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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 21/06/2017****Judgment Delivered on : 13/07/2017****Criminal Appeal No. 19 of 2002**

Chotelal Nishad, S/o Samaru Nishad, Aged about 22 years, R/o Ramsagarpara, Near Shiv Mandir, Azad Chowk, District Raipur.

---- Appellant**Versus**

State of Chhattisgarh, Through D.M. Raipur.

---- Respondent**Criminal Revision No. 186 of 2002**

Preetam Singh Khalsa, S/o Sardar Jeet Singh, Aged – 54 years, Occupation – Business, R/o Sidhi Colony, Katora Talaab, Police Station – Civil Line, District Raipur, Chhattisgarh

---- Applicant**Versus**

1. State of Chhattisgarh, through Station House Officer, Police Station – City Kotwali, District Raipur.
2. Pappu @ Harmindar Singh Hora, S/o Amrik Singh Hora, Aged – 39 years, R/o Devendar Nagar, Sai Nagar Thana Ganj, Raipur, Chhattisgarh.
3. Sujit Thakur, S/o Chandrahas Thakur, Aged – 28 years, R/o Near Gujarati School, Baldeo Baag, Rajnandgaon, Chhattisgarh.
4. Sahibo Udia, S/o Shyam Sundar, Aged – 30 years, R/o Motilal nagar, Birdi Colony, Police Station – Amanaka, Raipur, Chhattisgarh.
5. Guru Charan Singh Hora, S/o Ajit Singh Hora, Aged – 28 years, R/o Devendar Nagar, Thana Ganj, Raipur.
6. Salman @ Salaam, S/o Mohammad Bhai, Aged – 26 years, R/o Mohadaa Para Talab Paar Jaitu Be's house, Thana Ganj, Raipur.

---- Respondents

Criminal Appeal No. 30 of 2002

Danesh S/o Dhularu Sahu, aged about 29 years, R/o Chuna Bhatti, Gudyari, Raipur, Chhattisgarh.

---- Appellant

Versus

State of Chhattisgarh, through P.S. City Kotwali, District Raipur, Chhattisgarh.

---- Respondent

Criminal Appeal No. 43 of 2002

Pankaj Das @ Pinku, S/o Mohan Das @ Manish Das Esahi, aged about 25 years, resident of Devendra Nagar, Sector 3, Thana Ganj, Raipur, District Raipur.

---- Appellant

Versus

The State of Chhattisgarh, Through the District Magistrate, Raipur.

---- Respondent

Criminal Appeal No. 46 of 2002

Ratan Khattri, Son of Baldev Singh Sahu, aged about 22 years, resident of Fafadih Bhatapara, Thana Ganj, Raipur, Chhattisgarh.

---- Appellant

Versus

The State of Chhattisgarh.

---- Respondent

Acquittal Appeal No. 447 of 2010

The State of Chhattisgarh

---- Applicant/Appellant

Versus

1. Danesh, aged about 29 years, S/o Dularu Sahu, R/o Chuna Bhatti, Gudhiari, Raipur, Chhattisgarh.
2. Chhotelal Nishad, Aged about 22 years, Samaru Nishad, R/o Ramsagarpara, Near Shiv Mandir, Azad Chowk, Raipur, Chhattisgarh.
3. Ratan Khatri, Aged about 22 years, S/o Baldeo Singh Sahu, R/o Fafadih, Bhatapara, P.S. Ganj, Raipur, Chhattisgarh.
4. Pankaj Das, Aged about 25 years, S/o Mohandas @ Manishdas Isai, R/o Devendra Nagar, Sector-3, P.S. Ganj, Raipur, Chhattisgarh.
5. Pappu @ Harmindar, Aged about 39 years, S/o Amrik Singh Hora, R/o Devendra Nagar, Sai Nagar P.S. Ganj, Raipur, Chhattisgarh.
6. Sujit Thakur, Aged about 28 years, S/o Chandrahas Thakur, R/o Near Gujati School, Baldeo Bagh, Rajnandgaon, Chhattisgarh.
7. Sahibo Uriya, Aged about 30 years, S/o Shyam Sundar, R/o Motilal nagar, Birdi Nagar, Police Station – Amanaka, Raipur, Chhattisgarh.
8. Gurucharan Singh Hora, Agd about 38 years, S/o Late Ajit Singh Hora, R/o Devendra Nagar, P.S. Ganj, Raipur, Chhattisgarh.
9. Salman @ Salam, Aged about 26 years, S/o Mohammad Bhai Musalman, R/o Mohada Para, Talab Para, House of Jaitun Bi, P.S. Ganj, Raipur, Chhattisgarh.

---- Respondents

For Appellants/Accused	:Shri Surendra Singh, Shri Manish Sharma and Shri Y.C. Sharma, Advocates.
For Respondent/State	:Smt. Smita Ghai, Panel Lawyer.
For Objector	:Shri Rajeev Shrivastava and Shri Malay Shrivastava, Advocate.

Hon'ble Shri Thottathil B. Radhakrishnan. Chief Justice
Hon'ble Shri Rajendra Chandra Singh Samant, J.

C.A.V. Judgment

Per Rajendra Chandra Singh Samant, J.

