at Saroj Hospital. Police had also come SGM hospital and told me to come to PS Sultan Puri between 7:00 PM and 7:30 PM. I along with Hem Chander, Virender and Sujit reached there at about 7:30 PM. Accused Rohit, present in court today, was also there. We were interrogated by the police. Rohit was also interrogated by the police. It was also asked from me whether I had any arm or licence thereof to which I replied in negative. Same question was asked from the other two persons who had accompanied me and they gave similar reply. However, Rohit answered that he was having a weapon as well as licence. Police then took Rohit for recovery of weapon at his residence."

The said cross-examination speaks for itself and visibly demonstrates that Vikas Dabas (PW-20) had rattled like a parrot, falsities apparently spoon fed to him after someone had worked on the testimony of Suraj Bhan (PW2). The narration is too striking and leaves you benumbed. This witness was examined after the public witnesses, including those who had turned hostile had testified, and seeks to trip and clobber at the

deposition of Suraj Bhan (PW-2), who had singularly indicted and enmeshed Rohit Sehrawat. This statement in a concerted manner seeks to nullify the entire prosecution case and indeed counsel for the appellant heavily relies upon it. Vikas Dabas (PW-20) proclaims that he had lifted Bhagat Raj with the help of two others in the crowd and taken Bhagat Raj in his car to the BSA hospital. PW-20 does not name the two persons. He profess that Bhagat Raj did not tell him anything and that they had remained at the BSA hospital for 4-5 minutes. This assertion is apparently false and incorrect for the MLC, Ex.PW20/DA, records that Bhagat Raj was brought to the said hospital at about 12.35 PM and had remained there till 12:50 PM. The patient at the time of admission had informed the doctors that he had suffered fire arm injuries. He was conscious and oriented. However, the patient had not given the time of occurrence and was declared unfit for statement. Vikas Dabas (PW-20) professed that he had made a call to the wife of Bhagat Raj using the latter's phone, but has accepted that he did not know her number. It is obvious that this statement was to counter the statement of Suraj Bhan (PW-2) that he had made a call to the wife of Bhagat Raj and had informed her about the occurrence. Vikas Dabas (PW-20) pretends that relatives of Bhagat Raj were not present in the BSA Hospital, and they had reached the Saroj hospital, a fact which is patently false. The last paragraph of the cross-examination is more revealing and indiscreet and therefore confirms our opinion. PW 20 has stated that Hem Chander Singh (PW-12), Virender and Sujit

Khatri (PW-4) had come to police Station Sultanpuri at about 7:30 p.m. and at that time Rohit Sehrawat was also present and under interrogation. Vikas Dabas (PW-2)'s attempt to titivate is exposed when he states that Rohit Sehrawat was asked in his presence about the licenced weapon / arms licence and thereafter the police had taken Rohit Sehrawat for recovery of weapon to his residence. The said statement is laughable and farcical.

24. The prosecution version which we would, for reasons to follow, accept, is that the weapon of offence was never recovered. The licensed pistol owned by Rohit Sehrawat could not be traced and subjected to forensic examination. Rohit Sehrawat as per the prosecution version was arrested on 1st June, 2008 at about 2 AM i.e. past midnight, outside Jaipur Golden Hospital. Rohit Sehrawat claims that he was arrested on 30th May, 2008 and had at that time handed over his licenced pistol and the arms licence. The aforesaid version set up by the defence is an afterthought, a belated claim, which is conceited and a mere subterfuge to cover-up failure to produce the licensed weapon. Contemporaneous trial court record is revealing and negates the challenge, for the prosecution had moved three applications on 01.06.08, 06.06.08 and 11.06.08 for police remand pleading that the weapon of offence had to be recovered. These applications were hotly contested by counsel for Rohit Sehrawat, but not once did they assert and propound that the licensed weapon had been produced and was in police custody, or submit that the ballistic examination

would establish that the licensed weapon was not used in the crime. We have no hesitation in recording that these contemporaneous records in the form of applications seeking police remand and court orders, stupefy the plea that Rohit Sehrawat had handed over the licenced pistol to the prosecution on 30th May, 2008. The said assertion is false and devoid of any truth.

25. SI Gulshan Gupta (PW-33) has deposed that on 1st June, 2008, they had received information regarding Rohit Sehrawat and accordingly reached Jaipur Golden Hospital, at about 1A.M. where he met Narvir, an advocate and who then produced Rohit Sehrawat. Personal search of Rohit Sehrawat was conducted vide memo Ex.PW33/B and he was arrested vide memo Ex.PW30/A. The memos were signed by PW-33. Noticeably, the name of Narveer Dabas is mentioned in the arrest memo. Trial court, while recording the testimony of PW-33 in the noting dated 4th July, 2011 has mentioned that Narvir Dabas, Advocate was present in the Court. He was a part of the team of Advocates assisting the leading Counsel who was cross examining the witness. However, PW-33 could not recognize Narvir Dabas in the Court, which is understandable as his testimony was being recorded after nearly four years in July, 2011.
26. Similarly, Mahender Singh (PW-35) has testified that in the intervening night of 31st May, 2008 and 1st June, 2008, he had received information that Rohit Sehrawat was roaming near Jaipur Golden Hospital. He along with staff had reached the

said hospital at about 1.30 a.m. and had seen two persons walking at a little distance from each other near the main gate. In the meanwhile, one person came there and introduced himself as an Advocate, whose surname was Dabas. The said person was present in the court room when testimony of PW-35 was being recorded. PW-35 had interrogated Rohit Sehrawat. Narvir Dabas had arrived at the police station in his own vehicle, and on 1st June, 2008, Rohit Sehrawat was produced in Court and five days' police custody remand was taken. In view of the overwhelming evidence, we hold that Rohit Sehrawat was arrested on 1st June, 2008.

