
(2021) 11 UK CK 0124

In the Uttarakhand High Court

Case No : Criminal Appeal No. 151 Of 2015

Pal Singh @ Pala @ Lakkar @Harpal Singh

APPELLANT

Vs

Central Bureau Of Investigation

RESPONDENT

Date of Decision : 23-11-2021

Acts Referred:

Indian Penal Code, 1860 — Section 109, 120B, 147, 148, 149, 216A, 302, 307, 326, 412, 414
Arms Act, 1959 — Section 7, 25, 27, 27(2), 54, 59
Terrorist And Disruptive Activities (Prevention) Act, 1987 — Section 3
Code Of Criminal Procedure, 1973 — Section 82, 161
Evidence Act, 1872 — Section 27, 32, 61, 62, 63, 65, 66

Citation : (2021) 11 UK CK 0124

Hon'ble Judges : Raghvendra Singh Chauhan, CJ;Alok Kumar Verma, J

Bench : Division Bench

Advocate : Surendra Singh, G.S. Sandhu, Harshit Sanwal, Sandeep Tandon

Final Decision : Allowed

Judgement

Raghvendra Singh Chauhan, CJ

1. Aggrieved by the judgment dated 28.02.2015/10.03.2015, passed by the IIIrd Additional Sessions Judge/Special Judge (C.B.I.), Dehradun, the appellant, Pal Singh @ Pala @ Lakkar @ Harpal Singh, has filed the present appeal before this Court.

2. By the said judgment, the appellant has been convicted for offence under Section 302 of the Indian Penal Code (for short "the IPC"). He has been sentenced to life imprisonment. He has further been directed to pay a fine of Rs. 25,000/-, and to further undergo a simple imprisonment of one year in default thereof. He was further convicted for offence under Section 307 IPC, and sentenced to undergo ten years' rigorous imprisonment; he was directed to pay a fine of Rs. 10,000/-, and to further undergo six months of simple imprisonment in default thereof. He was further convicted for offence under Section 326 IPC,

and sentenced to undergo seven years' rigorous imprisonment. He was directed to pay a fine of Rs. 5,000/- and to undergo one month of additional simple imprisonment in default thereof. Furthermore, he was convicted for offence under Section 27 of the Arms Act, and was sentenced to life imprisonment. He was directed to pay a fine of Rs. 5,000/- and to undergo one month of simple imprisonment in default thereof. All the sentences were directed to run concurrently.

3. Briefly, the facts of the case are that on 13.09.1992, Anil Kumar Bhati (P.W. 39), the nephew of one of the deceased person, namely Mahendra Singh Bhati, lodged a written report (Ex. Ka. 30) with the Police Station Dadri, District Ghaziabad, Uttar Pradesh, wherein he claimed that on 13.09.1992, around 6:30 p.m., Mahendra Singh Bhati, the M.L.A. Dadri Constituency, Ghaziabad, received a telephonic call from Mool Chand Tiwari, Inspector C.B.C.I.D. Mool Chand Tiwari informed Mahendra Singh Bhati that his presence is required in order to record his statement for the murder of Santram. Therefore, he is directed to come to village Bhangel. Upon this information, Mahendra Singh Bhati left in his Maruti car, along with his driver, Devendra, and his gunman, Vedram Kaushik (P.W.31), for village Bhangel. On the way, his friend, Udai Ram Arya also got into the car, and sat in the back seat. However, on the way to village Bhangel, as the Dadri railway crossing gate was closed, Mahendra Singh Bhati's car stopped at the railway crossing gate. According to the complainant, he and one Dharamveer Singh also reached the railway crossing gate on their motorcycle. As soon as the railway crossing gate opened, around 7:00 PM, and as soon as the driver, Devendra started the car, about seven to eight unknown persons fired at the car. Consequently, both Mahendra Singh Bhati, and Udai Prakash Arya died on the spot. The gunman, Vedram Kaushik (P.W. 31), was also injured. The driver, Devendra, ran away as soon as the firing was started. Near the car of Mahendra Singh Bhati, in another car, O.P. Kayal (P.W. 35) was also injured. Moreover, Dharamveer Singh, who was on his bicycle, and was standing near the railway crossing gate, he too was injured. O.P. Kayal (P.W. 35) was rushed to the Yashoda Hospital; the gunman, Vedram Kaushik (P.W. 31), was taken to the Narendra Mohan Hospital; the bicyclist, Dharamveer Singh was carried to the District Hospital for medical treatment. After killing Mahendra Singh Bhati, the killers sat in a Maruti car, and escaped. When they were fleeing, they shouted "try again to have Prakash Pehelwan contest the elections". According to the complainant, Amar Singh, Omveer Singh, Manveer Singh, Prakash, Atar Singh, Dharamveer Singh and others, standing at the scene of the crime, have seen the incident. Although, these eye-witnesses have recognized the assailants, due to fear that the assailants were armed, they did not try to catch hold of them.

