

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-D-503-DB of 2011(O&M)
Date of Decision : 24.01.2017

Raj Kumar @ Raju Appellant

Versus

State of Punjab Respondent

AND

CRA-D-476-DB of 2011(O&M)

Kulwinder Singh @ Kinda Appellant

Versus

State of Punjab Respondent

AND

CRA-D-583-DB of 2011(O&M)

Naresh Kumar @ Nesha Appellant

Versus

State of Punjab Respondent

AND

CRA-D-588-DB of 2011(O&M)

Jagjit Singh @ Raja Appellant

Versus

State of Punjab Respondent

AND

CRA-D-990-DB of 2011(O&M)

Chander Khosla @ Bhushan @ Bomb

..... Appellant

Versus

State of Punjab

..... Respondent

**CORAM: HON'BLE MR. JUSTICE S.S.SARON
HON'BLE MR. JUSTICE DARSHAN SINGH**

Present : Mr. Preetinder Singh, Advocate (Amicus Curiae)
for the appellants.

Ms. Ritu Punj, Addl.AG. Punjab.

DARSHAN SINGH, J.

This judgment of ours shall dispose of all the five appeals captioned above which have arisen out of the same judgment of conviction and the order of sentence dated 30.03.2011, vide which all the five appellants have been held guilty and convicted for the offences punishable under Section 302 read with Section 120-B of the Indian Penal Code, 1860 (for short 'IPC') and Section 25 of the Arms Act, 1959 (for short 'Act'). They were sentenced to undergo imprisonment for life with a fine of Rs. 1000/- each for the offence punishable under Section 302 read with Section 120-B of IPC and in default of payment of fine to further undergo rigorous imprisonment for a period of six months. They were further sentenced to undergo rigorous imprisonment for a period of one year with a fine of Rs. 300/- each and in default of payment of fine to undergo rigorous imprisonment for a period of one month each for the offence

punishable under Section 25 of the Arms Act (though not specifically mentioned in the impugned order of sentence).

2. The catalogue of the facts and sequence of the events giving rise to this prosecution are that on 05.08.2007, PW-10 Inspector Rakesh Kumar, the then Station House Officer (hereinafter called 'the Investigating Officer') Police Station City Nawanshahr along with other police officials were present at Chandigarh Chowk, Nawanshahr in connection with the law and order duty. At about 9.45.a.m., he received the secret information that a dead body was lying on Saloh-Barsian road in the area of village Saloh. On which, he along with other police officials reached at the spot and found the dead body of unidentified person lying there. From the search of the dead body, he recovered a driving licence. On the basis of the driving licence and the photo affixed therein, the deceased was identified as Sarabjit Singh @ Sabba son of Charanjit Singh, resident of Ambedkar Nagar, Mussapur Road, Nawanshahr. One mobile phone bearing sim no. 98550-89397 was also recovered from the pocket of the deceased. The motorcycle make Hero Honda bearing registration no. PB-32-G-0982 was also lying near the dead body. The deceased was having a firearm injury on the left side of his back. Investigating Officer sent ruqa Ex.PF to the police station. On the basis of which FIR Ex.PF/1 was registered. The photographer was called at the spot, who took the photographs of the place of occurrence from different angles. The Investigating Officer prepared the inquest report Ex.PE. He also prepared the rough site plan of the place of occurrence. The articles recovered from the dead body were taken into possession vide memo Ex.PD. The dead body of Sarabjit Singh @ Sabba was sent to Civil Hospital for autopsy

vide application Ex.PB. After the postmortem examination, ASI Dilbag Singh produced the sealed parcels containing one bullet recovered from the dead body of Sarabjit Singh @ Sabha and his belongings which were taken into possession vide memo Ex.PG. The dead body was handed over to his relatives.

3. On 06.08.2007, PW-8-Charanjit Singh, the father of the deceased produced the letter Ex.PW8/A written by his daughter-Manjit Kaur from Germany to him along with the envelope Ex.PW8/B. The said letter was taken into possession vide memo Ex.PW8/C along with the covering envelope. The Investigating Officer also recorded the statement of Charanjit Singh, the father of the deceased, who stated that his daughter-Manjit Kaur was married with co-accused-Jasvir Singh (Proclaimed Offender) in the year 1989. He was residing in Germany at that time. His daughter-Manjit Kaur also accompanied him to Germany after the marriage. The relations between Manjit Kaur and Jasvir Singh were strained. Manjit Kaur had been informing them regarding their strained relations through letters and also by telephone. Jasvir Singh was suspecting the moral character of Manjit Kaur. Due to this reason Manjit Kaur started residing separately in the year 2005. Jasvir Singh started threatening Manjit Kaur to kill her as well as her family members. Jasvir Singh also threatened them on telephone. In the beginning of the year 2007, deceased-Sarabjit Singh also received threatening calls from Jasvir Singh and due to this reason an altercation took place between them on telephone. They started abusing each other. Then, Jasvir Singh threatened to kill him with a bullet. He further deposed that on 05.08.2007, Sarabjit Singh @ Sabha received a telephone call at 09.30. a.m. from somebody

that he is to paint a Kothi at village Barsian as the deceased was painter by profession. Thereafter, Sarabjit Singh @ Sabba left the house on motorcycle and at about 09.30/10.00. a.m, he received the telephonic call from the police officials about the murder of his son.