1. By this judgment, five appeals being Criminal Appeals No. 19 of 2002, 30 of 2002, 43 of 2002, 46 of 2002 and Acquittal Appeal No. 447 of 2010 and

Criminal Revision No. 186 of 2002 are being disposed of since they arise out of one incident and one judgment of the trial court dated 29.11.2001 passed by the 3rd Additional Sessions Judge, Raipur in Sessions Trial No. 113 of 1998.

2. Chhotelal Nishad-Appellant in Criminal Appeal No. 19 of 2002, Appellant-Danesh in Criminal Appeal No. 30 of 2002, Appellant-Pankaj Das @ Pinku in Criminal Appeal No. 43 of 2002 and Appellant-Ratan Khattri in Criminal Appeal No. 46 of 2002, have been convicted and sentenced as under:

Appellant	Conviction Under Section	Sentence
Chhotelal Nishad	302 read with Section 34 IPC 25 of the Arms Act	Life imprisonment with fine of Rs. 1000/-. In default of payment of fine, 2 months R.I. Imprisonment for 3 years with fine of Rs. 100/-. In default of payment of fine, 15 days imprisonment.
Danesh	302 IPC 25 and 27 of the Arms Act	Life imprisonment with fine of Rs. 1000/-. In default of payment of fine, 2 months R.I. Rigorous imprisonment for 5 years with fine of Rs. 500/-. In default of payment of fine, 1 month rigorous imprisonment.
Pankaj Das @ Pinku	201 read with Section 302 IPC	Rigorous imprisonment for 3 years and fine of Rs. 1000/-. In default of payment of fine, rigorous imprisonment for two months.
Ratan Khattri	302 read with Section 34 IPC 25 of the Arms Act	Life imprisonment with fine of Rs. 1000/-. In default of payment of fine, 2 months R.I. Imprisonment for 3 years with fine of Rs. 100/-. In default of payment of fine, 15 days imprisonment.

3. The case of the prosecution is that deceased Devendra Singh Khalsa had enmity with acquitted accused Gurucharan Singh Hora and Pappu @ Harmindar Singh Hora and there had been history of criminal incidents.

Acquitted accused Gurucharan Singh Hora and Pappu @ Harmindar Singh Hora had first conspired with Rajju @ Hanif (PW-5), Panchu (PW-6), Rafiz Ahmad (PW-7), Nabbu and Satish for committing murder of deceased Devendra Singh Khalsa by providing them with vehicle, money and weapons, which could not be executed by these persons. Later on, acquitted accused Gurucharan Singh Hora and Pappu @ Harmindar Singh Hora conspired with Pankaj Das @ Pinku, Danesh, Ratan Khattri and Chotelal Nishad for committing murder of Devendra Singh Khalsa. For this purpose, weapon and money were made available to these persons and they were also assured of other benefits by them. On the date of incident i.e. 20.11.1997, deceased Devendra Singh Khalsa had been to Shastri Market for buying a pair of shoes with his relative Bittu @ Jagjit Singh (PW-50). Bittu (PW-50) remained sitting in the vehicle while deceased Devendra Singh Khalsa alone went towards the shop of the uncle of Mohd. Asgar (PW-2). Thereafter, both of them went to another shop at *Bans Tal* and after purchase of the shoes, while both were returning back towards Shastri Chowk, Appellants-Accused Pankaj Das @ Pinku, Danesh, Ratan Khattri and Chotelal Nishad arrived at the place of incident on a motor-cycle Hero Honda, bearing registration No. MP 23-A/6525 and on a Scooter bearing registration No. MP 26-B/2174. On a signal being given by the Appellant-Pankaj Das, the other Appellants-accused Danesh and Chotelal Nishad who were armed with revolver and Appellant-Ratan Khatri, who was armed with a knife, with an intention to commit murder, assaulted deceased Devendra Singh Khalsa. Appellant-Danesh fired a shot after which deceased Devendra Singh Khalsa fell down. Thereafter, all of them fled from the spot. This incident was witnessed by Mohd. Asgar (PW-2), Sewaram (PW-8), Gurnarayan Tiwari (PW-9), Satish (PW-10), Vikas Tiwari (PW-11), Mohd. Ayub (PW-13), Ashraf (PW-14), Nanhu (PW-21), Bittu @ Jagjit Singh (PW-50) and Vijay Kumar Jolhe (PW-56). Appellant-Danesh and other accused were helped by Ram Maghani and

acquitted accused-Sahibo Uriya helped Appellants-Danesh and Ratan Khattri in concealing their clothes and providing fresh clothes. Appellants-accused Danesh, Chotelal Nishad, and Ratan Khattri fled from the spot and went to **Rajnandgaon where they went in hiding in the farm house of acquitted** accused Sujit Thakur.

4. A telephonic information was received by Assistant Sub Inspector, Rakesh Narayan Pandey (PW-52) City Kotwali, Raipur regarding commission of murder of Devendra Singh Khalsa. The information was immediately recorded in the Station House Diary (Exhibit P-64). Deceased Devendra Singh Khalsa was taken to the Medical College Hospital, Raipur, by Bittu @ Jajgit Singh (PW-50) where the deceased succumbed to the injuries at about 1:50 pm. The information (Exhibit P-44) sent by Dr. Smt.Chandramani Pandey (PW-59) was received in Police Station Modhapara, on the basis of which an unnumbered merg intimation (Exhibit P-45) was recorded in Police Station Modhapara. On the basis of said unnumbered merg intimation, a numbered merg intimation (Exhibit P-45A) was recorded at Police Station City Kotwali, Raipur. Subhash Chandra Chaudhary (PW-70) recorded one unnumbered First Information Report (Exhibit P-78) in the hospital, on the basis of which numbered First Information Report (Exhibit P-46) was separately recorded in the Police Station Kotwali, Raipur. Inquest on the dead-body of the deceased was conducted vide Exhibit P-71 in the presence of the witnesses. Postmortem examination was conducted by Dr. Ullas Gonnade (PW-45) with Dr. Sanjay Dadu. Vide postmortem report (Exhibit P-62), it was opined that death of the deceased was a result of shock which occurred due to excessive haemorrhage from gun shot injury caused by a firearm.
5. During the investigation, Subhash Chandra Chaudhary (PW-70) made seizure of one bullet-head from the shop, M.A. Footwear, Shastri Market vide Exhibit P-28. Blood stained and plain soil and blood stained stone