27. This brings us to the testimony of Hem Chander (PW-12), which can be divided into two parts or stages. In his examination in chief recorded on 24th February, 2010, the witness maintained that on 30th May, 2008, at about 11:00 A.M., when he was at Mahipalpur Chowk and going towards Gurgaon, Rohit Sehrawat had called and spoken to him. The witness had told Rohit Shehrawat and expressed his inability to return to Delhi for settlement of accounts. He affirmed that there were disputes between Rohit Sehrawat and Bhagat Raj, regarding land at Panchkula. After about one and a half hours, Mahinder Singh, father of Rohit Sehrawat had called PW-12 and had told him that Bhagat Raj and Rohit (Sehrawat) had quarreled and Bhagat Raj had been admitted to the BSA hospital. PW-12 was asked to go to the hospital. After some time, PW-12 received a call from Vikas Dabas (PW-20), informing him that Rohit had shot Bhagat Raj, who had been

admitted to the Saroj hospital. He then returned and had gone to the Saroj hospital, but by then Bhagat Raj had expired. We agree with the counsel for the appellant that the deposition of Hem Chander (PW-12) cannot be used to implicate and hold that Rohit Sehrawat was the perpetrator, who had fired and killed Bhagat Raj. This would be hit by the rule of best evidence and would be hearsay. However, the said version given by Hem Chander (PW-12) can be used and is admissible in evidence to take on record what was stated by Mahinder (father of the appellant) to PW-12 and what was stated by Vikas Dabas (PW-20) on telephone to PW-12. There is a difference between taking on record the factum that there was a conversation and what was conveyed to PW-12 by Mahinder Singh and Vikas Dabas (PW-20), and the truth of the facts stated in the conversion. The first fact is not hearsay, while the second assertion would be hearsay. The said statement by Hem Chander (PW-12) when accepted as credible and correct can be used to discredit and reject the contrary version given by Vikas Dabas (PW-20).

28. PW-12 was cross-examined after about 5 months on 7th July, 2010 and by then, the witness had withered to subjugation, for in the cross-examination, Hem Chander (PW-12) made a complete U-turn and swiveled. He accepted the defence line, proclaiming having gone to the police station Sultanpuri at 7:30 pm on 30th May, 2008, where he had remained present till 12:30 at night. Vikas Dabas (PW-20) and Rohit Sehrawat were then present, were under interrogated. PW-12 was asked about

his armed licence, which he denied. A similar reply as was given by Vikas Dabas (PW-20). Rohit Sehrawat, after being questioned about the license, was taken with the police to his house for its recovery. In his cross-examination, PW-12 asserted that he was earlier threatened at the police station to make a statement as per the police version or he would be implicated. For detailed reasons recorded above in paragraphs 23 to 27, we reject this part / portion of PW-12's testimony.

29. Deposition of Ravi Raj Chillar (PW-17) is like the deposition of Vikas Dabas (PW-20) and makes an interesting reading. He accepts that he was running a gun house at Bahadurgarh and had sold a pistol and a rifle gun to Rohit Sehrawat. On 2nd June, 2006, two police officers had come to his shop as they wanted to ascertain whether the witness knew Rohit Sehrawat, to which he had confirmed and on checking the record had told them that he had sold a pistol and a rifle. PW-17 had thereafter visited police station Sultan Puri on 4th June, 2008 with the original records and then on 10th June, 2008, when the said original record was seized. Learned counsel for the defence had thereafter stated that he would not insist upon production of the original register and bills as the factum of purchase of rifle and pistol by Rohit Sehrawat from Ravi Raj Chillar (PW-17) was not disputed. Possibly, the said original records had not been brought to court.
30. In his cross-examination, Ravi Raj Chillar (PW-20) had testified :-

“xxxxxx by Sh.... learned counsel for both accused.

"I remained at PS for one hour on 04.06.2008. Police had seen the original record and made inquiries from me that day also. Police had also shown me pistol which I had sold to accused Rohit Seharawat vide bill no.342 dated 29.08.2006. I had even tallied the number inscribed on such pistol and identified the same as the one I had sold to accused Rohit under said bill. Cartridges sold were of KF mark. I did not sell any cartridge bearing mark of S&B to accused Rohit. On 04.06.2008 original record was returned to me and photocopies were retained but again when I was called on 10.06.2008, even the original record was retained."

