

Neutral Citation:2023:PHHC:114860-DB

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Criminal Appeal-D No.1336-DB of 2015 (O&M)

Date of Decision: 31.08.2023

Reserved on: 07.08.2023

Priyavart and others

... Appellants

Versus

State of Haryana

... Respondent

**CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA**

Argued by: Mr. Sunil Sihag, Advocate,
for appellants No.1, 5 and 6.

Mr. Akashdeep Singh, Advocate,
for appellants No.2, 3 and 4.

Mr. Pawan Girdhar, Additional Advocate General, Haryana.

MANISHA BATRA, J.

1. The instant appeal has been preferred under Section 374 (2) of Criminal Procedure Code against the judgment of conviction and order on quantum of sentence dated 20.07.2015 and 21.07.2015 respectively passed by the Court of learned Additional Sessions Judge, Sonipat in Sessions cases arising out of FIR No.132 dated 08.04.2013 registered at Police Station Sadar, Sonipat under Sections 302 and 34 of IPC and Section 25 of Arms Act whereby the accused **Priyavart, Sandeep @ Kala, Anil @ Leela, Parveen @ Kaira, Pardeep & Sumit @ Pehalwan** were held guilty and sentenced to undergo rigorous imprisonment for life for commission of offence punishable under Section 120-B read with Section 302 of IPC and were sentenced to pay fine of Rs.10,000/- each

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and in default of payment of fine were further sentenced to undergo rigorous imprisonment for a period of six months. The accused Sumit @ Pehalwan was also held guilty and sentenced to undergo imprisonment for three years for commission of offence punishable under Section 25 (1-B) (a) of Arms Act.

2. The prosecution was set into motion in this case on 08.04.2013 when the dead body of an unknown youth was found by PW-1 Rakesh to be lying near the gate of Saraswati Shiksha Shansthan, Murthal Road, Sonapat. He had informed the owner of the school namely, PW-2 Vikas who had further informed the police. The victim was found to have sustained several fire arm injuries and spent as well as live cartridges and empties were found lying near the dead body. Post mortem examination of the dead body was conducted on the same day. Inquest proceedings were also conducted. A case under Section 302 read with Section 34 of IPC and Section 25 of Arms Act was registered. On 09.04.2013, Dharambir s/o Rishi Pal, r/o Village Purkhas, District Sonapat contacted the police and identified the dead body to be that of his son Parveen @ Parchi. He got recorded his statement that Malad resident of Village Karor, his co-brother (husband of his sister-in-law Rajbala) was brother of Sarpanch of Village Karor who had rivalry with accused Anil who was a gangster. Malad was lodged in Hisar Jail in connection with some murder case which had occurred due to enmity between accused Anil @ Leela and family of Malad. Parveen @ Parchi son of Dharambir used to visit his mausa Malad in the jail. He further recorded that accused Anil @ Leela and Sandeep @ Kala were lodged in Tihar Jail, Delhi. Accused Pardeep, brother of accused Sandeep @ Kala had threatened the victim to not to meet Malad and help him in pursuing his cases and

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otherwise to face dire consequences. He disclosed that on the evening of 07.04.2013 at about 8:30 PM, his son was sitting in the Chaupal adjacent to their house, when accused Priyavart, a co-villager came on a Platina motorcycle and took his son Parveen along with him. On asking, Priyavart told him that they would be returning in short time. He further stated that his son did not return back on 08.04.2013. He had made search for his son and came to know that accused Priyavart was also missing. He further recorded that some days before 07.04.2013, he had seen some unknown youths while roaming around with accused Priyavart. He raised suspicion that the accused Anil @ Leela and Sandeep lodged in jail had hatched a conspiracy with accused Pardeep and had joined Priyavart into the said conspiracy and thereafter killed the victim and hence he prayed for taking penal action against the culprits.

3. On the basis of statement of PW-20 Dharambir, offence under Section 120-B of IPC was added. Further investigation was conducted. The accused Priyavart was apprehended and arrested on 19.04.2013. He suffered disclosure statement admitting his involvement in the subject crime and also about involvement of co-accused Pardeep and Anil @ Leela, Sandeep and Amit Dahiya @ Sonu and Parveen and demarcated the place of occurrence. On the basis of his statement, the co-accused Sandeep and Anil who were in custody in some other case, were arrested on 25.04.2013. They too were interrogated and suffered disclosure statements admitting the fact that they had entered into a criminal conspiracy with the accused Amit Dahiya @ Sonu and Pardeep to make arrangement for eliminating the victim and disclosed that the accused Amit Dahiya had informed them subsequently that he had contacted Surender @ Chita and Amitabh @ Manu to arrange to kill