4. The complainant, Anil Kumar Bhati (P.W.39), dictated the complaint (Ex. Ka. 30) to Narendra Singh Bhati (P.W. 10), the M.L.A. of Secunderabad. The complaint (Ex. Ka. 30) was lodged with the Police Station Dadri, Ghaziabad. On the basis of this complaint (Ex.Ka.30), a formal FIR (Ex. Ka. 39), namely FIR No. 371/92, was registered, for offences under Sections 147, 148, 149, 302, 307 IPC.

5. Initially, the investigation was handed over to the S.S.I., Jagdish Singh Yadav (P.W. 36). The Investigating Officer immediately reached the scene of the crime, and recovered five empty cartridges of AK-47 rifle, and seven empty cartridges of 7.62 mm rifle. Through the recovery memo (Ex. Ka. 96), the dead bodies of Mahendra Singh Bhati, and Udai Prakash Arya were sent for post-mortem.

6. Since a sitting M.L.A., Mahendra Singh Bhati, was assassinated by unknown persons, his assassination generated sufficient heat. But as the investigation by the police was not upto the mark, on 10.08.1993, the investigation was transferred to the Central Bureau of Investigation (for short "the CBI") by notification No.228/58/92 A.B.D.

7. Initially, the CBI registered the case as RC-1(S)/93/SIU-I, for offences under Section 147, 148, 149, 302, 307, 109, 120-B IPC, and under Section 3 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short "TADA").

8. After completing the investigation, the CBI submitted the charge-sheet not only against the present appellant, Pal Singh @ Pala @ Lakkar @ Harpal Singh, but also against the other co-accused persons, namely Dharmpal Singh Yadav @ D.P. Yadav, Karan Yadav, Tejpal Bhati, Praneet Bhati, Maharaj Singh, Jaipal Gujjar and Aulad Ali.

9. By order dated 07.01.1996, the Special Judicial Magistrate, CBI, Dehradun, took cognizance against the appellant, Pal Singh @ Pala @ Lakkar @ Harpal Singh, and Jaipal Gujjar for the offences under Sections 302, 307 and 326 IPC, and for offence under Section 27 of the Arms Act.

10. Since the other co-accused persons were being tried under a different Session Case, by order dated 23.04.2001, the Special Court, CBI, consolidated the Session Trial No. 87 of 2000, "C.B.I. vs. Tejpal Bhati and others", with Session Trial No. 48 of 2001, "C.B.I. vs. D.P. Yadav".

11. In order to prove its case, the CBI examined forty-one witnesses, submitted 115 documents, and produced 159 material objects.

12. During the trial four co-accused persons expired, namely, Maharaj Singh, Tejpal Bhati, Jaipal Gujjar & Aulad Ali. Therefore, the trial qua them abated.

13. After appreciating the evidence produced by the prosecution, by a common judgment dated 25.02.2015/ 10.03.2015, the learned Trial Court convicted and sentenced the present appellant as aforementioned. Although, a number of appeals have been filed by other co-accused persons, presently we shall deal with the appeal filed by the appellant, Pal Singh @ Pala @ Lakkar @ Harpal Singh. The other appeals shall be decided separately.

14. In order to convict the appellant, for the aforementioned offences, the learned Trial Court relied on the following evidence :-

Firstly, according to Sameer Bhati (P.W. 32), the son of the deceased, Mahendra Singh Bhati, his father had an apprehension that he may be killed by the

appellant. Furthermore, he had given three documents written by his father to the police. The said three documents were recovered by Seizure Memo (Ex. Ka. 94). Treating one of these documents, namely complaint dated 23.06.1992 (Ex. Ka.95) as a dying declaration, where the appellant has been named, the learned Trial Court was of the opinion that the said complaint (Ex. Ka. 95) has a grave incriminating evidentiary value against the appellant. Thus, the said complaint (Ex. Ka. 95) was read against the appellant.

Secondly, according to Inspector Mamchand (P.W. 27), on 18.06.1996, the police had received secret information that the appellant, and Jaipal Singh were sleeping outside the house of Jassa Singh in Village, Pehwa. Therefore, the police surrounded the said house, and nabbed the appellant and Jaipal Singh. At the time of his arrest, the appellant had pulled out an AK-47 rifle from the side of his bed. Therefore, even the said gun was recovered while arresting Pal Singh. On the basis of this recovery, an FIR, namely FIR No. 134 of 1996 was registered against the Pal Singh for offences under Sections 307, 216A, 412 and 414 IPC and under Sections 25, 54, 59 of the Arms Act.

Thirdly, S.S.I Jagdish Singh Yadav (P.W. 36) recovered five empty cartridges of AK-47 rifle from the scene of the crime. According to Abhijeet Dey (P.W. 25), after examining the bullets recovered from the scene of the crime, and from the bodies of the deceased persons, he had concluded that these bullets were, indeed, fired from the AK-47 rifle recovered from the appellant.