4. The Investigating Officer collected the call details Ex.PH and Ex.PH/1 of the mobile phone of deceased-Sarabjit Singh @ Sabba and accused-Raj Kumar @ Raju. He also recorded the statement of Kuldip Singh, the owner of the sim no. 98140-06694, who disclosed that on 06.06.2007, when he was going from his village Pharala to Behram his mobile phone had lost. The bullet recovered from the dead body was sent to Forensic Science Laboratory, Punjab, Chandigarh (for short 'F.S.L.'). The Investigating Officer also recorded the statements of PW-6-Rajinder Kumar and PW-9-Ram Lubhaya. On 20.10.2007, accused Kulwinder Singh @ Ninda, Chander Khosla @ Bhushan and Naresh Kumar @ Nesha were arrested. From the personal search of Kulwinder Singh, four live cartridges of 315 bore were recovered, which were taken into possession vide memo Ex.PW5/D. Four live cartridges of 315 bore were also recovered from the possession of accused Naresh Kumar @ Nesha, which were taken into possession vide memo Ex.PW5/E. From the search of accused Chander Khosla @ Bhushan @ Bomb, one country made pistol loaded with a cartridge of 315 bore was recovered, which was kept in a sealed parcel and was taken into possession vide memo Ex.PW5/F. The articles of the case property were deposited in intact condition with the Mohrir Head Constable (for short 'MHC').

5. On 04.11.2007, accused-Jagjit Singh @ Raja and Raj Kumar @ Raju were also arrested. From the search of accused-Jagjit Singh @

Raja four live cartridges of 315 bore and motorcycle bearing registration no. PB-09(T)-H-1929 were recovered. The live cartridges were kept in sealed parcel. These articles were taken into possession *vide* memo Ex.PQ. From the search of accused-Raj Kumar @ Raju, four live cartridge of 315 bore and one motorcycle bearing registration no. PB-07-R-0285 along with registration certificate were recovered. The cartridges were kept in a sealed parcel. The aforesaid articles were taken into possession *vide* memo Ex.PR.

6. The Investigating Officer recorded the disclosure statements of accused-Raj Kumar @ Raju and Jagjit Singh @ Raja, which are 'Ex.PS' and 'Ex.PT' respectively. Accused-Raj Kumar @ Raju and Jagjit Singh @ Raja in their disclosure statement disclosed the facts regarding the commission of offence. The Investigating Officer also collected the evidence regarding the money received by accused-Kulwinder Singh @ Kinda and Raj Kumar @ Raju from their co-accused-Jasvir Singh from Germany. He also took into possession the arms licence of Jasvir Singh Ex.P-26. The pistol recovered from accused-Chander Khosla @ Bhushan @ Bomb was also sent to FSL, Punjab, Chandigarh. The reports of FSL Ex.P-27 and Ex.P-28 were received and on completion of the investigation, the report under Section 173 of the Code of Criminal Procedure, 1973 (for short Cr.P.C.) was presented against all the five appellants. Co-accused-Jasvir Singh was declared as 'PO'.

7. All the five accused-appellants were charge sheeted for the offences punishable under Section 302, 120-B of IPC. Accused-appellant Naresh Kumar @ Nesha, Jagjit Singh @ Raja, Kulwinder Singh @ Kinda and Raj Kumar @ Raju were charge sheeted for the offence punishable

under Section 25 of the Act for having in their possession four live cartridges of 315 bore each without any valid licence. Similarly, accused-appellant Chander Khosla @ Bhushan @ Bomb was also charge sheeted for the offence punishable under Section 25 of the Act for having been found in possession of one pistol along with one cartridge without any licence.

8. All the accused-appellants pleaded not guilty to the charge and claimed trial.

9. In order to substantiate its case, the prosecution examined as many as 13 witnesses.

10. After the closure of the prosecution evidence, when examined under Section 313 Cr.P.C, accused-appellants Chander Khosla @ Bhushan @ Bomb, Jagjit Singh @ Raja, Kulwinder Singh @ Kinda, Raj Kumar @ Raju pleaded that they are innocent and have been falsely implicated. Accused-appellant Naresh Kumar @ Nesha pleaded that he has no relation or concern of any kind with the complainant or his family members. He also had no concern with any matrimonial dispute between the complainant or his children or anybody else. He was a government employee and was gainfully employed as sweeper in Civil hospital, Nawanshahr. He was also doing the profession of dog training. The complainant and his family members are residing at a distant place from his residence. They belonged to different caste and had no reason to involve himself in the family affairs of the others. Thus, he pleaded that he is innocent and has been falsely implicated in this case.

11. In the defence evidence, accused-appellants examined DW-1-AMHC Raj Kumar, Police Station City Nawanshahr. He produced register

no. 19. He deposed about handing over of the dead body after the postmortem examination to the relatives of the deceased-Sarabjit Singh @ Sabba and the deposit of the articles of the case property. Thereafter, accused-appellants closed their defence evidence.