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the victim and that the accused Pardeep had joined accused Priyavart in the conspiracy to kill the victim and subsequently they came to know that Pardeep and Amit in conspiracy with Priyavart, Parveen and Ajit had committed murder of the victim. They also identified the place of occurrence. The accused Parveen suffered disclosure statement during interrogation in another criminal case before AATS/OD/Delhi Police Station on 07.08.2013 and was arrested in this case on 25.09.2013. He again suffered disclosure statement to the effect that he in connivance with accused Priyavart, Sumit, Pardeep and Ajit had killed the victim by firing shots with pistol and revolvers upon him. Accused Sumit was arrested on 11.10.2013. He suffered disclosure statement and got recovered a revolver 32 bore and two live cartridges in pursuance of his disclosure statement. Accused **Amit Dahiya** and **Ajit** could not be arrested and were declared proclaimed offenders. After completion of necessary investigation and usual formalities, challans/supplementary challans were presented against the other accused at different points of time and the same were committed to the Courts of Sessions. Charges were also framed against the accused at different stages. However, on 28.10.2014, the appellants-accused had been charge-sheeted vide a common order for commission of offences punishable under Sections 302 read with Section 34 and 120-B of IPC whereas the accused Sumit was also separately charge-sheeted for commission of offence under Section 25 (1-B) (a) of Arms Act. They pleaded not guilty to the charges and claimed trial.

4. The prosecution examined as many as 30 witnesses besides placing reliance upon documentary evidence and thereafter the evidence of prosecution was closed by the learned public prosecutor.

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5. Statements of accused were recorded under Section 313 of Cr.P.C. They abjured their guilt and pleaded false implication. They did not produce any evidence in their defence.

6. On appraising the evidence produced on record and after hearing both the sides, the learned trial Court held all the accused guilty for commission of offence punishable under Section 120-B read with Section 302 of IPC and accused Sumit was separately held guilty for commission of offence punishable under Section 25 (1-B) (a) of Arms Act. The accused were sentenced in the manner as indicated above.

7. Feeling aggrieved, the appellants-accused have filed the present appeal. For the sake of convenience, they shall be referred to as accused hereinafter.

8. Initiating the arguments, learned counsel for the appellants argued that the findings as given by learned trial Court were not sustainable in the eyes of law and were liable to be set aside as the same suffered from several material infirmities. There was no direct evidence of murder of victim on record. The chain of circumstantial evidence was not at all complete. The evidence as to last seen which rested upon testimony of interested witness Dharambir was not worthy of any credence. The disclosure statements of accused were not admissible in evidence. No new or distinct fact had been discovered in pursuance of alleged disclosure statements of the accused. The place of occurrence was already known to the police. The weapon allegedly recovered from accused Sumit could not be connected with the crime of murder of the victim. The disclosure statements of co-accused could not be considered to be sufficient to form basis of conviction of other accused. The prosecution failed to establish the charge

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of criminal conspiracy by leading any cogent and convincing evidence and the learned trial Court committed grave error by holding them guilty for commission of offence punishable under Section 120-B of IPC. The prosecution could not establish motive on the part of the appellants to eliminate the victim. The reliance by learned trial Court on the call detail record was totally misplaced. Such record was also not admissible in evidence for want of production of mandatory certificate under Section 65B of the Indian Evidence Act, 1872 (For short "Evidence Act"). With these broad submissions, it was urged that the appeal deserved to be accepted and the appellants deserved to be acquitted of the charges for which they had been held guilty and convicted. In support of their arguments, learned counsel for the appellants placed reliance upon authorities cited as **Kanhaiya Lal v. State of Rajasthan**, 2014 (2) R.C.R. (Criminal) 180; **State of Goa v. Sanjay Thakran and another**, 2007 (2) R.C.R. (Criminal) 458; **Ved Parkash alias Bhagwan Dia v. State of Haryana**, 2006 (3) R.C.R. (Criminal) 992; **Bhola Singh v. State of Punjab**, 2002 (2) CLR 402; **Joginder Singh v. State of Haryana**, 2014 (1) R.C.R. (Criminal) 248; **Puran Singh v. State of Uttaranchal**, 2008 (3) R.C.R. (Criminal) 929; **Keshav v. State of Maharashtra**, 2008 (1) R.C.R. (Criminal) 570; **Musheer Khan @ Badshah Khan and another v. State of Madhya Pradesh**, 2010 (2) SCC 748; **Md. Kalam @ Abdul Kalam v. State of Rajasthan**, 2008 (2) R.C.R. (Criminal) 631; **Mohd. Abdul Hafeez v. The State of Andhra Pradesh**, 1983 (1) R.C.R. (Criminal) 141; **Anvar P.V. v. P.K. Basheer and others**, 2014 (4) R.C.R. (Civil) 504 & **Sayeed Alarm Lari @ Babu v. State of Haryana**, 2017 (2) Law Herald 1655.

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appellants, it was submitted by Sh. Pawan Girdhar, learned Additional Advocate General, Haryana that the findings as given by learned trial Court were well reasoned. The prosecution had proved all the circumstances emanating from record and pointing towards the guilt of the appellants for committing murder of the victim. These circumstances were of conclusive nature and led to the only hypothesis that the appellants-accused had conspired with each other and had eliminated the victim. The call detail records of the mobile phones which were used by the victim and the accused Pardeep respectively proved that conversation had taken place between them at least twice on the night of occurrence. The enmity between the accused and Malad, uncle of the victim and motive on the part of the accused stood established. The evidence of PW-20 Dharambir as to last seen was established beyond doubt. Therefore, it was urged that the findings given by learned trial Court did not warrant any interference and that the appeal was liable to be dismissed.