were seized from the spot vide Exhibit P-27. Appellants-Danesh, Chotelal Nishad and Ratan Khattri were arrested from the farmhouse of accused Sujit Thakur on 24.11.1997. At the instance of Appellant–Danesh, vide his memorandum statement (Exhibit P-21), one revolver and two cartridges were seized from his possession vide Exhibit P-22. At the instance of Appellant–Chotelal Nishad, vide his memorandum statement (Exhibit P-33), a country-made firearm and four cartridges were seized from his possession vide Exhibit P-38. At the instance of Appellant–Ratan Khattri, vide his memorandum statement (Exhibit P-34), a knife was seized from his possession vide Exhibit P-39. Further, at the instance of Appellant–Pankaj Das @ Pinku, vide his memorandum statement (Exhibit P-35), one Hero Honda motor-cycle bearing registration No. MP 23A-6525 and three empty cartridges of 0.455 bore were seized from his possession vide Exhibit P-37. Another memorandum statement of Appellant–Danesh was recorded vide Exhibit P-36. At the instance of acquitted accused-Sahibo Uriya, vide his memorandum statement (Exhibit P-32), some clothes were seized from his possession vide Exhibit P-31. Test Identification Parade was conducted by the Executive magistrate G.M. Ansari (PW-32) in which witnesses of the spot, namely, Mohd. Asgar (PW-2), Gurunarayan Tiwari (PW-9), Satish (PW-10) and Vikas Tiwari (PW-11) identified Appellants-Danesh, Ratan Khattri and Chotelal Nishad vide memorandums of Test Identification Parade Exhibits P-2, P-3, and P-4. At the instance of absconded accused Ram Maghani, vide his memorandum statement (Exhibit P-7), one Scooter bearing registration No. MP-26B/ 2174 was seized from two-wheeler stand of Railway Station, Raipur. The articles received after postmortem examination, revolver, bullets, cartridges were sent for ballistic examination to Forensic Science Laboratory. The report (Exhibit P-54) was received in which it is reported that the bullet-heads examined were fired by the firearm of 0.455 bore. This report was given after firing a test shot from the same firearm.

6. The appellants and the acquitted accused persons were charge-sheeted for trial. Appellants – Danesh, Ratan Khattri and Chotelal Nishad were charged under Sections 109 read with 302, 120B and 302/34 of the IPC and Sections 25 and 27 of the Arms Act. Appellant – Pankaj Das @ Pinku was charged under Sections 109, 302, 120B and 320 read with Section 34 of the IPC. Acquitted accused-Pappu @ Harmindar Singh and Gurucharan Singh Hora were charged under Sections 109, 302, 120B of the IPC and Section 25 of the Arms Act. Acquitted accused – Sujit Thakur and Salman @ Salam were charged under Section 212 of the IPC. Acquitted accused – Sahibo Uriya was charged under Section 212 and 201 of the IPC. On being examined under Section 313 of the Code of Criminal Procedure, denying all the incriminating evidence against them, the Appellants and the acquitted accused persons pleaded innocence and false implication. The Appellants and all the acquitted accused persons denied the charges framed against them and prayed for trial. The prosecution examined as many as 70 witnesses, however, no witness was examined in defence. By the impugned judgment, co-accused persons, namely, Pappu @ Harmindar Singh Hora, Sujit Thakur, Sahibo Uriya, Guru Charan Singh Hora and Salman @ Salam have been acquitted of all the charges, whereas appellants – Danesh, Chotelal Nishad, Pankaj Das @ Pinku and Ratan Khattri have been convicted and sentenced as mentioned above.
7. The common grounds in all the criminal appeals against conviction are that the judgment of conviction and sentence passed by the learned trial Court is arbitrary, illegal and contrary to law applicable in this case. The prosecution has utterly failed to prove its case beyond all reasonable doubts. All the eyewitnesses in this case have turned hostile. The witnesses of memorandum and seizure have also turned hostile. The prosecution has failed to establish the connection with the revolver seized from Appellant-Chotelal Nishad as there is nothing against him in the

report of the ballistic expert and as the independent witnesses of memorandum and seizure have turned hostile, there had been no evidence to convict Appellant-Chotelal Nishad for offence under Section 25 of the Arms Act. The grounds urged for Appellant-Danesh are that the description given in the seizure memo with respect to the revolver seized at his instance and the description of the same by the ballistic expert differ from each other. The size of barrel of the revolver varies in the seizure memo and the report of the ballistic expert. The conviction is based on a weak type of evidence and the impugned judgment suffers from material irregularity. Therefore, Appellant-Danesh should have been extended the benefit of doubt. The grounds urged for Appellant-Pankaj Das @ Pinku are that he had no connection with the alleged conviction of offence and seizure of one motor-cycle and empty cartridges do not connect him with the offence in any manner without support of other evidence of the prosecution. On behalf of Appellant-Ratan Khattri, it is urged that the independent witnesses have not supported the prosecution case and all the eyewitnesses have turned hostile. As alleged, a knife was seized from his possession, however, no injury was found on the body of the deceased caused by use of a knife. Therefore, the conviction of Appellant-Ratan Khattri is bad in law and a prayer has been made for setting aside the impugned judgment.