The aforesaid examination reflects a pre-determined statement, which had been rehearsed. Ravi Raj Chillar (PW-17) claimed that he was shown the original pistol, sold by him to Rohit Sehrawat and had even tallied the details. The cartridges sold by him had the mark 'KF' and he had not sold any cartridge with mark 'S&B'. (The two fired cartridges recovered on 30.5.2008 from the office of Rohit Associates had the marking S&B.) In his cross-examination by the Additional Public Prosecutor, PW-17 accepted that his mobile phone number was 9315451123. For reasons set out while examining testimony of Vikas Dabas (PW-20), we would reject this version of Ravi Raj Chillar (PW-27) in his cross examination and accept the prosecution version that the licensed pistol was never recovered, and was destroyed for it could have connected and implicated Rohit Sehrawat with the fired cartridges and the lead recovered from the scene of crime and the dead body.

31. On the question of non-recovery of the licensed pistol, SI Deepak Kumar, PW-32, was categorical that recovery could

not be made, though they had searched for the weapon of offence in the Gang Nehar, Muradnagar, Delhi-Meerut Road and had also searched the house of Rohit Sehrawat at Dehradun. Similarly, Mahender Singh (PW-35), accepts that they had searched the weapon of offence in the Ganga Nehar, but no recoveries were made. On 5th June, 2008, he had approached the licensing authority Jhajhar for verification of the arm's license issued to Rohit Sehrawat. He had also written a letter to District Magistrate, Jhajhar, Haryana marked Ex.PW-35/D. Mahender Singh (PW-35) emphatically denied the suggestion that the pistol, which was owned by Rohit Sehrawat, was shown to Ravi Raj Chillar (PW-17) on 4th June, 2008 to ascertain whether he had sold the said pistol. He also denied the suggestion that request or priority letter Ex.PW35/DA was written on 30th May, 2008 as the weapon of offence had already been recovered by that time. It is pertinent to mention that the other weapon i.e. rifle and cartridges from the drawer of Almirah with engraving "KF 7.65" were recovered and taken into possession, vide memo Ex.PW36/D.

32. Abdul Sattar (PW-9) a diver (*Gotakhor*), used to work at Wazirbad Bridge. He had gone to the Ganga Nahar, Muradnagar, U.P. on 9th June, 2008 at the request of police officers to trace a pistol, which had been thrown in the canal. Four persons were given Rs.1000/- towards labour charges. However, nothing could be recovered. We do not find any ground to disbelieve the said statement, though PW-9 in his

cross-examination conducted on 7th July, 2010 (examination-in-chief was conducted on 24th February, 2010) has stated that he had a cordial relationship with the Delhi Police and had appeared for the prosecution in nearly 100 cases. He did accept that Rohit Sehrawat was seen by him with the Police.

33. SHO Mahinder Singh (PW-35) has admitted that an application for getting the exhibits examined on priority from a biological and ballistic expert was written by him on 30th May, 2008 vide letter marked Ex.PW-35/DA. The said letter refers to eight exhibits out of which six were meant for biological examination and two for ballistic examination. As per the prosecution case, two empty shells and one piece of lead were recovered from the spot on 30th May, 2008, the same were put into a container and seized. On the same day itself, post-mortem was conducted and one lead was recovered from the dead body. The said lead was also sent for forensic examination. Blood was also found on the floor at Rohit Associates. In these circumstances, the then investigating officer (PW-35) had written a priority letter to ensure prompt and expeditious examination. It would be fallacious and rather absurd to infer from writing of the priority letter that the licensed fire arm had been recovered.
34. Our attention was drawn to the statement of K.C. Varshney (PW-39), Assistant Director, Ballistic Division, FSL, Rohini. He had examined two empty cartridges Ex.EC-1 and EC-2 and deformed bullet Ex.EB-1, which were marked in the Court as Ex.P6, Ex.P7 and Ex.P8, respectively. He had opined that

the deformed bullet corresponded to the cartridges and the empty cartridges had been fired through the same fire arm. Learned counsel for the appellant has highlighted that K.C. Varshney (PW-39) had testified that the weapon was an improvised fire arm. Report given by PW-39, marked Ex.PW39/A, mentions that individual characteristics of firing pins on the fired empty cartridges were examined and compared under a comparison microscope and were found to be identical and, therefore, these cartridges had been fired through the same fire arm. On examining the deformed bullets, it was opined that the two bullets EB1 and EB2 corresponded to the bullet of 7.65 mm cartridge case and had been discharged through an improvised firearm. In his cross-examination, the said witness had stated as under:-

"I have gone through the book written by Mr. B.R. Sharma on the subject "Fire Arms in Criminal Investigation and Trials".

Q. Do you agree that improvised weapon are those which are home made/country made weapons?

Ans. It is correct.

Q. The characteristics of improvised weapon and the standard weapons are distinguishable.

Ans. Yes, to some extent.

Q. Since the basic characteristics of the above mentioned weapons are different, their use and mark on fired bullets would also be different?

Ans. Yes.

Court question: Are you expert on fire arms also?

Ans: I can give opinion on fire arms only after seeing/examining them.

Q. I put it to you that you can given the opinion about the use of fired arms after looking/examining the mark/characteristics on the fired bullets?