Fourthly, on 15.07.1996, the appellant had made a disclosure statement (Ex. Ka. 113), wherein he had claimed that he had gotten the getaway car, given by D.P. Yadav, serviced in September, 1992 at Sumko Automobiles, i.e. prior to the murder. He had further stated that he can take the police to the Sumko Automobiles, and identify the service station, near the Court, in Gurgaon. On the basis of this disclosure statement, the police reached the Sumko Automobiles Service Station in Gurgaon. The police had recovered the Service Register (Ex. Ka. 78) from the Service Station. According to Page No. 726 of the Service Register (Ex. Ka. 78), a car bearing registration No. DL-4C/B- 3597 was serviced on 09-07-1992 under the name of Harpal Singh. According to the prosecution, it is this car which was used as a getaway car at the time of the commission of the alleged crime; the car was serviced prior to the alleged crime.

Fifthly, after the commission of the alleged crime, the appellant had stayed at the Rainbow Guest House under the pseudonym of Harpal Singh. This fact was proven by Satpal Singh (P.W. 3) and by the Guest Register of the Guest House.

Lastly, after the commission of the crime, the appellant had absconded for about four years. Although the crime was committed on 13-09-1992, the appellant was not arrested till 18.06.1996. His absconding for four long years was an additional link in the chain of circumstances which pointed towards his guilt.

Therefore, according to the learned Trial Court, the prosecution had established a complete chain of circumstances which unerringly pointed towards the

involvement and guilt of the appellant. The learned Trial Court convicted and sentenced the appellant for the aforementioned offences.

15. Mr. Surendra Singh, the learned Senior Counsel appearing for the appellant, has raised the following contentions before this Court:-

(I.) Anil Kumar Bhati (P.W. 39), the complainant, had lodged a complaint (Ex. Ka. 30) against seven to eight unknown persons. Neither in his complaint (Ex. Ka. 30), nor in his statement, under Section 161 Cr. P. C., does he give any particular details about the appearance of the alleged assailants. Therefore, the appellant is not even named in the FIR (Ex. Ka. 39). Although the prosecution has produced a number of eye-witnesses, namely Rajkumar (P.W. 7), Vedram Kaushik (P.W. 31), D.N. Singhaniya (P.W. 33), Om Prakash Kayal (P.W. 35), Anil Bhati (P.W. 39), none of these eyewitnesses either described the appellant physically in their testimonies, or identified him in the court. In fact, no identification parade was conducted by the CBI. Thus, the prosecution witnesses do not claim the appellant to be at the scene of the crime. Hence, he cannot be said to be the author of the fatal injuries. Yet, the appellant has been convicted and sentenced for offence under Section 302 IPC.

(II.) Anil Kumar Bhati (P.W. 39) in his testimony changes his entire stand as revealed in his complaint (Ex. Ka. 30), and his statement given under Section 161 Cr. P. C. According to his testimony, it is not that seven to eight unknown persons had attacked the deceased, Mahendra Singh Bhati and Udai Ram Arya, but only two unknown persons had ambushed and killed the deceased persons. Despite the fact that the appellant is unknown to the complainant, the appellant has never been subjected to a Test Identification Parade. Surprisingly, even in the Court, Anil Kumar Bhati (P.W. 39), the complainant, does not identify the appellant. Therefore, there is no direct evidence produced by the prosecution to establish that the appellant was the author of the fatal injuries caused to the two deceased persons. Therefore, the entire case against the appellant is based on circumstantial evidence.

(III.) The prosecution has not been able to establish all the links in the chain of circumstances, which would unerringly point towards the guilt of the appellant. In fact, the prosecution case suffers from gaping holes. However, in order to convict the appellant for the aforementioned offences, the learned Trial Court has misread the evidence and misapplied the law. Hence, the appellant's conviction is based on sheer surmises and conjectures.

(IV.) Although Sameer Bhati (P.W. 32) had furnished three documents, which were seized by Seizure Memo (Ex. Ka. 94) by the police, the said documents were photostat copies of alleged complaints written by the deceased, Mahendra Singh Bhati, to the police. However, the said documents being secondary piece of evidence could not and should not have been admitted by the learned Trial Court. For, the requirements of Sections 65 and 66 of the Evidence Act were not fulfilled by the prosecution. Therefore, the learned Trial Court has erred in accepting the

document in evidence. In order to buttress this plea, the learned Senior Counsel has relied on cases of Jagmail Singh and Another v Karamjit Singh and Others, [(2020) 5 SCC 178], and U. Sree v U. Srinivas [(2013) 2 SCC 114].

(IV-A.) Moreover, while recording the testimony of Sameer Bhati (P.W. 32), the appellant had objected to the admissibility of the said document (Ex. Ka. 95). Despite the objection, and without deciding the objection, the learned Trial Court has accepted the document (Ex. Ka. 95) ostensibly on the ground that the defense had admitted the existence of the document. But once the appellant had challenged the admissibility of the document, the question of "admitting" the existence of the document would not even arise. Thus, it is a mis-reading of the evidence readily available in the record.

(IV-B.) Even if for the sake of argument it were accepted that the appellant had admitted the existence of the document, it does not prove the contents of the documents. Hence, the learned Trial Court has misapplied the law on the issue of admissibility of secondary evidence. Thus, the first reason given by the learned Trial Court for convicting the appellant is clearly untenable.