8. The acquittal of co-accused Pappu @ Harmindar Singh Hora, Sujit Thakur, Sahibo Uriya, Guru Charan Singh Hora and Salman @ Salam has been challenged in Criminal Revision No. 186 of 2002 by Preetam Singh Khalsa, the brother of the deceased. It is submitted that the learned trial Court has ignored the evidence of the prosecution and acquitted the co-accused/respondents No. 2 to 6, which is erroneous and thus, the learned trial Court has committed material irregularity in acquitting them. On these grounds, a prayer has been made for setting aside the impugned judgment

with respect to co-accused Pappu @ Harmindar Singh Hora, Sujit Thakur, Sahibo Uriya, Guru Charan Singh Hora and Salman @ Salam.

9. The State has also separately preferred an appeal being Acquittal Appeal No. 447 of 2010, against acquittal of the accused persons. The grounds urged in this appeal are that the learned trial Court has failed to appreciate the evidence of the prosecution in its true perspective. There had been evidence that the empty cartridges were found in possession of Appellant-Pankaj Das @ Pinku which shows his involvement in the offence of murder. There is evidence and it has also been observed by the learned trial Court in the impugned judgment that Appellants-Danesh, Chhotelal and Pankaj were found in the farmhouse of acquitted accused-Sujit Thakur, which has been ignored and Sujit Thakur has been acquitted of the charges. Further, the evidence is present on record is that the acquitted accused Pappu @ Harmindar Singh Hora and Guru Charan Singh Hora had previous enmity with deceased Devendra Singh Khalsa. The said fact has not been given due consideration, which makes them participants in the conspiracy for committing the murder of the deceased. It is also urged that seizure of clothes worn by Appellants-Chotelal Nishad and Ratan Khattri from the acquitted accused-Sahibo Uriya indicates his involvement in conspiracy. The evidence in this aspect has been wrongly discarded by the learned trial court. Further, it is submitted that acquitted accused Gurucharan Singh Hora was given shelter by acquitted accused-Salman @ Salam and as such, he was also responsible for harbouring an offender. On the aforesaid grounds, it is prayed that the acquittal of the acquitted accused persons be set aside and a judgment of conviction and order of sentence may be passed against them.

10. Learned counsel for the Appellants argued that seizure of articles i.e. revolver, cartridges etc. vide Exhibit P-22 at the instance of memorandum statement (Exhibit P-21) of Appellant-Danesh has not been supported by

the independent witnesses, which should have been disbelieved by the learned trial Court. Further, the discrepancy in the investigative procedure has been ignored by the learned trial Court. S.J.Jefrin (PW-63), Inspector, Azad Chowk, Raipur, has made no mention with respect to depositing of seized articles in the Maalkhana soon after the procedure was conducted. There is delay in sending the seized articles for forensic science laboratory examination and examination by the ballistic expert. As per the report (Exhibit P-54), articles were received in the State Forensic Science Laboratory on 09.01.1998 whereas the seizure of revolver etc. were made on 24.11.1997. This delay has not been explained. Further, it has been argued that the description of the seized revolver in the seizure memo and the description mentioned in the report of the ballistic expert differ from each other. It is also to be noticed that the length of the barrel mentioned in the seizure memo is also different from the description of the revolver mentioned by the ballistic expert. It is submitted that there is evidence that the seal was tampered as there was a news article that the Superintendent of Police displayed the revolver before the media persons which was widely published in the newspapers. For this reason, the intactness of seals on the packets of revolver etc. alleged to be used in the commission of crime, which were sealed at the time of seizure, is doubtful as the seals were tampered to display the revolver before the media persons. Absence of evidence regarding depositing of sealed articles in the Maalkhana and their remaining in safe deposit till they were sent for examination by the ballistic expert also is a fact which needs to be noticed.

11. Attention has been drawn to Madhya Pradesh & Chhattisgarh (Criminal Court) Rules and Orders, which are applicable in the State of Chhattisgarh. Rule 207 provides that in cases where the report of the Chemical Examiner is tendered, it is absolutely necessary that evidence should be taken to connect the articles reported on by the Chemical Examiner with the case before the Court and every step taken with regard

to safe custody of such article must be proved from their discovery to their despatch to the Chemical Examiner. In the absence of such proof, the report of the Chemical Examiner is valueless as evidence. Lastly, it is submitted that on the aforesaid grounds, all the appellants are entitled for acquittal.