12. On appreciation of the evidence on record and the contentions raised by learned counsel for the parties, the learned trial Court vide impugned judgment of conviction and the order of sentence dated 30.03.2011 held guilty and convicted all the accused-appellants for the offences punishable under Section 302 read with Section 120-B IPC and Section 25 of the Act and were sentenced as mentioned in the upper part of this judgment.

13. Aggrieved from the aforesaid judgment of conviction and order of sentence, all the appellants have separately preferred these appeals.

14. We have heard learned counsel for the parties and have meticulously examined the record of the case.

15. Initiating the arguments, learned counsel for the appellants contended that the case of the prosecution is based on the circumstantial evidence. The prosecution was required to establish the complete chain of the circumstances leading to the guilt of the accused. But, in the instant case, what to talk of the chain of circumstances, even no incriminating circumstance is established against the accused-appellants. He contended that the prosecution was relying upon the incriminating circumstances i.e. the motive for the commission of offence, extra judicial confession, recoveries, disclosure statements, call details, statement of Rajinder Kumar, who had allegedly overheard the conversation between the

accused and had seen them going towards the place of commission of crime and remittance of the money by co-accused Jasvir Singh from Germany to appellant-Raj Kumar @ Raju and Kulwinder Singh @ Kinda.

16. He further contended that the motive for commission of crime is not established. The letter Ex.PW8/A is not legally proved. Moreover, this letter is dated 14.03.2005, whereas the occurrence had taken place on 05.08.2007 i.e. after more than two years. The prosecution has not brought on file any evidence to show as to when the divorce has taken place between Manjit Kaur, the sister of the deceased and accused-Jasvir Singh. There is also no evidence to establish that the relations between them were strained immediately before the occurrence. He further contended that even Manjit Kaur wife of co-accused-Jasvir Singh has not been examined to establish the strained relations between her and her husband at the relevant point of time.

17. He further contended that the witness of extra judicial confession PW-9-Ram Lubhaya has not supported the prosecution version at all. The recoveries were planted and are not proved. He contended that it is not plausible that all the accused will have same number of live cartridge in their possession, that too without firearm. He further contended that it is not established that the bullet recovered from the body of the deceased was fired from the pistol allegedly recovered from the possession of accused-Chander Khosla @ Bhushan @ Bomb.

18. He further contended that the call details produced by the prosecution are not admissible in evidence as the conditions provided in Section 65B of Indian Evidence Act, 1872 are not complied with. To support his contentions, he relied upon cases **Anvar P.V. Vs. P.K.**

Basheer and others, AIR 2015 S.C. 180 and Harpal Singh @ Chhota Vs. State of Punjab, 2016(4) R.C.R(Criminal) 936. He further contended that even no official of the telephone company has been produced to prove these call details. The Investigating Officer was not the competent witness to prove the call details. Thus, he contended that there is also no evidence on record to establish that the telephone bearing sim no. 98140-06694 was being used by accused-Raj Kumar @ Raju. In-fact, one Kuldip Kumar was the owner of this sim card. Said Kuldip Kumar has not been examined by the prosecution nor any DDR about the loss of that mobile phone has been produced. The said mobile phone has also not been recovered from the possession of accused-Raj Kumar @ Raju. So, accused-Raj Kumar @ Raju is not connected with the call details.

19. He further contended that PW-6-Rajinder Kumar is an introduced witness. The occurrence has taken place on 05.08.2007. His statement for the first time has been recorded on 12.10.2007. He was the cousin of the deceased. It is not believable that if he had heard the conversation of the accused that they had shoot at Sarabjit Singh @ Sabba, then he would have kept mum for more than two months and had left the place for Delhi. PW-8-Charanjit Singh has admitted that Rajinder Kumar had come to condole the death. But, even at that time, no such facts were disclosed by Rajinder Kumar. He further contended that it is not plausible that accused will discuss their plan and execution thereof in the public. Thus, he contended that PW-6-Rajinder Kumar is not a reliable witness.

20. He further contended that even the remittance of the money by Jasvir Singh is not established as PW-7-Jatinder Kumar has admitted in the cross-examination that the relevant entry was not in his hand. The

same was in the hand of his employee, but he could not tell his name. So, he had no personal knowledge about the transaction. He further contended that moreover, the amount of Rs. 48,745/- has been remitted by Manjit Kaur, the daughter of the complainant. He further contended that moreover, the remittance of the money by a relative from abroad cannot be an incriminating circumstance. Thus, he contended that the accused-appellants have been booked only on the basis of suspicion, which cannot be a legal basis to record the conviction. Thus, he pleaded that the learned trial Court has wrongly convicted the appellants.