(IV-C.) Moreover the learned Trial Court has erred in accepting the said document (Ex. Ka. 95) as a dying declaration. In order to support this contention, the learned Senior counsel has relied upon the case of State of M.P. v. Paltan Mallah & others, [(2005) 3 SCC 169].

(V.) The prosecution has heavily relied upon the recovery of AK-47 bullets from the scene of the crime, and upon the alleged recovery of an AK-47 gun from the appellant. But on a closer scrutiny of the evidence, even these two circumstances do not prove the involvement of the appellant in the alleged crime. For, firstly, none of the eyewitnesses claim that an AK-47 gun was used by the assailants for committing the crime. Since AK-47 guns are rare, its use would have attracted the attention of the eyewitnesses. Yet, not a single eyewitness, including the complainant, Anil Kumar Bhati (P. W. 39), utter a single word about the use of an AK-47 gun for commission of the alleged crime. Of course, Jadgish Singh Yadav (P. W. 21) does claim that he recovered five empty cartridges of AK-47 from the scene of the crime. Moreover, two AK-47 bullets were recovered from the body of Mahendra Singh Bhati; two AK-47 bullets were equally recovered from the body of Uday Prakash Arya. But the issue is whether the prosecution has succeeded in proving the fact that the recovered bullets were, indeed, fired from the allegedly recovered AK-47 gun from the appellant or not?

(V-A) Man Chand (P. W. 27) has claimed that the AK-47 gun, used for committing the alleged crime, was recovered from the appellant. However, while the alleged crime had occurred on 13-09-1992, the AK-47 gun was recovered on 18-06-1996. Thus, the AK-47 gun was recovered four years after the alleged crime was committed. The alleged crime had taken place in Dadri, District Gaziabad, U. P. Yet, the AK-47 gun was recovered from village Dhoolgarh, Police Station Pehwa, District Kurukshetra, Haryana. Hence, there is a long gap of time

and of space between the commission of the crime and the recovery of the weapon. Relying on the case of *Pancho v. State of Haryana*, [(2011) 10 SCC 165], the learned Senior Counsel has argued that the prosecution has failed to prove the possession of the AK-47 with the appellant for the intervening period of four years. Hence, the recovery cannot be relied upon to convict the appellant.

(V-B) Although the seizure memo of the AK-47 gun (Ex. Ka. 81) was produced, it is a photocopy of the original seizure memo. Hence, it is a secondary piece of evidence. Interestingly, the prosecution has not produced Surendra Singh, the scribe of the original recovery memo as a witness. Since a material witness has been withheld, an adverse inference should be drawn against the prosecution. Thus, the seizure memo (Ex. Ka. 81) loses its significance.

(V-C) In connection with the alleged recovery of the AK-47 gun, an FIR, namely FIR No. 134/96, was registered at Police Station Pehwa, for offences under Sections 307, 216A, 412, 414 IPC and for offence under Sections 25, 54 and 59 of the Arms Act; Session Case No. 88/2005 was registered qua the said FIR. However, by judgment dated 08-07-2006, the learned Additional Sessions Judge, (FTC), Kurukshetra had acquitted the appellant in the said case. The learned Additional Sessions Judge has acquitted the appellant, inter alia, on the ground that according to witness Rampal (P.W. 2), in that case, had claimed that the number on the AK-47 was KA. 1527, whereas according to the recovery memo (Ex. Ka. 81), the number on the said AK-47 gun is shown as KO-1527/1949-T. Thus, the recovered memo does not relate to the alleged recovery of AK-47 gun. Hence, the appellant has been acquitted of offence under Section 25 of the Arms Act, i.e. for possessing the AK-47 gun. The said judgment passed by a competent criminal court is binding on the learned Trial Court in this case. For, there is issue estoppel. Since the possession of the AK-47 gun has been disbelieved by a criminal court, the very recovery of the said gun becomes highly doubtful.

(V-D) Even in the present case, there is a grave contradiction between the number shown in the Seizure Memo (Ex. Ka. 81), and the number actually inscribed on the AK-47 gun, and the numbers given by witnesses in their testimonies. But, the learned Trial Court has gone out of its way to interpret the numbers inscribed on the gun in such a fanciful manner so as to custom tailor the numbers according to the prosecution case. According to the Recovery Memo (Ex. Ka. 81), the number on the AK-47 gun is "KO 1527/1949 T". Yet, according to the learned Trial Court, the AK-47 gun bears the number as "KO 1527/4949 F". Having observed the numbers visually, the learned Trial Court proceeds to misinterpret the number in an imaginative manner. According to the learned Trial Court, the letter 'F' can be read as 'T'. By changing the letter from the visible 'F' to the recorded letter 'T', the learned Trial Court is custom tailoring the visible evidence to the Recovery Memo (Ex. Ka. 81). According to the Recovery Memo (Ex. Ka. 81), the number inscribed on the AK-47 gun is "1949"; yet, according to the learned Trial Court the number visible on the said gun is "4949". Curiously, the learned Trial Court does not discuss the discrepancy between the numbers

"1949" and "4949". But the difference in the numbers of the AK-47 gun, between the one recovered, and the one produced in the court, raises a grave doubt about the recovery of the AK-47 gun from the possession of the appellant.