12. Learned counsel for the Accused, with reference to the scope of interference in appellate jurisdiction by the High Court in an appeal against acquittal, relied on the judgments of the Apex Court in ***Ganesh Bhavan Patel v. State of Maharashtra* {(1978) 4 SCC 371}**, ***Bhim Singh v. State of Haryana* {(2002) 10 SCC 461}**, ***Kallu @ Masih v. State of M.P.* {(2006) 10 SCC 313}**, ***Chandrappa v. State of Karnataka* {(2007) 4 SCC 415}**, ***Bhadragiri Venkat Ravi v. Public Prosecutor, High Court of A.P.* {(2013) 14 SCC 145}**. Further, in a case of acquittal, if two views are possible, the view which favours accused has to be considered and in this regard, reliance has been placed on ***Upendra Pradhan v. State of Orissa* {(2015) 11 SCC 124}** and ***Golber Hussain v. State of Assam* {(2015) 11 SCC 242}**.

13. With regard to the scope of interference in revisional jurisdiction against an order of acquittal at the instance of private party, learned counsel for the Accused relied on the judgments of the Apex Court in ***K. Chinnaswamy Reddy v. State of A.P.* {AIR 1962 SC 1788}**, ***Akalu Ahir v. Ramdeo Ram* {(1973) 2 SCC 583}**, ***Bansi Lal v. Laxman Singh* {(1986) 3 SCC 444}**, ***Hydru v. State of Kerala* {(2004) 13 SCC 374}**.

14. Learned counsel for the Accused submits that to bring home the charge of conspiracy within the ambit of Section 120-B of IPC, it is necessary to establish that there was an agreement between the parties to doing an unlawful act. To bring home the charge, there must be evidence of prior meeting of mind to do an illegal act. In this regard, reliance has been placed on a judgment of the Apex Court in ***Vijayan @ Rajan v. State of***

Kerala {(1999) 3 SCC 54}, Sherimon v. State of Kerala, Sherimon v. State of Kerala {(2011) 10 SCC 768}, State of Madhya Pradesh Through CBI v. Paltan Mallah {(2005) 3 SCC 169} and S. Arul Raja v. State of Tamil Nadu {(2010) 8 SCC 233}.

15. Learned counsel for the Accused submits that the report (Exhibit P-56) lodged before the police by the deceased did not relate to the cause of his death or to any of the circumstances of the transaction which resulted in his death and therefore, the same is inadmissible in law. In support of this contention, learned counsel relied on judgments of the Apex Court in **Babubhai Bhimabhai Bokhiria v. State of Gujarat {(2014) 5 SCC 568}** and **Paltan Mallah** (supra).
16. Learned counsel for the Accused submits that memorandum statement given to the police by the accused under Section 27 of the Evidence Act, is not a statement under Section 10 of the Evidence Act and facts beyond discovery of a fact are inadmissible. In support of this contention, they rely on a decision of the Supreme Court in **Jitendra Kumar v. State of Haryana {(2012) 6 SCC 204}**.
17. Learned counsel for the Accused submits that the confession made by the co-accused cannot be made the basis for conviction. In this regard, reliance has been placed on the judgments of the Apex Court in **Kashmira Singh v. State of M.P. {AIR (1952) SC 159}** and **Haricharan Kurmi v. State of Bihar {AIR (1964) SC 1184}**.
18. Learned counsel for the Accused submits that merely motive of enmity cannot be a circumstance to convict a person. In this regard, reliance has been placed on the judgments of the Apex Court in **Paltan Mallah (supra)** and **Sampath Kumar v. Inspector of Police, Krishnagiri {(2012) 4 SCC 124}**.
19. Learned counsel for the Accused have further relied on the judgment of the Privy Council in **Pakala Narayanaswami v. Emperor {AIR 1939 Vol.**

26-Privy Council 47}, and the judgments of the Apex court in ***Sharad Birdhichand Sarda v. State of Maharashtra* {AIR (1984) SC 1622}** , ***Shingara Singh v. State of Haryana* {(2003) 12 SCC 758}**, ***Joseph v. State of Kerala* {(2003) 1 SCC 465}**, ***State of Punjab v. Lakhwinder Singh* {(2010) 4 SCC 402}**, ***State of Haryana v. Satender* {(2014) 7 SCC 291}**, ***Seena @ Srinivasa v. State of Karnataka* {(2014) 13 SCC 545}**, ***Santa Singh v. State of Punjab* {AIR (1956) SC 526}**, ***State of Rajasthan v. Daulat Ram* {(1980) 3 SCC 303}**, ***Valsala v. State of Kerala* {(1993) Supp. 3 SCC 665}**, ***Mohd. Aman v. State of Rajasthan* {(1997) 10 SCC 44}**, ***Jaswant Singh v. State of Haryana* {(2000) 4 SCC 484}**, ***Suresh & Another v. State of Uttar Pradesh* {(2001) 3 SCC 673}**, ***Sukhiram v. State of Maharashtra* {(2007) 7 SCC 502}**.

20. Learned counsel for the State submits that Investigation Officer S.J. Jefrine PW-63 has explained the seizure of revolver and other articles, the sealing of articles and their depositing in *Malkhana* of police-station which has been further confirmed by Inspector Subhash Chandra Choudhari (PW-70) in his statement, which has been appreciated in Para-45 of the impugned judgment. The difference in serial number of revolvers seized from the possession of appellant Danesh, as mentioned in seizure memo Ex-P-22 and FSL report Ex.P-54 is a clerical mistake which does not have any significance. Hence, the objections raised by defence in this respect have been rightly rejected by the trial Court. Further, it is submitted that the ballistic report Ex.P-54 is positive and in support of prosecution which indicates that the revolver seized from the possession of appellant Danesh was used to fire and injure the deceased Devendra Singh Khalsa. It is also argued that statement of Rajinder Kaur (PW-68), Pritam Singh (PW-69) and Manish Bhosle (PW-42) clearly established that the acquitted accused persons had previous enmity with the deceased on account of his being a witness in a criminal prosecution for which deceased had been threatened repeatedly.