21. On the other hand, learned State counsel contended that co-accused-Jasvir Singh had strained relations with his wife Manjit Kaur and in-laws. So, he had strong motive to eliminate Sarabjit Singh @ Sabba, his brother-in-law (brother of his wife-Manjit Kaur). She contended that the motive for the commission of offence is fully established from the statement of PW-8-Charanjit Singh, the complainant and the letter Ex.PW8/A. She further contended that PW-6-Rajinder Kumar is a reliable witness. He has seen all the accused going towards the place of occurrence. He has further overheard their conversation before and after the commission of the crime. She further contended that the weapon of offence i.e. the pistol has been recovered from the possession of accused-appellant-Chander Khosla loaded with one cartridge. The cartridges were also recovered from the possession of the other accused. Accused-Raj Kumar @ Raju and Jagjit Singh @ Raja have also suffered the disclosure statements narrating the manner in which the crime was committed. She further contended that the call details Ex.PH and Ex.PH/1 clearly establishes that on the day of occurrence as well as one day prior to the

occurrence, accused-appellant-Raj Kumar @ Raju had made various calls to deceased-Sarabjit Singh @ Sabba. He has also made the call immediately before the commission of crime, which is the strong incriminating evidence. She further contended that co-accused-Jasvir Singh has sent money from Germany to accused-Kulwinder Singh @ Kinda and Raj Kumar @ Raju for the commission of the offence. The remittance of money is proved from the statement of PW-6-A Rohit Gupta and PW-7 Jatinder Kumar. Thus, she contended that the aforesaid circumstances clearly establishes that the appellants have committed the murder of Sarabjit Singh @ Sabba and have been rightly convicted by the learned trial Court.

22. We have duly considered the aforesaid contentions.

23. There is no direct evidence to prove the commission of the crime. The case of the prosecution is entirely based on the circumstantial evidence. The Hon'ble Apex Court in case **Nathiya Vs. State Rep. By Inspector of Police, Bagayam police Station, Vellore 2016 (4) R.C.R (Criminal) 868** after taking into consideration the earlier pronouncements laid down the following golden principles to prove the case on the basis of the circumstantial evidence:-

- “1. The facts so established should consistent only with the hypothesis of the guilt of the accused – They should not be explainable on any other hypothesis except that the accused is guilty.
2. The circumstances should be of a conclusive nature and tendency.
3. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
4. In scrutinizing the circumstantial evidence, a Court is required to

evaluate it to ensure that the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused.

5. Whether the chain is complete or not would depend on the facts of each case emanating from the evidence and no universal yardstick should ever be attempted.
6. In judging the culpability of the accused, the circumstances adduced when collectively considered, must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime alleged – That the circumstances established must be of a conclusive nature consistent only with the hypothesis of the guilt of the accused, was emphatically pronounced.”

Similar principles of law were laid down in cases **Krishnan Vs. State (2009) Supreme Court Cases (CrI.) 1029** and **Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116**.

24. It is further the settled principle of law that there should be the complete chain of incriminating circumstances to establish the guilt of the accused. One or two isolated circumstances cannot form the basis of conviction. The Hon'ble Apex Court in case **K.Venkateshwarlu Vs. The State of Andhra Pradesh 2012 (3) R.C.R.(Criminal) 990** has laid down as under:-

“Crime may be heinous, morally repulsive and extremely shocking, but moral considerations cannot be a substitute for legal evidence and the accused cannot be convicted on moral considerations.”

It was further laid down in this pronouncement by the Hon'ble Apex Court that the conviction for want of legal evidence has to be set aside.

25. In the instant case, the prosecution has relied upon the following incriminating evidence/circumstances:-

1. Motive for the commission of offence.
2. Extra judicial confession.

3. Statement of PW-6-Rajinder Kumar, who is alleged to have overheard the conversation between the accused with respect to the commission of offence.
4. Recoveries from the possession of the accused.
5. Disclosure statements made by accused Raj Kumar @ Raju and Jagjit Singh @ Raja.
6. Call details between accused Raj Kumar @ Raju and deceased-Sarabjit Singh @ Sabba.
7. Remittance of money by co-accused-Jasvir Singh to accused-Raj Kumar @ Raju and Kulwinder Singh @ Kinda from Germany.

26. We have to see as to whether the prosecution has been able to establish the aforesaid incriminating circumstances against the accused-appellants.

1. MOTIVE FOR THE COMMISSION OF OFFENCE:

27. As per the prosecution case, it is alleged that the co-accused-Jasvir Singh was married with Manjit Kaur, the daughter of complainant-Charanjit Singh and sister of deceased-Sarabjit Singh @ Sabba. They were having strained relations and due to that reason, Jasvir Singh connived with the accused-appellants for elimination of Sarabjit Singh @ Sabba. The prosecution has built up its case in order to prove the motive for commission of offence on the basis of the statement made by PW-8-Charanjit Singh and the letter Ex.PW8/A written by Manjit Kaur to her parents. No doubt, PW-8-Charanjit Singh-complainant has deposed about the strained relations between Jasvir Singh and his daughter-Manjit Kaur. He has also deposed that Jasvir Singh had telephonically threatened them. Even, an altercation has taken place between Sarabjit Singh @ Sabba and Jasvir Singh in the early period of the year 2007. In the letter Ex.PW8/A dated 14.03.2005, Manjit Kaur has also mentioned about her maltreatment and physical torture by Jasvir Singh. But, when this evidence is tested on

the touchstone of evidentiary value, it leads us nowhere. PW-8-Charanjit Singh has admitted in the cross-examination that his daughter-Manjit Kaur had obtained divorce from her husband-Jasvir Singh in Germany. He further contended that his daughter-Manjit Kaur has never told him that she has filed any complaint against Jasvir Singh before the German Police regarding her quarrel with Jasvir Singh. He further admitted that his daughter-Manjit Kaur visited India before divorce to attend the marriage of the brother of Jasvir Singh. He and his family members also attended that marriage. He also admitted that Jasvir Singh had even sent him the money on one or two occasions in the year 1994-95. But, he deposed that the said money was returned by him when Jasvir Singh visited India as the said money was taken as a loan.