(V-E) Further, according to the letter written by the Superintendent of Police (Ex. Ka. 69), dated 04.07.1996 to the Director, CFSL, the number on the AK-47 gun is shown as K-01527/1949T. Thus, according to the said letter (Ex. Ka. 69), the numbers are '01527', yet according to the Recovery Memo (Ex. Ka. 81), the number is K O 1527. Hence, according to the latter, 'O' is a letter, and not the number '0'. But the learned Trial Court reads the number '0' as the letter 'O'. Hence, the learned Trial Court misreads the evidence available on the record. The learned Trial Court has ignored the cardinal principle that if there are two interpretation of the same evidence, the interpretation in favour of the accused should be accepted.

(V-F) The prosecution has relied on the testimony of Abhijeet Dey (P. W. 25) and the FSL Report (Ex. Ka. 71) to prove the fact that the recovered bullets were certainly fired from the recovered AK-47 gun. But once the very recovery of the gun, from the possession of the appellant, is doubtful, the testimony of Abijay Dey (P. W. 25) and the FSL Report (Ex. Ka. 71) lose all their significance.

(V-G) Furthermore, Abhijeet Dey (P. W. 25) clearly admits, in his cross-examination, that the FSL Report (Ex. Ka. 71) does not show that any bullet was test fired in order to discover the fact that the recovered bullets were, indeed, fired from the recovered AK-47 gun. Moreover, there is no indication in the FSL Report (Ex. Ka. 71) that any microscopic comparison was carried out. Thus, his evidence with regard to the co-relation of the bullet with the allegedly recovered AK-47 gun is highly unreliable. Relying on the case of Pattu Rajan v. State of Tamil Nadu, [AIR 2019 SC 1674], the learned Senior Counsel has emphasised the vital role of an expert in a criminal trial. Further, relying on the case of Ramesh Chandra Agrawal v Regency Hospital, [AIR 2010 SC 806], the learned Senior Counsel has argued that unless the expert reveals the criteria used by him to reach his conclusion, his conclusions are unacceptable. Furthermore, relying on the case of State of Gujarat v Adam Fateh Mohmed Umatiya, [(1971) 3 SCC 208], the learned Senior Counsel has argued that unless reliable evidence is given by the expert in his report, the trial court has no means of cross-checking the expert opinion. Therefore, it was imperative for the FSL Report (Ex. Ka. 71) to reveal the microscopic examination carried out on the recovered bullets. Hence, the ballistic report (Ex. Ka. 71) and the expert opinion lose their evidentiary value.

(VI.) According to Navin Chandra Jha (P.W. 41), Pal Singh had made a disclosure statement under Section 27 of the Indian Evidence Act, 1872, wherein he had claimed that prior to the commission of the alleged offence, he had taken the car to Somko Automobile, located near a court in Gurgaon. He could take the police to the said Automobile Service Station. Consequently, the appellant took the police to the said Service Station. From the Service Station, a Service Register

(Ex. Ka. 78) was recovered by the police. According to Page No.726 of the said Service Register (Ex. Ka. 78) of the Service Station, the car was serviced on 09.07.1992. However, Mr. Surendra Singh, learned Senior Counsel, submits that, firstly, according to the disclosure statement, the appellant claimed that he had gotten the car serviced in September, 1992, yet the Service Register (Ex. Ka. 78) reveals that the car was serviced on 09.07.1992; i.e. the service was done in July and not in September. Further, Page No. 726 of the Service Register (Ex. Ka. 78) is full of overwriting. The name of the owner of the car has been struck-off and the name of Harpal is overwritten. Likewise, the registration number of the car is struck-off and a new registration number has been inserted. Therefore, there is lot of interpolation in the Service Register (Ex. Ka. 78). Thus, the very veracity of the Service Register (Ex. Ka. 78), and the veracity of the contents of the register are highly doubtful. Therefore, the recovery of the Service Register (Ex. Ka. 78), and the relevant entry at page No. 726 of the Register is totally unconnected and irrelevant for convicting the appellant in the present case.

(VII.) Satyapal Tandon (P.W. 3) had claimed that a person, by name of Harpal Singh, had come and stayed at his Guest House. However, the said witness has never identified the appellant in any Test Identification Parade. Moreover, even in the Court he failed to identify the appellant as the person who had signed the register of the Guest House as Harpal Singh. Therefore, his testimony does not buttress the prosecution case.

(VIII.) Although the learned Trial Court has considered the fact that, after the commission of the alleged crime, the appellant had absconded, absconding by itself is not incriminating evidence. Moreover, the appellant was never declared as an absconder under Section 82 of the Code of Criminal Procedure, 1973. Furthermore, no police officer claims that he had gone to the house of the appellant in search of the appellant. Therefore, the learned Trial Court is unjustified in concluding that the appellant had absconded.