The statement of witnesses Manish Bhosle (PW-42), Raju Prabhakar (PW-44) and Rajju @ Hanif (PW-5) were recorded under Section 164 of Cr.P.C., which speaks of conspiracy for committing murder of the deceased in which all the accused persons were party. There is no scope of interference in the judgment of conviction against the appellants whereas there are grounds on the basis of which the acquittal appeal may be allowed and the acquitted accused persons may be convicted accordingly for the offence of conspiracy for committing murder.

21. Learned counsel for applicant in revision petition has adopted the argument presented by state.

22. In reply on behalf of the appellants, it is submitted that the statement of Investigation Officer alone does not rule out the possibility of tempering with the seized articles before they were sent for FSL examination. S.J. Jefrine (PW-63) has stated that Inspector Shamsheer Khan (PW-62) accompanied him throughout the process of investigation whereas Shamsheer Khan (PW-62) has not mentioned anything about seizure of revolver from the appellant Danesh. It is further replied that complaint Ex.P-56 lodged by the deceased against the acquitted accused persons was lodged 6 months prior to the date of incident against the acquitted accused persons which cannot be said to have any direct connection with this incident. It is also submitted that it has been held in the judgment of **Ram Kishan Singh Vs. Harmit Kaur** reported in **AIR 1972 SC 468** that statement under section 164 of Cr.P.C. is not a substantive piece of evidence, it can be used only for the purpose of corroborating the statement of witness or for contradicting his evidence. The witnesses namely Manish Bhosle (PW-42), Raju Prabhakar (PW-44) and Rajju @ Hanif (PW-5) have not supported the case of prosecution and declared hostile. On being confronted with their previous statement under Section 164 of Cr.P.C. they have not admitted the contents of their previous

statement, it has been stated by Manish Bhosle (PW-42) in his cross-examination that he was tortured and compelled to give the statement of under Section 164 of Cr.P.C. before the Magistrate by Police Officer, hence, there is no evidence of conspiracy in this case.

23. We have perused all the material on record and heard the arguments submitted on behalf of the appellants, respondents and State at length. It is apparently clear that eyewitnesses to this incident have turned hostile, witnesses of circumstantial evidence have also turned hostile and not supported the case of prosecution. The witnesses of memorandum and seizure with respect to recovery of various articles from the accused persons have also turned hostile and not supported the case of prosecution. Thus, the conviction against the appellants is based merely on the evidence of Investigating Officer regarding the memorandum and seizure of articles and on the basis of the report of ballistic expert. Hence, on the basis of the grounds urged in appeals, revision and acquittal appeal and the arguments submitted on behalf of appellants, applicant and State the questions for determination are as follows:-

1. whether the conviction of appellants are based on proof beyond reasonable doubt ?

2. whether prosecution has succeeded in establishing by evidence that the acquitted accused persons were party to conspiracy for committing murder of Devendra Singh Khalsa?

24. The facts scenario of this case is that all the witnesses, apart from the witnesses of the investigative procedures cited and produced for proving the prosecution case, have turned hostile. The eyewitnesses to the incident namely Mohd. Asgar (PW-2), Sewaram (PW-8), Gurunarayan Tiwari (PW-9), Satish (PW-10), Vikas Tiwari (PW-11), Mohd. Ayub (PW-13), Ashraf (PW-14), Nanhu (PW-21), Bittu @ Jagjit Singh (PW-50) and

Vijay Kumar Jolhe (PW-56) have turned hostile. Similarly, the witnesses examined by the prosecution in proof of conspiracy, Gopal Thakare (PW-3), Nawab (PW-4), Rajju @ Hanif (PW-5), Panchu (PW-6), Rafiz Ahmed (PW-7), Arjun Bagh (PW-12) and Manish Bhosle (PW-42), have not supported the prosecution case and have been declared hostile. The other witnesses of circumstance relevant to the incident are Shantilal (PW-1), Thanuram Sahu (PW-22) and Rajju Yadav (PW-35) have also not supported the prosecution case and have been declared hostile.

25. The witnesses to the test identification parade conducted vide Exhibits P-2, P-3, P-4, namely Mohd. Asgar (PW-2), Satish (PW-10) and Vikas Tiwari (PW-11) have also not supported the test identification parade in which Appellants-Danesh, Chotelal Nishad and Ratan Khattri were identified. The witnesses of memorandum (Exhibits P-21) and seizure (Exhibit P-22), Manish (PW-16) and Rajesh Singh (PW-17) have stated denying the procedure being conducted in their presence and have been declared hostile. The witnesses of seizure of shoes and soil etc. conducted vide Exhibits P-27 and P-28, namely Abdul Rahman (PW-19) and Mahesh Kumar (PW-23) have also been declared hostile. The witness of seizure from acquitted accused-Sahibo Uriya vide Exhibit P-31, is also a hostile witness. The witness of memorandum statements given by Appellants-vide Exhibit P-32 to P-36 and Exhibit P-39, namely Mohd. Ishaq (PW-25), has denied these procedures being conducted in his presence. Another witness Ramnath Sahu (PW-28) stated to be present in these procedures has also been declared hostile and has not supported the prosecution case in any manner. Bimu Kumar (PW-39), witness of seizure of registration paper of scooter vide Ex.P-43 is also a hostile witness. The witnesses examined for the purpose that appellants-accused were helped to go into hiding by the other co-accused persons, namely Shravan Kumar (PW-20), Mehar Singh (PW-58) and Ashok Kumar (PW-36) have not supported the prosecution case and have been declared hostile.