28. Manjit Kaur, the daughter of complainant-Charanjit Singh and sister of deceased-Sarabjit Singh @ Sabba, was the best witness to prove the strained relations between her and her husband-Jasvir Singh. But, she has not been joined in the investigation nor produced in the witness box. The prosecution has also not brought on file any documentary evidence to show that on which date the divorce has taken place between Manjit Kaur and Jasvir Singh. The letter Ex.PW8/A is dated 14.03.2005 i.e. more than two years prior to the occurrence. The complainant has alleged that in the beginning of the year 2007, co-accused-Jasvir Singh has threatened them telephonically and also had altercation with deceased-Sarabjit Singh @ Sabba. But, the prosecution has not collected any call details to show that any telephone call was received by the complainant or by deceased-Sarabjit Singh @ Sabba from Germany made by co-accused-Jasvir Singh. As already mentioned, Manjit

Kaur, the scribe of the letter Ex.PW8/A, who happens to be the real sister of the deceased-Sarabjit Singh @ Sabba and was easily available to the prosecution, has not been examined. Complainant-Charanjit Singh has not even disclosed the date of divorce between his daughter-Manjit Kaur and co-accused-Jasvir Singh. Thus, the prosecution has not been able to establish the motive alleged by the prosecution for the commission of the offence.

29. Moreover, it is the settled principle of law that the motive itself cannot be a ground for proving the guilt in the absence of either direct or circumstantial evidence. Reference can be made to cases **Swapan Ch. Dey Vs. State of Tripura 2011(6) R.C.R.(Criminal) 22** and **State of Himachal Pradesh Vs. Narender Singh and others**. The Hon'ble Apex Court also in the latest judgment titled as **State of Punjab Vs. Bittu 2016(1) R.C.R.(Criminal) 1043** has laid down that even though the motive is established by the testimony of PW-7-Jatinder Kumar yet it alone cannot be sufficient to convict the accused as it is not substantive evidence and is merely corroborative in nature. The case is hand is even on better footing as even the motive alleged by the prosecution for the commission of the offence is not established.

2. EXTRA JUDICIAL CONFESSION:

30. It is alleged that accused-Naresh Kumar @ Nesha, Chander Khosla @ Bhushan @ Bomb and Kulwinder Singh @ Kinda suffered the extra judicial confession on 15.10.2007 before PW-9-Ram Lubhaya. But, this witness has not supported the prosecution version at all and categorically deposed that they did not meet him on 15.10.2007 in the Court Complex. He also denied that he has suffered any statement to the

police to this effect. So, there is no proof that accused-Naresh Kumar @ Nesha, Chander Khosla @ Bhushan @ Bomb and Kulwinder Singh @ Kinda suffered any extra judicial confession.

3. **STATEMENT OF PW-6-RAJINDER KUMAR, WHO IS ALLEGED TO HAVE OVERHEARD THE CONVERSATION BETWEEN THE ACCUSED WITH RESPECT TO THE COMMISSION OF OFFENCE:**

31. PW-6-Rajinder Kumar is the most material witness of the prosecution. He has deposed that on 05.08.2007 at about 9.00 a.m., he was going to village Barsian to see his in-laws on his cycle. When, he reached near Nirankari Bhawan, five persons namely Chander Khosla @ Bhushan @ Bomb, Naresh Kumar @ Nesha, Kulwinder Singh @ Kinda, Raja and one other boy who was present in the Court, were present there. They were talking with each other that they had contacted him (deceased) on telephone and he was coming towards Barsian and he should be finished. Accused-Chander Khosla @ Bhushan @ Bomb was having a weapon like pistol. He deposed that he passed over near these persons and reached near Colony. Then, his cousin-Sarabjit Singh @ Sabba (deceased) came on motorcycle behind him. He was attending a telephone call on mobile phone. He talked with him. He told that he was going to village Barsian in-connection with painting of Kothi and will contact him while returning. He further deposed that all the accused present in the Court followed him on two motorcycles. Thereafter, he deposed that when he turned from Saloh road towards Rahon, then all the five accused persons came back on their motorcycles. Accused were asking Raja that he has done the work and accused-Raja stated that he fired the shot on the back of Sarabjit Singh @ Sabba and he will die due to the fire shot. He further deposed that

thereafter on 05.08.2007, he left for Delhi for about two months. After coming from Delhi, he came to know that his cousin brother-Sarabjit Singh @ Sabba has been murdered and he disclosed the facts to the police.

32. From the aforesaid statement of PW-6-Rajinder Kumar, it emerges that on 05.08.2007, he has seen all the five accused present near Nirankari Bhawan. They had called deceased-Sarabjit Singh @ Sabba by making a telephone call. When, Sarabjit Singh @ Sabba came on his motorcycle, they followed him on the motorcycle. It further comes out that this witness has further seen them returning and at that time accused-Jagjit Singh @ Raja had stated that he had shot Sarabjit Singh @ Sabba on the back and he will die.