(IX.) Thus, despite a number of circumstances forged against the appellant, the prosecution has not been able to establish a chain of circumstances, which would unerringly point towards his guilt. Hence, the appellant deserves to be acquitted by this Court.

16. On the other hand, Mr. Sandeep Tandon, the learned counsel for the CBI, has raised the following counter-arguments before this Court:

(I.) At the relevant time, there was a gang warfare, which had erupted between the gangs of Satbir Gujjar and Mahendra Singh Fauji. While the appellant and other co-accused persons, namely, D.P. Yadav and others, were supporting Mahendra Singh Fauji's gang, the deceased, Mahendra Singh Bhati, was supporting the gang of Satbir Gujjar. Both the gangs were trying to eliminate the members of the other gang. This fact is evident from the existence of large number of FIRs, which were lodged in different police stations against each other.

(I-A) Crime Case No. 372/90 was registered at Police Station Loni against

Satveer, Kaluram Rana Kesar Gujar, Ashok, Ali, Maidan, Mohan, Pappu Neeraj, Onnkar Singh, Vikram, Ranapal, Lokesh and Kenga Nai for the murder to Rashid Ali, Sajan Sah, Mehardeen, Ajmeithi, Brahma Singh Feju. While the deceased belonged to the Salbir Gujar's gang, the accused persons belonged to Mahendra Singh Fauji's gang. In this case six persons were killed, including Rashid Ali, who was the brother of Aulad Ali, one of the co-accused in the present case.

(I-B) On 23-12-91, FIR No. 251/91 was chalked out in Police Station Bhopa, Muzzafar Nagar, for offence under Section 302 IPC against Bharampal Singh, Prempal, Satendra, Dakpal, Ajeet, and Titu for the murder of Shobha Ram Yadav, and Yahada Hasan. Even in this case while the accused persons belonged to Mahendra Singh Fauji's gang, the deceased belonged to the gang of Satbir Gujar.

(I-C) Likewise, in Crime Case No. 647/92, registered at Police Station Kavi Nagar, the case was registered against Prakash Pehalwan, Prakash Gujar, Satyavir Gujar, Man Singh and Satyapal. These persons belonged to the Satbir Gujar gang.

(I-D) According to the learned counsel, in FIR No. 38 of 1993, the present appellant was an accused. According to the complainant in the said FIR, the present appellant, along with Karan Yadav, had attacked Prakash Pahalwan, Jaiveer, Gurpreet and Ram Prakash and had injured them. Therefore, the said FIR was registered for offence under Section 307 IPC. This clearly proves that the present appellant was part of Mahendra Singh Fauji's gang, and was trying his level best to kill those persons, who either belonged to Satbir Gujar's gang or were supporting the said Satbir Gujar's gang.

(I-E) Moreover, FIR No. 134/96 was registered at Police Station Pahewa, for offence under Section 307 IPC, and for offences under Sections 25, 54, and 59 Arms Act, against the appellant.

(I-F) Thus, it is obvious that from 1990 till 1996, for six long years, gang wars were waged between the members of Satbir Gujar's gang and the members of the Mahendra Singh Fauji's gang. As stated earlier, the deceased supported the former gang, and the appellant and the other co-accused persons, in the present case, supported the latter gang. Hence, the appellant had a strong motive for killing the deceased, Mahendra Singh Bhati.

(II.) According to Jagdish Singh Yadav (P. W. 36), the moment the FIR was lodged, he rushed to the scene of the crime. There, he recovered five empty cartridges of AK-47 gun, and seven empty cartridges of 7.62 mm rifle. The said cartridges were duly sealed. Subsequently, they were sent to the Forensic Science Laboratory. According to the testimony of Abhijeet Dey (PW25), these cartridges, which were recovered from the scene of the crime, were fired from AK-47 gun, which was allegedly recovered from the present appellant. Abhijeet Dey (P. W. 25) has proven the FSL Report (Ex. Ka. 71). Therefore, there is direct linking evidence between the cartridges recovered from the scene of the crime, and the AK-47 gun recovered from the appellant.

(III.) Merely because the Addl. Sessions Judge, Fast Track Court, Kurukshetra had acquitted the present appellant in the Sessions Case No. 88/2005, for possessing the AK-47 gun, the said judgment would not have any impact on the present case.

(IV.) The numbers present on the AK-47 gun do tally with the numbers mentioned in the recovery memo (Ex. Ka. 81) and the seizure memo (Ex. Ka. 83) prepared by the CBI. Therefore, the prosecution is justified in claiming that not only the AK-47 gun was recovered from the possession of the appellant, but even the cartridges, which were recovered from the scene of the crime and from the bodies of both the deceased persons, were fired from the said AK-47 gun. According to the learned counsel, this is a clinching evidence to not only prove the presence of the appellant at the scene of the crime, but also to prove that he is the author of the fatal injuries.

(V.) The overwriting in the Service Register (Ex. Ka. 78) of the car has been explained by Tara Chand (P.W. 26). Therefore, the Register is an incriminating piece of evidence, for it clearly proves that prior to the commission of the alleged crime, the appellant had gotten the getaway car serviced.