Ans. In some cases, it can be given after ruling out some characteristics. For example, in this case, on the bullet marked EB-1 and EB-2, there was no rifling marks on these bullets, striations were present. Hence, I opined that these have been discharged through a improvised fire arm.

Q. It is correct that the standard fire are those, such as, Colt, Webleyscot and Smith and Wesson?

(Objected to on the ground that the question is a matter of record.)

Court Observation: Objection overruled because the witness is ballistic expert.

Ans. Yes. These are a few well known manufacturers of fire arms.

At this stage, Ld. Special APP for the State stated that he wants to get clarify from the witness whether any person used a countrymade pistol having the names of Colt, Webleyscot, Smith and Wesson comes in the purview of the standard fire arm. Permission declined because it is self understood."

It was, therefore, highlighted and submitted before us by the appellant that the fired bullet found at the scene of crime and recovered from the body of the deceased Bhagat Raj was not

fired from a licensed or standard pistol and this was the reason why the police has withheld the licensed pistol, though Ravi Raj Chillar (PW-17) had seen the said pistol with the police on 4th June, 2008. We have dealt with the said contention earlier, and elucidated the hollowness and concavity of the argument.

35. Dr. V.K. Jha (PW-25) who had conducted the post-mortem and recovered the projectile from the body of Bhagat Raj, in his deposition, had stated that the weapon used was rifled. This portion of his testimony in the examination-in-chief remained unchallenged as he was not cross examined. Thus, there appears to be a contradiction between the testimonies of two expert witnesses, i.e. Dr. V.K. Jha, Medical Officer, who was then posted at SGM Hospital, Mangol Puri and had conducted the post mortem and the statement of K.C. Varshney (PW-39), who in his cross-examination had stated that no rifling marks were present on the bullets, whereas striation marks were present and, therefore, the bullets had been discharged or fired through an improvised firearm. Noticeably, in the opinion/report marked Ex.PW-39/A, K.C. Varshney (PW-39) had not stated or specified as to why and for what reason, he had concluded that the weapon used was an improvised firearm, though he had recorded the said finding. This report marked Ex.PW-39/A does not mention that rifling marks were absent. This was a conspicuous addition or improvement made by PW-37 in his cross-examination.
36. When a bullet is fired, it moves through a barrel, which results in etching of fine grooves called "striations". Striations are

grooves in the form of cut etch raised and lowered in the interior surface of the barrel, which can be matched by examination of the barrel with the fired bullet to ascertain whether the bullet was fired from the said firearm. Striations have the potentiality to be consistent, as the interior surface of each barrel is unique and, therefore, leave a uniform pattern on every fired bullet. In the 1700s, German gunsmiths had started incorporating rifling mark as it spins the bullet when it moves down the barrel, thereby increasing the accuracy. Most of the modern pistols, revolvers, rifles and some shotguns have rifled barrels to impart a spin on the bullets. Rifling marks on the fired bullet consist of groove cuts or marks of a spiral nature, lengthwise down to the output point of the firearm's barrel. A rifled bore thus has to be distinguished from a smooth bore. Smooth bore weapon has a completely smooth barrel inside, which would leave striation marks, whereas a rifled bore would have both rifling marks and striation marks. When a bullet passes through a smooth bore, it may spin in a way that it would cause it to curve slightly through the trajectory thereby making the smooth bore of weapons inaccurate, particularly at long distances.

37. However, both weapons i.e. smooth-bore and rifled-bore are available and shotguns are normally smooth-bore weapons. There is considerable literature to suggest and show that improvised weapons can have rifling marks and standard pistols may have smooth bores. In the article "Modern Trend of Country Made/Improvised Pistols used in the Capital of

India", co-authored by K.C. Varshney (PW-29), it is observed that barrels of country made pistols are usually smooth bored and rifling marks are made in improvised pistols of 7.65mm/9mm. Sometimes, these rifling marks are incomplete and finishing grooves are unlike standard rifling in regular firearms. Thus, many a sophisticated and standardized weapon has a rifled bore rather than a smooth bore, but this is not mandatory or universal.

38. At this stage we would like to quote some paragraphs from the decision of the Supreme Court in *Siddharth Vashist @ Manu Sharma Vs. State (NCT of Delhi)*, 2010 (6) SCC 1, on the question of applicability of Section 106 of the Evidence Act, when the licensed weapon is not produced by the accused and the prosecution has established or shown that the licensed weapon could have been used for committing the offence. On the question of adverse inference which may be drawn under Section 106 of the Evidence Act, it was observed as under:-

"143.This was a licensed pistol and thereby the onus was on the accused to show where it was and that the possession and whereabouts of the pistol are in the special knowledge of accused Sidhartha Vashisht @ Manu Sharma and having failed to produce the same an adverse inference has to be drawn against him in terms of Section 106 of the Evidence Act.