10. We have heard learned counsel for the appellants and learned Additional Advocate General, Haryana at considerable length and have minutely gone through the evidence available on record.

11. So far as the question as to nature of death of the victim is concerned, uncontroverted and unrebutted evidence in the form of testimony of PW-6 Dr. Jitendera Sharma who had conducted postmortem examination of the dead body of the victim Parveen and post mortem report Ex.PW6/B has come on record which shows that the victim had died due to sustaining several firearm injuries which were in the nature of entry/exit wounds. These injuries were ante mortem in nature and sufficient to cause death in the ordinary course of nature. Therefore, there is no dispute about the fact that

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the victim had died a homicidal death.

12. The next question that arises for consideration is as to whether the appellants-accused along with the co-accused Ajit (who faced trial separately) had entered into a conspiracy to kill the victim and in pursuance of that conspiracy, had caused his death. The case as set up by the prosecution is that being offended with the victim Parveen @ Parchi due to the fact that he used to visit and help their rival Malad resident of Village Karor, who was confined in Hisar Jail, in dealing with cases which were pending against him, the accused Anil @ Leela and Sandeep @ Kala who were lodged in Tihar Jail, Delhi had entered into a conspiracy to kill the victim and had asked the accused Pardeep (brother of accused Sandeep) to make arrangement for eliminating him (the victim) with the help of accused Priyavart and by joining other co-accused.

13. As per the further prosecution version, the accused Pardeep who was a friend of accused Priyavart, a co-villager of the victim had joined him (accused Priyavart), Ajit, Parveen @ Kaira and Amit Dahiya in the said conspiracy by inducing them by offering money and in pursuance thereof, the accused Priyavart had taken the victim along with him on the evening of 07.04.2013 near Saraswati School wherein the remaining accused were already present and after making him consume liquor, they had fired shots with firearms on the victim thereby killing him. Admittedly and evidently, there is no direct evidence of murder of the victim on record and the prosecution had rested its case in this regard on circumstantial evidence. The well settled proposition of law with regard to a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those

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circumstances must be conclusive in nature unerringly pointing towards the guilt of the accused and that all the circumstances taken cumulatively should form a complete chain and there should be no gap left in the chain of evidence. Then, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. The aforesaid principles have been reiterated and re-affirmed by Hon'ble Supreme Court in **Trimukh Maroti Kirkan v. State of Maharashtra**, (2006) 10 SCC 681, **State of Rajasthan v. Kashi Ram**, (2006) 12 SCC 254, **Ganesh Lal v. State of Rajasthan**, (2002) 1 SCC 731 and **State of Himachal Pradesh v. Raj Kumar**, 2018 (2) SCC 69.

14. In the light of the above guiding principles, we have to examine this case. The trial Court had relied upon the following circumstances:-

- (i) The accused Anil and Sandeep having motive against the victim and hatching conspiracy with accused Pardeep who further conspired with the other co-accused to kill the victim.
- (ii) Disclosure statement of each accused implicating himself.
- (iii) Disclosure statements implicating co-accused.
- (iv) The accused Priyavrat having been lastly seen with the victim one night before his dead body was recovered.
- (v) Disclosure statement of accused Sumit leading to recovery of pistol Ex.P-25.
- (vi) Statements of accused under Section 313 Cr.P.C.

15. Since the case of the prosecution is that the accused had entered into a criminal conspiracy in pursuance of which some of them had murdered the victim by firing shots with firearms upon him, therefore, before adverting to the contentions respectively raised by the parties and

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discussing the circumstances taken into consideration by learned trial Court for recording the findings of guilt of the appellants, we would like to pinpoint the legal position relating to the offence of criminal conspiracy which is defined under Section 120-A of IPC and punishment for which has been provided under Section 120-B of IPC. To prove the charge of conspiracy, the prosecution has to establish that there was an agreement between the accused to do or cause to be done, an illegal act or an act which is not illegal by illegal means. Undoubtedly, there is seldom any direct evidence available for bringing criminal conspiracy in light as the same is hatched in secrecy. Privacy and secrecy are more characteristics of conspiracy, than of a loud discussion in an elevated place open to public. Direct evidence in proof of a conspiracy is seldom available. Offence of proof of conspiracy can be proved by either direct or circumstantial evidence and it is well settled that lack of direct evidence relating to conspiracy has no consequence. (See: **E.K. Chandrasenan v. State of Kerala**, AIR 1995 SC 1066). Reference can also be made to **Kehar Singh and others v. The State (Delhi Administration)**, AIR 1988 SC 1883 wherein the Hon'ble Apex Court had observed that generally a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will more often rely upon circumstantial evidence or on evidence of acts of various parties to infer that they were done in reference to their common intention. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement though no actual meeting of two persons is necessary. The gist of offence of conspiracy is an agreement to break the law. It can be inferred even by circumstances giving

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rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.