33. It is an admitted fact that PW-6-Rajinder Kumar was closely related to deceased-Sarabjit Singh @ Sabba. Deceased-Sarabjit Singh @ Sabba was the son of his Aunt (father's sister-Bua). It further comes out from the statement of PW-8-Charanjit Singh that they were having the good relations and were on visiting terms. PW-6-Rajinder Kumar has alleged that immediately after overhearing this tragic incident, he silently left for Delhi and stayed with his another aunt (Bua-Dharam Kaur). He stated that he did not disclose about this incident prior to his return from Delhi after two months to any of his family members as well as the family members of the deceased. He has admitted that there was a telephone in the house of Dharam Kaur his aunt. PW-8-Charanjit Singh has stated that a telephone was also installed at his house and the number thereof was known to Rajinder Kumar. PW-6-Rajinder Kumar has even gone to this extent that he does not know when Sarabjit Singh @ Sabba was cremated and when his last rites (kirya) took place and further stated that when he

returned from Delhi to Nawanshahr, he came to know about the murder of his Bua's son and then he recollected the incident. It is highly unbelievable that after overhearing such a tragic incident, a close relative will remain mum for a period of more than two months and will be so unconcerned that he silently left the place without narrating the facts to his family members and the family members of the deceased. The deceased was none else then the son of his aunt (Bua).

34. It is also not believable that the accused could have been publicly and openly discussing their plan and execution thereof which could have been overheard by PW-6-Rajinder Kumar particularly when the accused were going on the motorcycle and the witness was on his cycle.

35. PW-6-Rajinder Kumar has stated that he had gone to Delhi for doing the painting work. But, this version is also not corroborated from any evidence. It is highly improbable that such a close relative will not even attend the funeral or last rites of the deceased-Sarabjit Singh @ Sabba. Dharam Kaur with whom PW-6-Rajinder Kumar is stated to be living at Delhi was also closely related to the deceased. She is the sister of the mother of the deceased. It is not believable that such a close relative would not have come to know about the tragic occurrence and she must had come to condole the death of her sister's son. PW-8-Charanjit Singh-complainant has categorically stated in the cross-examination that they had informed all their relatives in India regarding the death of Sarabjit Singh @ Sabba. He further deposed that on the date of occurrence, all his relatives including Rajinder Kumar came to their house to condole the death of his son. All the relatives were called at the bhog ceremony of his

son-Sarabjit Singh @ Sabba. These facts in the cross-examination of PW-8-Charanjit Singh totally belies the statement of PW-6-Rajinder Kumar that he had not contacted the family members of the deceased till he returned back from Delhi after more than two months. PW-8-Charanjit Singh has categorically deposed that PW-6-Rajinder Kumar has come to their house on the date of occurrence itself and they had called all their relatives for the bhog ceremony. Thus, if PW-6-Rajinder Kumar would had any knowledge about the incident he must have narrated the same to the family members of the deceased when he went there to condole the death.

36. There is no explanation with respect to the delay of more than two months in recording the statement of PW-6-Rajinder Kumar under Section 161 Cr.P.C by the police, who was easily available to the Investigating Officer. The Hon'ble Apex Court in case **Harbeer Singh Vs. Sheeshpal & Ors. 2016(4) R.C.R.(Criminal) 747** has laid down as under:-

“17. However, **Ganesh Bhavan Patel Vs. State Of Maharashtra, (1978) 4 SCC 371**, is an authority for the proposition that delay in recording of statements of the prosecution witnesses under Section 161 Cr.P.C., although those witnesses were or could be available for examination when the Investigating Officer visited the scene of occurrence or soon thereafter, would cast a doubt upon the prosecution case. [See also **Balakrushna Swain Vs. State Of Orissa, (1971) 3 SCC 192; Maruti Rama Naik Vs. State of Maharashtra, (2003) 10 SCC 670 and Jagjit Singh Vs. State of Punjab, (2005) 3 SCC 68**]. Thus, we see no reason to interfere with the observations of the High Court on the point of delay and its corresponding impact on the prosecution case.”

Thus, the inordinate and unexplained the delay in recording the statement of PW-6-Rajinder Kumar clubbed with his total unnatural

conduct renders his statement unworthy of credence. It appears that this witness has only been introduced to create the evidence for the implication of the appellants.

4. **RECOVERIES FROM THE POSSESSION OF ACCUSED:**

37. The version of the prosecution regarding recoveries from the possession of the accused are also unbelievable. It is alleged that four live cartridges each were recovered from the possession of accused-Naresh Kumar @ Nesha, Kulwinder Singh @ Kinda, Raj Kumar @ Raju and Jagjit Singh @ Raja. It is highly improbable that all the four accused at different times will have same number of cartridges in their possession. These recoveries clearly appears to be a plantation by the Investigating Officer to create some incriminating evidence. The Investigating Officer has admitted in the cross-examination that the cartridges could be of no use without any fire arm. So, there was no purpose with all the accused to keep in their possession only four live cartridges each without any firearm. The recovery of the country made pistol loaded with one cartridge is also alleged to be effected from accused-Chander Khosla @ Bhushan @ Bomb in the same transaction when four cartridges each were recovered from accused-Kulwinder Singh @ Kinda and Naresh Kumar @ Nesha, which also does not inspire any confidence.