In this regard reliance may be placed on *Sucha Singh v. State of Punjab*[(2001) 4 SCC 375 : 2001 SCC (Cri) 717] : (SCC p. 381, para 19)

"19. [It is] pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases

where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference."

x x x x x x x x

275. The appellant-accused Manu Sharma was holder of a pistol .22" bore P. Berretta, made in Italy duly endorsed on his arms licence. It was his duty to have kept the same in safe custody and to explain its whereabouts. It is proved beyond reasonable doubt on record that extensive efforts were made to trace the pistol and the same could not be recovered. Moreover as per the testimony of C.N. Kumar, PW 43, DSP/NCRB, R.K. Puram there is no complaint or report of the said pistol. Thus an adverse inference has to be drawn against the accused Manu Sharma for non-explanation of the whereabouts of the said pistol.

276. Similarly another plea not supported by any positive evidence led by the appellant Manu Sharma is that his pistol i.e. the weapon of offence and the arms licence was recovered from his farmhouse on 30-4-1999, when in fact it is an established fact that the pistol could not be recovered and that the licence was surrendered on 6-5-1999 at the time of his arrest. It defies all logic and ordinary course of conduct to allege that the prosecution has withheld the pistol after seizing the same from his farmhouse. The fact that he has failed to produce the pistol, a presumption shall arise that if he has produced it, the testing of the same would have been to his prejudice. The burden thus shifts on him."

39. In *Siddharth Vashist* (supra), the Supreme Court has also dealt with the question as to whether a ballistic expert can, without examining the firearm, give a definitive opinion on whether the recovered cartridge cases/bullets were fired from unrecovered/unexamined firearms. It was held:-

"164. With regard to Prem Sagar Manocha, PW 95, the ballistic expert at FSL, Jaipur, a specific query being Query 3 was that whether both the empty cartridge cases have been fired from the same firearm or otherwise. In reply to the said query, the expert opined that no definite opinion could be given on the two .22" bore cartridge cases C-1 and C-2 in order to link with the firearm unless the suspected firearm is available to examination. It was pointed out that the trial court puts a question to the witness and while putting the question first gives a specific fact finding that for reply to Query 3, the presence of the firearm was not necessary. This incorrect finding of fact given by the trial court is based on no expertise and had resulted in grave miscarriage of justice. It is well settled that while giving reports after the ballistic examination, the bullets, cartridge cases and the cartridges recovered and weapon of offence recovered are carefully examined and test firing is done at the FSL by the said weapon of offence and then only a specific opinion is given.

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177. On behalf of the prosecution, it is pointed out that the entire argument of the accused that an expert opinion was sought at the fag end of the charge-sheet to seek a favourable opinion in favour of the prosecution in fact suggests that the IO in question was oblivious of the fact that such an opinion could work to the detriment of the case of the prosecution i.e. two empties having been fired from the same weapon of offence belonging to the accused Manu Sharma. The fact that the IO sought to mention at Sl. No. 67 of the list of documents in the charge-sheet about the forwarding letter to the expert only suggests that the prosecution had no intention of carrying out the act of seeking an expert opinion, is hiding. The discretion on the part of the IO and the superior officers was rightly exercised when they decided not to file the expert report since they realised that the expert report is ambiguous as it uses the term "appear" when it suggests that the two empties appear to have been fired from different weapons. Clearly the said opinion was far from conclusive and would have only created confusion in the case of the prosecution. Thereafter a second opinion was sought wherein the expert i.e. PW 95 opined that a conclusive opinion can only be given after the receipt of the weapon of offence.

178. The argument that the weapon of offence is not required to determine whether the two bullets have been fired from the same gun is based on the wrong premise that the two empties would necessarily consist of features which would enable an expert in determining the said fact. For instance, as in the case of a handwriting expert who has to give an opinion about two different sets of near identical questioned documents and as to whether the same belong to different persons, if the argument of the accused has to be accepted then the expert should be able to give such an opinion without having in his possession the specimen handwriting and the admitted handwriting of the accused. It is stated that such an approach would render the opinion as that of a layman and not an expert. Similar would be case of a fingerprint expert who undertakes the process of discovering two different sets of fingerprint which are in question, without having the specimen or the admitted fingerprint of the accused in question. In other words, an expert is only an expert if he follows the well-accepted guidelines to arrive at a conclusion and supports the same with logical reasoning which is a requirement of law as laid down in the Evidence Act."

In *Siddhartha Vashisht* (Supra), the licenced weapon could not be traced and recovered. The submission of the accused was that the licensed arm and ammunition were taken away in the raid conducted by the police. The defence was rejected as an afterthought as this submission was not forthcoming and raised at the first instance when the accused was produced before the Metropolitan Magistrate and request for Police remand was made for recovery of the pistol. The Supreme Court referred to Section 106 of the Evidence Act and observed that failure of the accused to produce the licensed pistol would be an additional incriminating fact, as possibly the accused had destroyed the fire arm. Section 106 of the Evidence Act is not

intended to relieve the prosecution from its burden to prove the guilt of the accused, and would apply to cases where prosecution has succeeded in proving the facts from which reasonable inference can be drawn of certain other facts, unless the accused by virtue of special knowledge regarding such facts, offers an explanation which would dispel the court from drawing the natural or normal inference. Equally important are the observations of the Supreme Court on the question of evidentiary value and purport of a ballistic report when only the fired cartridges or lead were examined, but the firearm itself was not examined.