16. It is also well settled that the circumstances in a case when taken together on the face value, indicate meeting of minds between the conspirator for an intended object of committing an illegal act or an act which is not illegal by illegal means, are relevant. A system role played by each accused should be highlighted. It has also to be proved that all means adopted or illegal means done were in furtherance of object of conspiracy hatched. Each circumstance should be proved beyond doubt and such circumstances proved, must form a chain of events from which only irresistible conclusion of guilt of accused can be drawn.

17. Keeping in view the position of law as discussed above, let us now proceed further and discuss the circumstances as relied upon by trial Court while holding the accused guilty of the charges as framed against them to arrive at the conclusion as to whether such circumstances cumulatively taken led to the irresistible conclusion pointing towards the guilt of the accused or not? As per the prosecution version, the mastermind of the conspiracy to kill the victim were accused Anil and Sandeep who were lodged in Tihar Jail, Delhi at the relevant time and who with the motive to eliminate the victim, had initially involved Pardeep in the conspiracy hatched by them and the accused Pardeep had further involved accused Amit Dahiya and others to accomplish the act of murder of the accused. There is no direct and substantive evidence on record to show motive and meeting of minds of the accused to form criminal conspiracy and the prosecution to prove the same relied upon testimony of PW-20 Dharambir, father of the victim, disclosure statements of accused individually implicating themselves

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in the crime and, disclosure statement of each accused implicating the co-accused. So far as PW-20 is concerned, he was admittedly neither an eye-witness to the murder of the victim nor he had heard or seen either of the accused while hatching conspiracy with co-accused. Undoubtedly, in his sworn deposition, he narrated in detail that initially the accused Anil @ Leela and Sandeep @ Kala had hatched a conspiracy to kill his son Parveen as they were offended with him due to the reason that the latter was visiting their rival Malad in Jail and was helping him in pursuing his cases and also deposed that the accused Pardeep had extended threat to his son to stop meeting with Malad and otherwise to kill him but during cross-examination, this witness stated that it was only after one and half months of the incident that he had come to know that his son had been killed by members of Anil Chippi Gang meaning thereby that prior to that, he had no personal knowledge that the victim had been killed by members of gang belonging to accused Anil. He did not explain as to how, when and from whom, he had come to know about the fact that there was conspiracy between the accused persons to kill the victim. He also did not explain as to on which particular date, month and year and where threats by accused Pardeep had been extended to the victim and how he had come to know about the same. Therefore, the evidence led by this witness on the point of motive and conspiracy can even not be said to be in the nature of hearsay evidence what to talk of direct evidence and as such, in our considered opinion, the testimony of this witness did not help the prosecution in any manner whatsoever in proving that the accused persons had any motive to kill the victim and in pursuance thereof they had hatched a conspiracy and the murder of the victim had been committed in pursuance of that conspiracy.

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18. So far as motive part is concerned, in our opinion, the most material witness to prove motive of the accused was Malad, uncle of the victim who could prove that there was infact previous enmity between the accused Anil and himself and that the victim had been visiting him in jail and helping him in pursuing cases registered against him. However, the name of this witness was not cited in the list of witnesses nor he was sought to be summoned as a witness by the prosecution though he was the best person to prove that there was motive on the part of the accused Anil to eliminate the victim and further that the victim used to pursue his cases or help him in jail. More so, no record from Hisar Jail had been summoned by the prosecution to prove that infact the abovesaid Malad was lodged in Hisar Jail at the relevant time and further that the victim used to meet him. The presence of this witness could very well be sought by the prosecution by way of issuance of production warrants but this important witness was withheld by the prosecution and in the absence of examination of this witness, it could not be proved that there was any motive on the part of the accused Anil, Pardeep and his brother namely, accused Sandeep to murder the victim and they had involved the other accused in the conspiracy to kill him and this fact, in our considered opinion, had created a serious dent in the story of the prosecution which could not be acted and relied upon beyond doubt as a very important link in the chain of circumstantial evidence had not been produced and proved by the prosecution.

19. This brings us to the next circumstance as relied upon by the prosecution i.e. disclosure statements alleged to be suffered by the accused persons implicating themselves in the allegation of hatching conspiracy and committing murder of the victim in pursuance thereof. Section 25 of the

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Evidence Act, mandates that no confession made to a police officer shall be proved as against a person accused of an offence. Section 26 provides that confession by the accused while in custody of police cannot be proved against him. There is an exception carved out to the aforesaid rule of Sections 25 and 26 of the Evidence Act providing that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to confession or not, as relates distinctly to the fact thereby discovered, may be proved. Thus, Section 27 is in the nature of a proviso to Sections 25 and 26. Such statements are generally termed as disclosure statements leading to the discovery of facts which are permissible in the exclusive knowledge of the maker. Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information is true and accordingly, it can be safely allowed to be given in evidence. In this case, as per the prosecution version, the accused Priyavart, Sandeep and Anil @ Leela had suffered disclosure statements vide memos Ex.PW12/A, Ex.PW12/B and Ex.PW12/C respectively and accused Pardeep and Parveen had suffered disclosure statements vide memos Ex.PW21/A and PW22/A respectively admitting their involvement in the subject crime. The inculpatory part of these disclosure statements being suffered in the custody of the police and being confessional in nature cannot be considered to be admissible in evidence in view of bar created by Sections 25 and 26 of the Evidence Act. No new or distinct fact is proved to have been discovered in pursuance of disclosure statements of these accused which might connect them with the subject offences. Though according to