(VI.) Once the existence of the complaint (Ex. Ka. 95) is admitted by the accused-appellant, the prosecution need not fulfill the requirements of Sections 65 and 66 of the Evidence Act. Therefore, the learned Trial Court was justified in not only admitting the complaint (Ex. Ka. 95), but also in treating it as a dying declaration of the deceased, Mahendra Singh Bhati.

(VII.) Satyapal Tandon (PW3) clearly proves that, on 25/26.09.1992, the appellant had stayed under the pseudonym of Harpal Singh at his Rainbow Guest House.

(VIII.) According to the learned counsel, through the series of evidence cogently produced by the prosecution, the prosecution has established its case against the appellant. Hence, the learned counsel has supported the impugned judgment.

17. In rejoinder, Mr. Surendra Singh, the learned Senior Counsel, submits that the existence of motive, at best, creates a suspicion against the appellant. But suspicion no matter how strong cannot take the place of proof. Therefore, the prosecution is still required to establish its case by cogent and convincing evidence.

Secondly, the appellant was, in fact, acquitted in the Criminal Case emanating from F.I.R. No.38/1993. Moreover, even in the Session Case No.88/2005 by judgment dated 08.07.2006, the appellant was acquitted. Hence, the possession of AK-47 gun with the appellant is highly doubtful.

Thirdly, the Register of Rainbow Guest House was neither seized, nor produced during the trial. Therefore, the testimony of Satyapal Tandon (PW3) loses its evidentiary value. Moreover, Satyapal Tandon (PW3) has never identified the appellant either in the Test Identification Parade, or in the Court. Hence, his

testimony is irrelevant.

18. Heard the learned counsel for the parties, examined the record, and perused the impugned judgment.

19. A holistic appreciation of the case clearly reveals two glaring facts:-

Firstly, the factum of the homicidal death of Mahendra Singh Bhati, and Udai Prakash Arya are not in dispute. For, according to Dr. A.K. Rastogi (P. W. 6), he had not only performed the post-mortem on the deceased persons, but has also opined that the death of both the persons is due to shock and hemorrhage caused by the fire arm injuries.

Secondly, since the complainant, Anil Kumar Bhati (P.W. 39), and the other eye witnesses have neither named, nor identified the appellant, the entire case against the appellant is based on circumstantial evidence. Therefore, this Court is not discussing the issue whether the two deceased persons had died a homicidal death, or not? The only issue before this Court is whether the circumstantial evidence are so complete as to point unerringly towards the guilt of the appellant, or not in the commission of the alleged offences?

20. In the case of Anwar Ali and Another v. The State of Himachal Pradesh, [(2020) 10 SCC 166], the Hon'ble Supreme Court has reiterated the principles with regard to the assessment of evidence in a case based on circumstantial evidence.

21. The principles are as under:-

5.4 It is also required to be noted and it is not in dispute that this is a case of circumstantial evidence. As held by this Court in catena of decisions that in case of a circumstantial evidence, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else and the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. In the case of Babu (supra), it is observed and held in paragraphs 22 to 24 as under:

"22. In Krishnan v. State (2008) 15 SCC 430, this Court after considering a large number of its earlier judgments observed as follows: (SCC p. 435, para 15)

"15. ... This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of definite tendency unerringly pointing

towards guilt of the accused;

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See *Gambhir v. State of Maharashtra* (1982) 2 SCC 351)"

23. In *Sharad Birdhichand Sarda v. State of Maharashtra* (1984) 4 SCC 116 while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are: (SCC p. 185, para 153)

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

(v) 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.

A similar view has been reiterated by this Court in *State of U.P. v. Satish* (2005) 3 SCC 114 and *Pawan v. State of Uttaranchal* (2009) 15 SCC 259.

24. In *Subramaniam v. State of T.N* (2009) 14 SCC 415, while considering the case of dowry death, this Court observed that the fact of living together is a strong circumstance but that by alone in absence of any evidence of violence on the deceased cannot be held to be conclusive proof, and there must be some evidence to arrive at a conclusion that the husband and husband alone was responsible therefor. The evidence produced by the prosecution should not be of such a nature that may make the conviction of the appellant unsustainable. (See *Ramesh Bhai v. State of Rajasthan* (2009) 12 SCC 603)."

(emphasis supplied)

5.5 Even in the case of *G. Parshwanath* (supra), this Court has in paragraphs 23

and 24 observed as under:

"23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. 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, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

22. Keeping the above principles in mind, this Court is required to critically examine the evidence produced by the prosecution against the appellant.