40. In the present case, a limited but relevant presumption under Section 106 of the Evidence Act would apply, as it is not disputed that the recovered cartridge cases and fired leads could have been fired from the licensed or similar weapon. The firing had taken place in the office of the appellant.
41. Mahender Singh (PW-35) has deposed about purchase of land at Panchkula, Haryana and that they had collected original documents which were produced by Hem Chand (PW-12) and Sujit Khatri (PW-4). The documents were marked Ex.PW-12/A and Ex.PW-4/B.
42. Sujit Khatri (PW-4) has testified that he was doing property business and knew Rohit Sehrawat as well as Bhagat Raj as they were in the same business. On 30th May, 2008, he had spoken to Bhagat Raj at about 11.30 a.m. and had later on come to know about the firing at the office of Rohit Associates, where he had gone but did not find anyone. As he had learnt

that Bhagat Raj had been shot and removed to the BSA Hospital, he went there. Thereafter, they went to the Saroj Hospital, where Bhagat Raj was referred and admitted to the ICU. He died on the same day. The witness claimed that he was not present in the same vehicle, when Bhagat Raj was being shifted to the Saroj Hospital. He was cross-examined by the Additional Public Prosecutor in view of the fact that as per the prosecution case, Bhagat Raj had made a dying declaring to Sujit Khatri (PW-4). In his cross-examination, PW-4 had accepted that he had gone to the office of the Crime Branch and documents in original were seized vide seizure memo Ex.PW-4/B. These documents included 4th January, 2007 marked Ex.P-9 and *baynama* Ex.P-10. He was using the mobile phone number 9871381017, which was issued in the name of one Deen Dayal, father of a student of PW-4. This witness was not cross-examined.

43. Sudhir Nandal (PW-6) had turned hostile and denied knowing Rohit Schrawat or Mahender. He, however, accepted that he knew Sujit Khatri and had also interacted with a property dealer called Deen Mohd. A sale deed was also executed in favour of Sujit Khatri, who had paid one per cent commission to Deen Mohd. In his cross-examination by the Additional Public Prosecutor, he accepted that he was a witness to the land deal.
44. Deen Mohd. (PW-11) was also declared hostile and in his cross-examination by the Additional Public Prosecutor, had accepted that police had contacted him and had recorded his

statement. Police had brought one person named Rohit Sehrawat, who was present in the Court, but he could not tell whether he had met him before. He claimed that his statement was recorded by the police under pressure.

45. Hem Chander (PW-12), has deposed that the deceased and Sujit Khatri were good friends and the deceased had suggested PW-4 to purchase land at Panchkula. Hem Chander (PW-12) was present at the time of the registration of the sale deed and had signed the same. These documents may not be in the name of Bhagat Raj but reflect on the root cause of the disputes and differences between Bhagat Raj and Rohit Sehrawat i.e. land deal. The Court will take judicial notice of the fact that land deals in a case of this nature are not straight forward and there could be exchange of money which was not accounted for. [See Section 57 of the Evidence Act, on judicial notice of notorious acts and matters of common knowledge].
46. The trial court, in our opinion, has been wrong in not accepting that the prosecution has been able to establish and show motive. There is certainly a transaction relating to land at Panchkula, on which disputes had arisen. This is apparent from statement of witnesses, especially Suraj Bhan (PW-2). The submission that the documents do not mention the name of the deceased, is irrelevant.
47. Our attention was drawn to PCR form Ex.PW-40/T21, which mentions the name of one Ravinder Mathur, who had met the PCR officer at Saroj Hospital. He had informed that Bhagat Raj was in property business and was shot at Sector-24, Rohini,

but was not revealing / stating the name of the person who had fired the shot. The contention raised is that Ravinder Mathur was the first person who had spoken to the police about the incident, but has not been examined. This contention has to be rejected for several reasons. It is apparent that several persons from the family of the deceased had gathered at Saroj Hospital. One Ravinder Mathur may have been present there, but unless he had seen the occurrence, he would not be an eye witness. Mahender Singh (PW-35) did not remember whether he had met Ravinder Mathur at the Saroj Hospital but had voluntarily stated that a large number of relatives of the injured were present there. The name of Ravinder Mathur did not figure in the cross-examination, or in the testimony of the witnesses. We do not think, in these circumstances, that the contention has any merit and the same has to be rejected.

48. The CDR of Rohit Sherawat marked Ex.PW-27/C, would show that he had made a call to his father Mahender Singh on telephone No.9811122626 at 12:16, 12:24 and then at 12:27 on 30th May, 2008; thereafter the phone was not in operation. Rohit Sehrawat had made a call to Ravi Raj Chillar (PW-17) on telephone No.9315451123 at 12:01 at 30th May, 2008. As noticed above, there is no call after 12:27. There is a gap of about five minutes between the last two calls made to Mahender Singh on telephone No.9811122626 at 12:24 and 12:27.
49. We would now deal with the judgments relied upon by Rohit Sehrawat. Decisions in criminal appeal No.775/2011 **Johnson**