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the prosecution, they had identified the place of occurrence in pursuance of their disclosure statements, however, it was admitted by the investigating officer PW-17 SI Jai Parkash that the same was already within the knowledge of the police. Hence, the exception to Sections 25 and 26 of the Evidence Act as carved out in the form of Section 27 cannot be assumed to be attracted thereby affording guarantee that the information given by these accused was true and for the purpose of making such statements to be admissible in evidence and in our considered opinion, these disclosure statements being not acceptable as admissible evidence could not be considered for the purpose of connecting the above named accused either with the charge of conspiracy to kill the victim or with the offence of murder of the victim and hence, we are inclined to hold that the learned trial Court had erred in considering the circumstance of suffering disclosure statements by the individual accused as an incriminating circumstance.

20. The next ground of challenge pertains to the question as to whether the confessional statements which were stated to have been suffered by the accused individually could be considered as incriminating piece of evidence as against the co-accused and were relevant for the purpose of proving the charge of conspiracy as well as murder of the victim against them? Section 30 of the Evidence Act is relevant for the purpose, as per which, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration, such confession as against such other person as well as the co-accused. The question about the part which confession made by a co-accused can play against the other, in a criminal trial has to be determined in the light of

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provisions of Section 30 of the Evidence Act. The well settled proposition of law in this regard is that where the prosecution relies upon the confession of one accused against another accused, then the proper approach to assure is to consider the other evidence against such accused person and if the said evidence appears to be satisfactory and the Court is inclined to hold that the said evidence may sustain the charge framed against the said accused person then the Court may turn to the confession with a view to assure itself that the conclusion which it is inclined to draw from other evidence is right or not. The exact scope of Section 30 was discussed by the Privy Council in the case of **Bhuboni Sahu v. King**, AIR 1949 PC 257. The relevant extract from the said decision which has become locus classicus reads as follows:-

“Section 30 applies to confessions, and not to statements which do not admit the guilt of the confessing party. A confession of a co-accused is obviously evidence of a very weak type it is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. This section, however, provides that the Court may take the confession into consideration and thereby, no doubt, make it evidence on which the Court may act but the section does not say that the confession is to amount to proof. There must be other evidence. The confession is only one element in consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. The confession of the co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction.”

21. The Hon’ble Supreme Court further explained the position with regard to provisions of Section 30 of the Evidence Act in **Kashmira Singh v. State of Madhya Pradesh**, AIR 1952 SC 159 wherein it was held that

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under Section 25 of the Evidence Act, a confessional statement is not admissible unless it is made to the Magistrate. The requirement of Section 30 is that before it is made to operate against the co-accused, the confession should be strictly established. Further, it being the confession of the maker, is not to be treated as evidence within the meaning of Section 3 of the Evidence Act against the non-maker co-accused and its use depends upon finding other accused so as to connect the co-accused with crime and that too as a corroborative evidence. It is only when the other evidence against the co-accused points towards his guilt then the confession duly proved could be used against such co-accused if it appears to affect him as lending support or assurance to such other evidence.

22. Further, a Constitutional Bench of Hon'ble Supreme Court in **Haricharan Kurmi and Jogia Hajam v. State of Bihar**, (1964) 6 SCR 623 reiterated the principles as laid down in **Kashmira Singh's** case (Supra) that the confession of the co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction by holding that the Court cannot start with confession of a co-accused person; it must be taken with other evidence adduced by the prosecution, and after it had formed its opinion with regard to the quality and effect of such evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on some other evidence.

23. On applying the above discussed principles of law to the peculiar facts and circumstances of the instant case and on a careful assessment of the evidence produced on record, we are afraid to say that the learned trial Court had erred in accepting the disclosure statements of the

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individual accused in this case as relevant and admissible against the co-accused Sandeep @ Kala, Anil @ Leela, Parveen @ Kaira, Pardeep & Sumit @ Pehalwan (except Priyavart) for connecting them with the charge of hatching criminal conspiracy and the murder of the victim as there was no other direct or indirect incriminating evidence to lend support to the same. With regard to the disclosure statement stated to be suffered by the co-accused qua involvement of accused Priyavart, we will make discussion in the subsequent paras of this judgment. As such, we hold that since there was no other evidence to support the evidence as to suffering of disclosure statement by the accused involving the co-accused, therefore, conviction of the accused on the basis of disclosure statements of co-accused could not be made foundation for the conviction of the individual accused.