26. Although, the independent witnesses with respect to memorandum Ex.P-21 and seizure memo Ex.P-22 regarding recovery of revolver 0.455 bore and cartridges, with respect to memorandum statement vide Ex.P-33 and seizure memo Ex.P-38 about seizure of country-made firearm and 4 cartridges from the possession of appellant Chhotelal Nishad, with respect to memorandum statement of Ratan Khattri vide Ex.P-34 and seizure of knife vide Ex.P-39, with respect to memorandum statement of appellant Pankaj Das @ Pinku vide Ex.P-35 and seizure memo Ex.P-36 about recovery of motorcycle and empty cartridges of 0.455 bore and with respect to another memorandum statement of acquitted accused Sahibo vide Ex.P-32 and seizure of clothes vide Ex.P-31 have not supported the case of prosecution and declared hostile, the trial Court has believed the statement of Investigating Officers S.J. Jefrine (PW-63) and relied on the judgment of Hon'ble Supreme Court in **Sama Alana Abdulla Vs. State of Gujrat** reported in **1996 Criminal Law Report SC 113** and **State of Gujrat Vs. Anirudh Singh and another** reported in **1997 Criminal Law Report SC 606** that it is not a rule of law that statement of Police Officer should be disbelieved. On going through the whole deposition of S.J. Jefrine(PW-63) the Investigating Officer. We find no reason why his statement should be disbelieved. The proposition of law as mentioned above should applicable in this case. Without disputing this finding of the trial Court, it has to be seen whether the articles recovered have been proved to have connection with offence committed. Dr. Ullas Gonnade (PW-45) conducted the autopsy of the deceased and has affirmed vide his postmortem report Ex.P-62 that the death of deceased was caused by two shots from a firearm. The bullet heads were preserved for FSL examination. Scientific Officer A.K. Khan (PW-67) has conducted ballistic examination of these bullet heads vide his report Ex.P-54 that these bullet heads were fired from a revolver of 0.455 bore which has relevance as one such revolver has been seized from the possession of appellant

Danesh. This finding of answer in question No.2 for determination, is negative.

27. The seizure of country-made firearm and 4 cartridges from the possession of appellant Chhotelal Nishad vide Ex.P-38, seizure of a knife from the possession of appellant Ratan Khattri vide Ex.P-39 and seizure of a motorcycle are of no relevance and there is no evidence that seizure of these articles have any connection with the death of deceased.

28. The seizure of revolver of 0.455 bore from the possession of appellant Danesh and the revolver examined by ballistic expert have a marked difference vide Ex.P-22, the seizure memo mentions the serial No. of revolver as 6624 and the length of barrel is mentioned as 5.5", whereas the report of ballistic expert Ex.P-54 mentions the serial No.5624 and the length of barrel is 6.4". Defence has raised objection on the basis of this difference submitting that the revolver which was seized from the possession of appellant Danesh has not been examined by the ballistic expert. Further, the manufacturer of the seized revolver is mentioned as Webley & Scott in seizure memo Ex.P-22, whereas manufacturer of the revolver examined is shown to be Smith and Wesson in Ex.P-54. This is a significant difference which can not be ignored.

29. The argument submitted on behalf of the appellant Danesh that the seized revolver was never kept in safe custody, seals were tampered with and there being undue delay in sending the seized article for FSL/ballistic examination need no further discussion. The difference in details of the revolver seized and the revolver examined is so remarkable that any layman can express his opinion that the revolver examined by ballistic expert was not the same which was seized from the possession of appellant Danesh. Although, there is report in Ex.P-54 that the bullet head/slugs found in the body of the deceased were fired from the revolver examined by the ballistic expert A.K. Khan (PW-67). This may be so but

there is no proof that this was fired from the same revolver which was seized from the possession of appellant Danesh. Similarly, statement of A.K. Khan (PW-67) on the basis of FSL report Ex.P-54 that the 3 empty cartridges found and seized from the possession of appellant Pankaj Das vide Ex.P-37 have no relevance. According to prosecution case, appellant Pankaj Das was in company of the appellant Danesh and the revolver which was allegedly fired by the appellant Danesh on the deceased, is not the same which has been examined by the Ballistic Expert. The empty cartridges may have been fired from the same revolver which was subjected to examination, but it cannot be assumed that these empty cartridges were the same which were used to fire upon the deceased without there being any direct evidence in this respect. Hence, evidence in this respect against appellant Pankaj Das is of no consequence and inconclusive.

30. The burden of prosecution is to prove its case beyond all reasonable doubts never shifts. The doubt raised in this case is reasonable in every respect as there is remarkable difference in the revolver seized from the possession of appellant Danesh and the revolver examined by Ballistic Expert. On the basis of report Ex.P-54, it may be argued that the revolver examined may have been used to fire upon and cause death of the deceased, but it cannot be assumed that it is the same revolver which was seized from the possession of appellant Danesh. Hence, for these reasons, findings of conviction under Sections 302/34, 302, 201/302 and 302/34 of IPC and 25 and 27 of the Arms Act, on the basis of evidence on record is bad, at the most the appellants could have been convicted for illegal possession of firearm and other articles prohibited under the law.