Vs. State 2012 (4) JCC 2627, *Ajay @ Chotu & Ors. Vs. State* 2012 (2) JCC 1261, *Ramesh Kumar Vs. The State* 1990 CrL.L.J. 255 and *State Vs. Ashok Kumar* 126 (2006) DLT 296 have been decided on their own facts, wherein in the factual background, one aspect or the other was held to be important. These decisions would not apply to the matrix of the present case. We are not relying upon the oral dying declaration and therefore, the judgment of the Supreme Court in *Ramsai and Anr. Vs. State of M.P.* AIR 1994 SC 464 is not relevant. *Satish Kumar Vs. State* 60 (1995) III DLT 74 is also a case of dying declaration wherein the court referred to the evidence on record, including extra judicial confession, but held that the prosecution case was not beyond doubt. In the factual background, reference was also made to the MLC, in which the assailant was not named. Same is the position in *Krishan Pal Vs. State* [CrL.A.No.81/1997 decided on 26th March, 2004], *Dalip @ Papu Vs. State* [CrL.A.No.781/2009 decided on 12.7.2012]. In *Ram Narain Singh Vs. State of Punjab* AIR 1975 SC 1727 it was observed that mere possession and recovery of live cartridges would not connect the accused to the crime. Further, in the said case, prosecution evidence was completely or totally inconsistent with the medical evidence. This is not the factual position in the present case. The legal position on the said aspect is well settled that ocular testimony of a witness has greater evidentiary value in comparison with the medical evidence, unless the medical evidence makes the ocular testimony improbable. In latter cases, the medical

evidence becomes a relevant factor in the process of evaluation of evidence. Thus, unless the medical evidence goes far enough to rule out possibility of the ocular evidence being true, ocular evidence should not be rejected. *Syed Darain Ahsan @ Darain Vs. State of West Bengal & Anr.* (2012) 4 SCC 352, *Meharaj Singh Vs. State of U.P.* (1994) 5 SCC 188, *Yusuf Warsi Vs. State of West Bengal* (2010) 3 Cal LT 510, *Patel Hiralal Mohanlal Jivani Vs. State of Gujarat* 1984 GLH 46 have been referred to for the question of blackening or tattooing. In the present case firing had taken place in the small room, blood was found in two places, next to the table and just inside after entering the main door. It is apparent that the deceased had moved. Presence of blood at two locations in the room affirms the post mortem opinion with regard to tattooing, which was visible on two entry wounds. The room was left open and was unsecured after the occurrence. The police subsequently had recovered empty cartridges and a fired lead next to the chair. The place from where the cartridges and lead were recovered need not necessary be the places where the cartridges and lead had fallen after firing. Presence of a hole on the upper portion of the wall behind the chair is inconsequential. We do not know when the hole was caused. What is important is that the firing had taken place inside the room i.e. the office of Rohit Sherawat. Decisions in *Sudarshan & Anr. Vs. State of Maharashtra* (2014) 12 SCC 312, *Raja Ram Vs. State of Rajasthan* JT 2000 (7) SC 549 and *Rohit Dhingra and Anr. Vs. State* 2012 (2) JCC 820 are also

decisions on their own facts. The decision in the *Raja Ram's case (Supra)* deals with hostile witnesses. The court is required to carefully scrutinize the evidence when it is possible to separate truth from untruth and the truth as deciphered can be relied. This principle has been followed by us.

50. The appeal by the State in the case of Mahender Singh, however, should fail. Mahender Singh, it is alleged, was a co-conspirator. It is not the case of the prosecution that he was present at the place of occurrence or had fired. The CDR of his telephone No. 9811122626, Ex. PW 27/F, would show that he was not present at the spot, but he had three conversations with Rohit Sherawat, his son. Mere conversation with the son before or after the incident by itself in the facts of the present case would not establish and prove conspiracy. Statement of Hem Chander (PW-12) in his examination-in-chief on 24th February, 2010, when he had supported the prosecution is relevant. He has stated that Mahender Singh had called him and told him that the deceased Bhagat Raj and the appellant Rohit Sherawat had fought and Bhagat Raj was admitted to the BSA hospital. Mahender Singh had asked Hem Chander to visit the hospital. This is not reflective of conduct of a conspirator.
51. In the end, we would like to crystallise and note in brief the evidence against Rohit Sehrawat, on which we have relied, to uphold the conviction.

(i) Bhagat Raj and Rohit Sehrawat were known to each other. They were in the same business i.e. sale and purchase of

property/land.

(ii) Bhagat Raj and Rohit Sehrawat had entered into a transaction regarding land at Panchkula, which was a cause of the dispute inter se. Motive is established.

(iii) The CDRs of the mobile telephone number 9350281179 (Ex.PW-26/C), which was being used by deceased Bhagat Raj and mobile telephone number 9811500024 (Ex.PW-27/C), of Rohit Sehrawat, show and prove that phone calls were exchanged between the two on 30th May, 2008 between 11.55 a.m. and 11.57 a.m.

(iv) Suraj Bhan (PW-2), the eye witness, has deposed that he along with Bhagat Raj had gone to the office of Rohit Sehrawat at Plot No.291, Pocket-8, Sector-24, Rohini, at about 12 noon on 30th May, 2008. Rohit Sehrawat had fired three shots from his pistol and had injured Bhagat Raj. Rohit Sehrawat had fled from the spot.