24. At this juncture, we also consider it proper to mention that though as per Section 10 of the Evidence Act, even prima facie evidence qua existence of a conspiracy is given and accepted, then the statement made by any of the conspirators in furtherance of common object is admissible and can be used against other accused as Section 10 is an exception to the general rule for permitting the statement made by one conspirator to be admissible against the other conspirator but in the instant case, Section 10 cannot be pressed into service as it is well settled proposition of law that the statement of one conspirator to be considered as admissible must be made during the period when the agency subsisted. Meaning thereby that the statement made by an accused subsequently when he snapped out of the conspiracy cannot be used against other conspirators. Reliance in this context can be placed upon **State of Gujarat v. Mohammed Atik and others**, (1998) 4 SCC 351. Since as per the version of the prosecution itself,

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the statements/disclosures were made by the accused against co-accused after their arrest, therefore, such statements obviously did not fall within the ambit of Section 10 of the Evidence Act and did not help the prosecution in connecting the accused persons with the offences of conspiracy and murder.

25. An additional circumstance which had been set up by the prosecution and which was considered to be a material circumstance by learned trial Court as against accused Priyavart, was the testimony of PW-20 that the victim was lastly seen alive when he had left with this accused on the night of 07.04.2013. The well established position of law with regard to the theory of last seen is that it comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. There can be no fixed or straightjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any person meeting the deceased in the intervening period. If the prosecution is able to lead any such evidence, then, the circumstance of last seen can be considered as one in the chain of circumstances to prove the guilt of the accused [See: **Bodh Raj alias Bodha and others v. State of Jammu and Kashmir**, (2002) 8 SCC 45 & **State of Goa v. Sanjay Thakran and another's** case (Supra)].

26. It is also equally well settled that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of guilt of the accused. Mere piece of evidence of last seen unless corroborated by other evidence is hardly sufficient to form foundation for conviction of the accused. In the absence of

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any other link in the chain of circumstantial evidence, it is not possible to convict the accused solely on the basis of 'last seen evidence' even if version of a witness in this regard is believed [See: **Jaswant Gir v. State of Punjab**, 2006 (2) RCR (Criminal) 202; **Ved Parkash alias Bhagwan Dia's** case (Supra); **Arjun Marik v. State of Bihar**, (1994) Supp. (2) SCC 372 & **Shailendra Rajdev Pasvan and others v. State of Gujarat and others**, (2020) 14 SCC 750]. In view of the well established position of law as discussed above, it emerges that the evidence as to the accused Priyavart and the deceased last seen together even if relied upon beyond doubt, might raise suspicion but such evidence is not independently sufficient to lead to a finding of guilt of the accused and the last seen theory could be applied while taking into consideration the case of the prosecution in its entirety. However, on assessment of testimony of PW-20, we are inclined to hold that the same was not of sterling quality and could certainly not be acted and relied upon beyond doubt for the purpose of holding that the victim had actually accompanied the accused Priyavart on the night of occurrence. Rather the act and conduct of this witness is shrouded with grave suspicions. Though he stated that the accused Priyavart had taken the victim along with him within his sight on 07.04.2013 at about 8:30 PM and on asking had told that they would be returning after sometime but strangely when the victim had not returned back till the noon of 09.04.2013, this witness had not lodged any missing report regarding his son. Even no proper inquiry about the whereabouts of his son is proved to have been made by this witness as he himself stated that he had asked about his son from one Azad Singh s/o Dalip Singh of his village and had not made any inquiry from anybody else including the family of the accused Priyavart or Priyavart. All this was

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reflective of abnormal conduct of PW-20 because if the victim had actually left along with accused Priyavart then the normal act and conduct of this witness should have been to approach the accused Priyavart or his family for knowing about the whereabouts of his son on 08.04.2013 and if no information would have been gathered by him, then to report the matter to the police. However, this was not done by him. He also did not render any explanation whatsoever for not filing any report to the police regarding missing of his son and this goes to create a reasonable doubt about the truthfulness of the testimony of this witness with regard to the allegation that the accused had taken the victim along with him.

27. More so, the dead body of the victim was recovered in the morning of 08.04.2013 at about 10 AM i.e. after a gap of 14 hours when he had allegedly left with the accused Priyavart. This gap of time cannot be stated to be so small that the possibility of any person other than the accused Priyavart being the author of the crime, became impossible and, therefore, we are inclined to hold that the circumstance of last seen evidence as relied upon by learned trial Court was not proved by the prosecution by leading such evidence which could be relied upon beyond any doubt and, therefore, the findings as given by learned trial Court basing conviction of the accused Priyavart on this circumstance cannot be held to be sustainable. This also takes us to the circumstance of disclosure statements stated to be suffered by the co-accused involving the accused Priyavart in the conspiracy. Since it has been observed above that the circumstance of last seen could not be proved as against the accused Priyavart beyond doubt, and as no other evidence has come on record to prove the involvement of accused Priyavart in the subject crime, therefore, his conviction could not be founded on the

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basis of disclosure statements of the co-accused and hence the accused Priyavart should not have been held guilty on the basis of disclosure statements of the co-accused.