38. DW-1 AMHC-Raj Kumar, who appeared in the witness box along with Register no. 19 and stated that the register contained the entry of the case property of FIR No. 133, vide DDR no. 16 dated 20.08.2007 the Investigating Officer deposited a *Desi* pistol and one cartridge and a parcel containing four live cartridges and another parcel containing four live cartridges. Whereas, as per the prosecution case, these recoveries have

been effected on 20.10.2007. This document of the prosecution itself renders the recoveries doubtful.

39. Moreover, the prosecution has not been able to establish that the pistol allegedly recovered from the possession of accused-Chander Khosla @ Bhushan @ Bomb is the weapon of offence. The prosecution has sent the bullet recovered from the dead body to the FSL. Similarly, the country made pistol recovered from the possession of accused-Chander Khosla @ Bhushan @ Bomb was also sent to the FSL for examination. The report of the FSL Ex.P-28 shows that the Ballistics expert could not form any definite opinion that the bullet recovered from the body of the deceased was fired from the pistol recovered from Chander Khosla @ Bhushan @ Bomb. So, the pistol allegedly recovered from the possession of Chander Khosla @ Bhushan @ Bomb is not proved to be the weapon of offence. Thus, the aforesaid recoveries, which are highly doubtful and are not connected with the commission of crime, cannot form the incriminating evidence against the appellants.

5. **DISCLOSURE STATEMENTS MADE BY ACCUSED-RAJ KUMAR @ RAJU AND JAGJIT SINGH @ RAJA:**

40. The Investigating Officer has recorded the disclosure statements of accused-Raj Kumar @ Raju and Jagjit Singh @ Raja Ex.PS and Ex.PT. These disclosure statements are in-fact the confessional statements made by accused before the Investigating Officer. The Hon'ble Apex Court in case **Pandurang Kalu Patil Vs. State of Maharashtra 2002(1) R.C.R (Criminal) 499** has laid down as under :-

“3. The legal proposition adumbrated in Pulikuri Kottaya has been considered and tested by this Court, time and again, and on all such occasions this Court has only reiterated the said principle with approval (vide *Jaffar Hussain Dastagir v. State of Maharashtra, [1969] 2 SCC*

872; (1995) 4 SCC 392; *Shamshul Kanwar v. State of U.P.*, [1995] 4 SCC 430 and *State of Rajasthan v. Bhup Singh*, 1997 (1) RCR (Crl.) 760 (SC): 1997(10) SCC 675 Para 15 and in the last cited decision this Court, while again re-affirming the ratio in *Pulikuri Kottaya* has said thus :-

"The ratio therein (Kottaya) has become locus classicus and even the lapse of half-a-century after its pronouncement has not eroded its forensic worth."

Even the recent decision in *State of Maharashtra v. Damu*, 2000(2) RCR (Crl.) 781: [2000] 6 SCC 269 this Court followed *Pulikuri Kottaya* with approval. The fallacy committed by the Division Bench as per the impugned judgment is possibly on account of truncating the word "fact" in Section 27 of the Evidence Act from the adjoining word "discovered".

The essence of Section 27 is that it was enacted as a proviso to the two preceding Sections (see Sec. 25 and 26) which imposed a complete ban on the admissibility of any confession made by an accused either to the police or to any one while the accused is in police custody. The object of making a provision in Section 27 was to permit a certain portion of the statement made by an accused to a police officer admissible in evidence whether or not such statement is confessional or non-confessional. Nonetheless the ban against admissibility would stand lifted if the statement distinctly related to a discovery of fact."

As per the aforesaid ratio of law, any confessional statement made by the accused before the police is not admissible in evidence and only that much information given by the accused can be proved which leads to the discovery/recovery of a fact or object. In the instant case, admittedly no recovery whatsoever has been effected on the basis of the disclosure statements allegedly made by accused-Raj Kumar @ Raju and Jagjit Singh @ Raja. So, these disclosure statements are inadmissible in evidence and cannot be taken into consideration.

5. **CALL DETAILS BETWEEN ACCUSED-RAJ KUMAR @ RAJU AND JAGJIT SINGH @ RAJA.**

41. It is alleged that on 4/5.08.2007, accused-Raj Kumar @ Raju has made the telephone calls to deceased-Sarabjit Singh @ Sabbi from his

telephone no. 98140-06694 to the mobile phone of Sarabjit Singh bearing no. 98550-89397. These calls details are also not legally proved. These call details have been exhibited in the statement of the Investigating Officer. No official of the telephone company has been produced along with the record to prove these call details. The three judges Bench of the Hon'ble Apex Court in case **Anvar P.V. Vs. P.K. Basheer and others (supra)** has laid down as under:-

“13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

- (i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;
- (ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;
- (iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its

contents;

- (iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

- (a) There must be a certificate which identifies the electronic record containing the statement;
- (b) The certificate must describe the manner in which the electronic record was produced;
- (c) The certificate must furnish the particulars of the device involved in the production of that record;
- (d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
- (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.”

The same legal position has been reiterated by the Hon'ble Apex Court in case **Harpal Singh @ Chhota Vs. State of Punjab (supra)**.