(v) Bhagat Raj had suffered firearm injuries at the office of Rohit Sehrawat, a fact proved from recovery of two fired cartridges, one fired lead, shoes of Bhagat Raj and blood on the floor, which was lifted and seized. These are undisputed facts.

(vi) Suraj Bhan (PW-2) had taken Bhagat Raj to the BSA Hospital, where MLC Ex.PW-20/DA was recorded at 12.35 p.m.

(vii) Contrary to medical advice, relatives of Bhagat Raj had shifted him to the Saroj Hospital. Bhagat Raj died in the Saroj hospital at about 3 p.m. on 30th May, 2008.

(viii) During post-mortem, a fired projectile was recovered from the dead body of Bhagat Raj. As per ballistic report, said fired bullet tallied with the bullet lead found in the office of Rohit Sehrawat. The fired cartridge and leads were of 7.65mm.

(ix) Rohit Sehrawat had a licensed pistol which could fire 7.65 mm cartridges, but the same could not be recovered. Pertinently, the firing had taken place in the office of Rohit Sehrawat. Adverse inference under Section 106 of the Evidence Act can be drawn against Rohit Sehrawat.

(x) As per CDRs of telephone number 9811500024, Rohit Sehrawat had made three phone calls to his father Mahender Singh at 12.14 p.m., 12.24 p.m. and 12.27 p.m. on 30th May, 2008. Thereafter, the phone was not used and became inactive. Rohit Sehrawat had also made a call to Ravi Raj Chillar (PW-17), the gun dealer, on his mobile telephone number 9315451123 at 12.01 p.m. on 30th May, 2008.

(xi) Rohit Sehrawat had absconded and was arrested at about 2:00 a.m. on 1st June, 2008, just outside the Jaipur Golden Hospital while in company of an advocate.

(xii) Deposition of Suraj Bhan (PW-2) is corroborated and supported by documentary evidence including the CDRs Ex.PW-26/C of the telephone number 9350281179 used by the deceased, which shows that the phone was inactive or not in use between 12.15 p.m. to 12.35 p.m. It is during this time that Bhagat Raj was shot. Suraj Bhan (PW-2) had thereafter made a call and spoken to the wife of Bhagat Raj from the mobile

telephone of Bhagat Raj.

(xiii) We have accepted the statement of Suraj Bhan (PW-2) that by mistake he had not taken his mobile phone with him when he and Bhagat Raj had visited the office of Rohit Sehrawat between 12.00 p.m. and 12.30 p.m. on 30th May, 2008. There is nothing to debate or doubt the said version.

(xiv) Suraj Bhan (PW-2) had subsequently made a phone call to the Police Control Room from Saroj hospital after his brother brought and gave him his mobile phone.

(xv) Blood was found in the Zen car, in which Suraj Bhan (PW-2) had taken Bhagat Raj to the BSA Hospital.

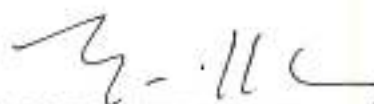
(xvi) Deposition of Vikas Dabas (PW-20) that he had taken Bhagat Raj to the BSA Hospital and that he had seen Rohit Sehrawat at about 7.00-7.30 p.m. in the police station on 30th May, 2008, is false and incorrect.

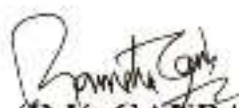
(xvii) Similar statement made by Hem Chander (PW-12) in his cross-examination on 7th July, 2010 should be disbelieved. PW-12 in his deposition recorded on 24th February, 2010 has accepted that he had spoken to Rohit Sehrawat at about 11 a.m. and there were disputes between Rohit Sehrawat and Bhagat Raj regarding land at Panchkula. Subsequently, Mahender Singh, father of Rohit Sehrawat called Suraj Bhan (PW-2) and informed him that Bhagat Raj and Rohit Sehrawat had quarrelled and that Bhagat Raj was admitted to the BSA Hospital. Vikas Dabas (PW- 20) had also called Hem Chander (PW-12) and informed that Rohit Sehrawat had shot Bhagat

Raj, who was admitted to Saroj Hospital. Truth of the statement made by Hem Chander (PW-12) would be hit by rule of hearsay and cannot be used to show the truth of the facts stated in the conversation. However, it would not be hearsay to the extent that there was a conversation between Hem Chander (PW-12) and Vikas Dabas (PW-20) and Mahender Singh. It can be used to discredit and reject the contrary version given by Vikas Dabas (PW-20).

(xviii) Medical evidence and the post mortem report affirm that the deceased had died as a result of firearm injury, which is in conformity and supports the version given by Suraj Bhan (PW-2).

52. In view of the aforesaid discussion, we dismiss the appeal filed by Rohit Sehrawat and confirm the order of his conviction. We also do not see any reason to interfere with the order on sentence. We also dismiss the appeal of the State, challenging acquittal of Mahender Singh for the reasons set out above.
53. The appeals are accordingly disposed of.


(SANJIV KHANNA)
JUDGE


(R.K. GAUBA)
JUDGE

MARCH 15, 2016
SSN/VKR/NA