28. The learned trial Court had relied upon the testimony of PW-20 Dharambir also for the purpose of holding that the accused Parveen, Pardeep and Sumit were also involved in the commission of offence of murder. It was observed by learned trial Court that since PW-20 Dharambir had identified these three accused as the persons who were found roaming around in the village of this witness on 07.04.2013 with accused Priyavart, therefore, they were also proved to be involved in the occurrence. The learned trial Court had also rejected the contention raised by these accused to the effect that they were neither named by PW-20 in his statement under Section 161 of Cr.P.C. nor their test identification parade had been conducted. However, we are unable to concur with the observations made by learned trial Court on this point. PW-20 in his statement initially recorded under Section 161 of Cr.P.C. before the police, disclosed that some days prior to the incident, some youths were found roaming around with accused Priyavart in a Figo car. Neither the names, number nor identity and physical description of those youths had been disclosed by PW-20 in the said statement. While recording his sworn deposition in the Court, this witness improved his version and stated that it was on the day of occurrence itself that he had seen the accused Parveen, Pardeep and Sumit while roaming around with accused Priyavart and he identified them in the Court. No doubt, test identification parade of an accused is not substantive evidence. However, it is also well settled proposition of law that identification of an accused at the trial for the first time is from its very nature, inherently of a

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weak character. The failure to hold test identification parade cannot be stated to be fatal in cases where the accused is previously known to the witness but in the instant case, neither the names, identity or other particulars of the youth who were allegedly seen while roaming around with the accused Priyavart had been mentioned by PW-20 in his statement recorded under Section 161 of Cr.P.C. Not even this, as per his own admission, he did not know these three accused previously nor had occasion to have any conversation with them. He deposed that he had seen them in the Court at the time of recording his deposition and one day prior to that. In our considered opinion, such identification could not be stated to be an identification in the eyes of law. Even otherwise, if his testimony is believed for the sake of arguments, still it could not be stated that merely because these accused were seen roaming around with the co-accused Priyavart, they were presumed to be involved in the occurrence. Therefore, it emerges that from the testimony of PW-20, the prosecution had failed to draw any support to link the accused Parveen, Pardeep and Sumit with the subject crime and, therefore, the reliance by learned trial Court upon the testimony of this witness was misplaced.

29. Yet another circumstance which had been taken into consideration by learned trial Court for recording findings of guilt of the accused was the evidence as to call detail record of mobile phone bearing No.8055352420 and mobile phone bearing No.8397802191. As per the prosecution case, the mobile phone bearing No.8055352420 was issued in the name of PW-19 Smt. Mukesh, mother of the victim and was used by the latter. PW-19 deposed that the phone issued in her name was used by her son though she could not disclose its number. As per the further version of the

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prosecution, the phone No.8397802191 which though was issued in the name of one Sanjeev Kumar resident of Village Jatheri was infact used by accused Pardeep who was also hailing from the same village and two calls were proved to have been made from the phone No.8397802191 to the phone used by the victim which was an additional link in the chain of circumstances to indicate that conversation had taken place between the accused Pardeep and the victim on the fateful night of 7/8.04.2013. The prosecution had examined PW-10 Constable Narender Singh who produced on record copies of consumer application forms of both these numbers as well as their call detail records as Ex.PW10/B, Ex.PW10/C, Ex.PW10/E and Ex.PW10/F for the relevant time. No doubt, on perusal of call detail records of both these numbers, two calls are shown to have been exchanged between them on the night of 07.04.2013 between 7:53 PM to 8:54 PM. However, the question is as to whether these call details records could be accepted as admissible evidence for the purpose of connecting the accused Pardeep with the subject crime? In our opinion, the answer should be in negative. The prosecution was expected to fulfill the requirement of Section 65B of the Evidence Act by producing a certificate issued by the concerned person who had prepared this record from the original electronic record but no such evidence had been produced. PW-10 was not the person who had prepared the call details record and he only deposed about handing over this record to the Investigating Officer. In the absence of the requisite certificate under Section 65B of the Evidence Act forthcoming on record, the call detail records of the above mentioned phone numbers could not even be considered to be admissible in evidence or authentic one. More so, even otherwise, on the basis of these call detail records, no presumption as to the

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accused Pardeep being linked with the murder of the victim could be drawn. Sanjeev Kumar in whose name, the phone No.8397802191 had been issued might be hailing from the same village as that of accused Pardeep but this fact itself could not be considered as an additional link in the chain of circumstances connecting the accused with the crime. The general principle of criminal law is that suspicion, howsoever grave, cannot take place of proof and while holding an accused guilty on the basis of circumstantial evidence, Courts should take utmost precautions. Only on the basis of suspicion that the phone No.8397802191 was issued in the name of a native of the same village as that of the accused Pardeep, no definite conclusion could be drawn that it was used by him and that he had made a call on the phone of the victim on the fateful night. Accordingly, it is held that the learned trial Court had erred in placing reliance upon the above circumstance for holding the accused Pardeep guilty for commission of offence of murder of the victim.