31. The evidence of identification of the accused persons in test identification parade conducted before the Executive Magistrate G.M. Ansari(PW-32) has no relevance. Statement of G.M. Ansari (PW-32) by itself has no

substance as the accused persons were though present in the identification procedure. The witnesses Md. Ajar (PW-2), Gurunarayan Tiwari (PW-9), Satish (PW-10) and Vikas Tiwari (PW-11) have not supported the case of prosecution and declared hostile. The statement of Executive Magistrate G.M. Ansari (PW-32) in such a case cannot be made use of in favour of prosecution as the witness on the spot, compared to a Police Officer who makes seizure while conducting investigation, who apart from being a Police Officer himself is a witness to the recovery of an article from the accused person. Hence, reliance can be placed on his evidence on the basis of this analogy but same cannot be applied here. Hence, the statement of G.M. Ansari (PW-32), is of no help for the prosecution.

32. Considering the acquittal appeal and the arguments submitted on behalf of the State and the applicant in this case, the evidence brought on record of witnesses Smt. Rajinder Kaur (PW-68), Pritam Singh (PW-69) disclose about some previous incident which had taken place between the deceased and the acquitted accused persons in which the acquitted accused persons had used abusive words against the deceased, assaulted him and had threatened to kill him. This shows that deceased and the acquitted accused persons had inimical terms which may be considered as a reason that acquitted accused persons may have been interested to eliminate the deceased, but this is not enough proof to rope them in for the offence of conspiracy. The witnesses Manish Bhosle (PW-42), Raju Prabhakar (PW-44) and Rajju @Hanif (PW-5) were examined by the prosecution for bringing evidence of conspiracy on the basis of there previously recorded statement under Section 164 of Cr.P.C., these witnesses have not supported the case of prosecution and declared hostile. The statement of under Section 164 of Cr.P.C. cannot be made use of as a substantive piece of evidence because such statement is recorded at the stage of investigation. Hence, such statement has the

status of a previous statement and not of a statement before the trial Court. Judgment in criminal case is based only on the evidence brought on record before the trial Court in accordance with the provision of law in which statement under Section 164 of Cr.P.C., is not a part, reliance has been placed upon the judgment of **AIR 1972 SC 468** by the respondents in the revision petition and in the acquittal appeal, is a well settled principle of law which has to be followed. Hence, for these reasons, we are of the considered view that there is no substance in the revision petition and the acquittal appeal. Hence, that revision and appeal against acquittal are dismissed.

33. On the basis of discussion made above with respect to involvement of the appellants in commission of murder of the deceased Devendra Singh Khalsa and the finding arrived at, the answer to the question No.1 for determination, is partly positive. The conviction of appellants under Section 302/34, 302, 201/302 and 302/34 of IPC is not sustainable. The conviction of appellants Chhotelal Nishad, Danesh and Ratan Khattri under Section 25 of the Arms Act needs no interference. Conviction of appellant Danesh under Section 27 of Arms Act is without basis, as there is no ocular or substantial evidence against the appellant Danesh that he used the revolver seized from him for commission of offence, hence, his conviction under Section 27 of Arms Act, is also not sustainable. Such conviction and sentence for offence punishable under Section 25 of Arms Act as imposed by trial Court are confirmed. His conviction and sentence for other offences are vacated and he is acquitted of the charges on those counts.

34. After consideration of all the material on record and the evidence of prosecution and defence, we are of the considered view that this appeal should be allowed in part. Criminal Appeal No.19/2002 of Chhotelal Nishad, Criminal Appeal No.30 of 2002 of Danesh and Criminal Appeal No.46 of 2002 of Ratan Khattri is allowed in part. Conviction under Section

302/34, 302 and 302/34 of IPC recorded against these appellants and the sentence awarded, are set aside. The conviction of appellants Chhotelal Nishad and Ratan Khattri under Section 25 of the Arms Act and the order of sentence in the impugned judgment, is upheld. The conviction of appellant Danesh under Section 27 of the Arms Act, is set aside but, his conviction under Section 25 of the Arms Act, is upheld. The sentence awarded to him RI for a period of 5 years for combined the offences under Section 25 and 27 of Arms Act, is set aside and instead appellant- Danesh is awarded sentence of R.I. for a period of 3 years along with fine of Rs.100/-, in default of payment of fine he shall be required to further undergo R.I. for a period of 15 days. Criminal Appeal No. 43 of 2002 of Pankaj Das @ Pinku is allowed vacating the conviction and sentence imposed on him and appellant is acquitted of all the charges.

35. Appellant Chhotelal Nishad in Criminal Appeal No.19 of 2002, appellant Danesh in Criminal Appeal No.30 of 2002 and appellant Ratan Khattri in Criminal Appeal No.46 of 2002 were taken into custody on 24.11.1997 and they were released on bail by this Court by order dated 17.11.2003. This period of custody undergone by them in jail shall be set off against the terms of imprisonment imposed on them for the conviction against them in this judgment.

Sd/-
(Thottathil B. Radhakrishnan)
CHIEF JUSTICE

Sd/-
(R.C.S.Samant)
JUDGE