42. Admittedly, in the present case, there is total non-compliance of the provisions of Section 65B of the Indian Evidence Act, 1872. No certificate as required under Section 65B(4) of the Evidence Act has been given. So, these call details are not admissible in evidence.

43. Moreover, there is no cogent and convincing evidence to establish that accused-Raj Kumar @ Raju was using the mobile phone no. 98140-06694. The Investigating Officer has admitted that the said sim card was issued to one Kuldeep Kumar son of Mohinder Pal, resident of village Pharala, Tehsil and District Nawanshahr. It is alleged that he has lost his mobile phone on 06.06.2007. Said Kuldeep Kumar has not been produced in the witness box nor any DDR with respect to the loss of said mobile phone by Kuldeep Kumar lodged with the police has been brought

on record. The prosecution has simply placed on file the photocopy of his affidavit Mark-A, which is also not legally proved as the executent of the affidavit has not been examined. No other evidence has been collected by the Investigating Officer to show that mobile phone no. 98140-06694 was possessed by accused-Raj Kumar @ Raju and was being used by him. Thus, these call details which are neither admissible in evidence nor connected with the accused can be legally used as incriminating evidence against accused-appellants.

7. **REMITTANCE OF MONEY BY CO-ACCUSED-JASVIR SINGH TO ACCUSED-RAJ KUMAR @ RAJU AND KULWINDER SINGH @ KINDA FROM GERMANY:**

44. As per the case of the prosecution, co-accused-Jasvir Singh has remitted the money from Germany to accused-appellant Kulwinder Singh and Raj Kumar @ Raju on different occasions. The prosecution has examined PW-6A-Rohit Gupta, who has proved the payment of Rs. 21,063/- to Kulwinder Singh @ Kinda on 23.05.2007. PW-7-Jatinder Kumar has proved the documents Ex.P7 and PW7/A to show the payment of Rs. 10,680.36/- on 01.08.2007, Rs. 50,000/- on 07.08.2007 and Rs. 48,745.48/- on 29.08.2007 to accused-Raj Kumar @ Raju. PW-7 Jatinder Kumar has stated that a sum of Rs. 48,745/- was sent by Manjit Kaur from Germany, which was received by accused-Raj Kumar @ Raju. Even if, for the sake of the arguments, it is accepted that co-accused-Jasvir Singh has sent the money to Raj Kumar @ Raju and Kulwinder Singh @ Kinda from Germany, that cannot be an incriminating evidence. PW-8-Charanjit Singh-complainant has admitted in the cross-examination that generally young un-married boys or girls who goes to foreign country sent their part of earning to their family members in India. Accused-Kulwinder Singh @ Kinda is the real brother of Jasvir Singh. As per the disclosure statement

Ex.PS made by accused-Raj Kumar @ Raju, Jasvir Singh is his maternal uncle's son. So, he was also closely related to Jasvir Singh. If, Jasvir Singh had sent money from Germany to his real brother and cousin, it cannot be used as an incriminating circumstance against the accused-appellants in the absence of any further evidence to show that the said money was passed over to the assailants for purchasing the weapon and for the commission of offence.

45. Thus, none of the aforesaid incriminating circumstances/evidence are established.

46. As already mentioned, in order to base the conviction, there must be the legal evidence. The conviction of the appellants cannot be maintained merely on the basis of suspicion that Manjit Kaur, the sister of the deceased was having strained relations with co-accused-Jasvir Singh as it is the settled principle of law that in the criminal trial, suspicion, howsoever grave, cannot substitute the legal proof to establish the commission of the offence. Reference can be made to cases **Nathiya Vs. State Rep. By Inspector of Police, Bagayam police Station, Vellore (supra), Sangili @ Sanganathan Vs. State of Tamil Nadu 2014 (6) R.C.R. (Criminal) 1, Sampath Kumar Vs. Inspector of Police, Krishnagiri 2012 (2) R.C.R.(Criminal) 231, Aftab Ahmad Anasari Vs. State of Uttranchal 2010(1) R.C.R.(Criminal) 832 and Vikramjit Singh @ Vicky Vs. State of Punjab 2006 (12)SCC 306.**

47. Accused-appellants have also been charge sheeted and convicted under Section 25 of the Arms Act. The Investigating Officer has categorically admitted that no sanction for prosecution of the appellants as required under Section 39 of the Arms Act was obtained from the District

Magistrate. In the absence of the sanction by the District Magistrate, the prosecution/conviction of the appellants for the offence punishable under Section 25 of the Arms Act stands vitiated.

48. Therefore, keeping in view of our aforesaid discussion, but to talk of the complete chain of incriminating circumstances, the prosecution has not been able to establish any of the incriminating circumstances alleged by it against all the accused-appellants. Consequently, the prosecution has failed to establish the charges punishable under sections 302 read with Section 120-B IPC and Section 25 of the Arms Act against all the appellants beyond shadow of reasonable doubt.

49. Resultantly, the present appeals are hereby allowed. The conviction and sentence of all the accused-appellants stands set aside. Accused-appellants who are in custody be released forthwith, if not required in any other case.

(S.S.SARON)
JUDGE

(DARSHAN SINGH)
JUDGE

January 24, 2017

s.khan

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No