30. The learned trial Court had also considered as admissible evidence, the circumstance of recovery of a 32 bore revolver at the instance of accused Sumit in pursuance of his disclosure statement and counted it as an important circumstance to link him with the murder of the victim. However, we find ourselves to be unable to concur with the findings given by learned trial Court on this point also. The case of prosecution was that the accused Sumit had suffered disclosure statement vide memo Ex.PW23/A in the presence of PW-23 ASI Naresh Kumar and PW-24 ASI Ramesh Chander, Investigating Officer of the case on 12.10.2013 and had got recovered country made revolver/pistol Ex.P-25. On perusal of statements of both these witnesses, it is revealed that they were inconsistent on certain

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points. According to PW-23, they had stayed at the place of recovery for about 15 minutes only whereas according to PW-24 they had stayed there for 1-1½ hours. As per PW-23, the Investigating Officer had not joined any public person at the time of recovery as no such person was available at that time, but as per PW-24, he had made efforts to join public persons at the time of recovery but they had expressed their inability. PW-24 admitted that the recovery was effected from a place which fell within the jurisdiction of another Police Station known as “Rai” but no intimation had been given to the authorities of the said police station at the time of recovery thereby making this recovery doubtful. The cartridges alleged to have been recovered at the instance of the accused had not been produced in the Court though both these witnesses stated that live cartridges were recovered from the spot. According to PW-23, it was a country made pistol of 32 bore whereas according to PW-24 it was a revolver of 32 bore. The inconsistencies in the statements of these police witnesses have assumed importance as the same have not been corroborated by any independent evidence and hence the same could not be acted and relied upon beyond doubt. More so, even if their statements were considered to be reliable for the purpose of proving recovery of pistol Ex.P-25 at the instance of the accused Sumit, still, on perusal of Ballistic report Ex.PX, we are of the considered opinion that the said recovery did not help the prosecution at all in connecting the accused Sumit with the offence of murder of the victim. As per Ex.PX, the empties/cartridges seized from the spot and recovered from the dead body of the victim did not match with the revolver Ex.P-25 as the same had not been fired from Ex.P-25. As such, the fact remains that no material could be produced on record to connect the firearm injuries suffered

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by the victim with the pistol/revolver allegedly recovered from accused Sumit and, therefore, in our considered opinion, the guilt of the accused Sumit for commission of offence punishable under Section 25 (1-B) (a) of the Arms Act or of murder of victim in pursuance of some conspiracy, had not been proved beyond doubt.

31. The last circumstance which was considered as one of the links in the chain of circumstances pointing towards the guilt of the accused, by the learned trial Court was the statements of the accused under Section 313 of Cr.P.C. It was observed by learned trial Court that the accused persons had given simple denial of the incriminating evidence appearing against them without offering any explanation and, therefore, an adverse inference was to be drawn against them. However, on an overall assessment of the facts and circumstances of the case when the prosecution has failed to bring unimpeachable and trustworthy incriminating evidence of such nature on record which could be acted and relied upon beyond doubt and no unbroken link in the chain of circumstances has been proved, in our considered opinion, the statements under Section 313 of Cr.P.C. simpliciter cannot be made the basis for convicting the accused and the answers given by them to the questions put under Section 313 of Cr.P.C. by the Court cannot be used to fill up the gaps left by the witnesses in the evidence. Reliance in this regard is placed upon the judgments of Hon'ble Apex Court cited as **Brajendrasingh v. State of M.P.**, AIR 2012 SC 1552; **State of Maharashtra v. Sukhdev Singh**, AIR 1992 SC 2100 & **Raj Kumar Singh @ Raju @ Batya v. State of Rajasthan**, AIR 2013 SC 3150.

32. In view of the reasons recorded above and in the totality of facts and circumstances, we are inclined to hold that the prosecution had failed to

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produce probative and unimpeachable evidence on record to connect the appellants with the commission of crime to establish the charges framed against them beyond reasonable doubt. The chain of circumstantial evidence is not complete. Rather the same is broken and no such circumstance has emanated from record which could link the accused with the charges as framed against them beyond doubt. The legal parameters for determination of guilt of all the accused charged for commission of offence of murder in pursuance of a criminal conspiracy and guilt of accused Sumit qua having been found in unauthorized possession of a country made firearm, on the basis of circumstantial evidence as enumerated above have not been satisfied. Accordingly, we allow this appeal and reverse the judgment of conviction dated 20.07.2015 and order on quantum of sentence dated 21.07.2015 passed by the Court of learned Additional Sessions Judge, Sonipat and resultantly acquit the appellants by giving them the benefit of doubt. As per the record, sentences awarded to accused Pardeep, Parveen @ Kaira, & Sumit @ Pehalwan had been suspended whereas the remaining accused namely Priyavart, Sandeep @ Kala and Anil @ Leela are in custody. The appellant-accused in custody be released forthwith from custody if not wanted in any other case, upon execution of bonds to the satisfaction of the trial court which shall remain in force for a period of six months in terms of Section 437-A of Code of Criminal Procedure. The appellants-accused whose sentence has already been suspended shall also appear in person before learned trial Court within a period of one month from the date of passing of this judgment to furnish bonds in view of provisions of Section 437-A of Code of Criminal Procedure. Let a copy of this judgment along with the trial Court record be sent forthwith to the trial

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Court. Copies of judgment, if applied for, be also made available to the appellants.

33. All the pending criminal miscellaneous application(s), if any, automatically stand disposed of.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

31.08.2023
manju

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No