23. Anil Kumar Bhati (P.W. 39) lodged a written complaint (Ex. Ka. 30) in the Police Station Dadri, wherein he claimed that seven to eight unknown persons had shot his uncle, who was seated in a car along with his friend, Udai Ram Arya. Due to the firearm injuries, both the persons had died on the spot. However, in his complaint (Ex. Ka. 30), he neither describes, nor names the appellant. Moreover, in his examination-in-chief, he reduces the number of assailants from seven to eight, to merely two. But, even in his deposition before the learned Trial

Court, he does not identify the appellant as the assailant. Although, he describes the height and the age of the two assailants, in his examination-in-chief, he readily admits in his cross-examination that it is for the first time that he is describing the personal traits of the two assailants. Interestingly, despite the fact that the appellant was arrested, the CBI never held a Test Identification Parade for the appellant, by the complainant, or by any other eyewitnesses. Therefore, the presence of the appellant and his being the author of the fatal injuries is completely based on circumstantial evidence.

24. Both the prosecution and the learned Trial Court have heavily relied upon a complaint (Ex. Ka. 95) allegedly written by the deceased, Mahendra Singh Bhati, to the SHO, Dadri Police Station. Admittedly, the said complaint (Ex. Ka. 95) is a photostat copy. Therefore, the issue before this Court is whether the learned Trial Court was justified in admitting the said document, or not?

25. Section 61 of the Evidence Act deals with the proof of contents of documents. According to the said provision, "the contents of documents may be proved either by primary or by secondary evidence". Section 62 defines the word "primary evidence" as meaning "the document itself produced for the inspection of the Court. Where a document is executed in several parts, each part is primary evidence of the document".

26. Section 63 defines the term "secondary evidence" as under :-

63. Secondary evidence. -- Secondary evidence means and includes --

- (1) certified copies given under the provisions hereinafter contained;
- (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them;
- (5) oral accounts of the contents of a document given by some person who has himself seen it.

27. Section 65 permits the giving of secondary evidence in certain circumstances. Section 65 is as under:-

65. Cases in which secondary evidence relating to documents may be given.--

Secondary evidence may be given of the existence, condition or contents of a document in the following cases: --

- (a) when the original is shown or appears to be in the possession or power -- of the person against whom the document is sought to be proved, of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74; 34

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1 [India] to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

28. Section 66 of the Evidence Act prescribes the procedure for production of a secondary evidence.

29. In *Sital Das v. Sant Ram & others*, [AIR 1954 SC 606], the Hon'ble Supreme Court observed that foundation must be first laid for the reception of the secondary evidence.

30. In *The Roman Catholic Mission v. State of Mardas & another*, [AIR 1966 SC 1457], the Hon'ble Supreme Court held that the copies of the original are not admissible in evidence, if no foundation is laid for the establishment of the right to give secondary evidence.

31. In the case of *Jagmail Singh (supra)*, the Hon'ble Supreme Court has opined as under:-

"Under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, or of any person out of reach of, or not subject to, the process of

the court, or of any person legally bound to produce it, and when, after notice mentioned in Section 65 such person does not produce it. For secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original evidence has not been furnished. Where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for the court to allow a party to adduce secondary evidence. Merely the admission in evidence and making exhibit of a document does not prove it automatically unless the same has been proved in accordance with the law".

32. Before the prosecution can be permitted to introduce a secondary piece of evidence, it must bring the case within the ambit of Section 65 of the Evidence Act. However, in the present case, the prosecution has failed to bring the case within the ambit and scope of Section 65. For, the prosecution has nowhere pleaded that the original copy of the alleged complaint has been destroyed or lost, or the party is unable to produce it in a reasonable time. The prosecution, in fact, has admitted that the original copy was submitted to the Police Station Dadri. But the prosecution has not made any attempt to collect the said document from the Dadri Police Station. Therefore, the prosecution has failed to lay down the foundation for introduction of a secondary piece of evidence.

33. Even the procedure prescribed under Section 66 of the Evidence Act has not been followed. For, the CBI has not issued any notice to the Dadri Police Station to produce the alleged complaint.

34. Nowhere it is stated that the xerox copy was taken from its original or that it was compared with the original after taking its xerox copy. When there is no possibility of the document being compared with the original, the xerox copy cannot be accepted as secondary evidence. Mere production of xerox copy does not amount to proof of the original unless the copy given in evidence is shown either to have been made from original or to have been compared with the original. Unless the foundation for producing the secondary evidence is laid, the xerox copy is not admissible in evidence.

35. According to the deposition of Sameer Bhati (P.W. 32), when he had identified the alleged complaint (Ex. Ka. 95), the defense counsel had immediately raised an objection about its admissibility in the trial. The learned Trial Court had merely noted that the question about the admissibility would be decided later on.

36. In his cross-examination, Sameer Bhati (P.W. 32) claims that "the police had come to investigate the complaint written by my father (Ex. Ka. 95). I do not know whether my father had complained to the Police Station Dadri over the phone or not? I do not know whether the investigation was made by the SSI R.K. Sharma, or not? I do not know what report was submitted by the Investigating Officer. I do not know if any information with regard to my father protecting a gang run by Satbir".

37. This part of the cross-examination has been treated by the learned Trial Court as "an admission made by the accused". However, the question raised by the defense counsel would have been as to why the police had come to investigate. Merely because the witness refers to the alleged complaint (Ex. Ka. 95) filed by his father, it does not mean that the defense has admitted the existence of the said document. This part of the cross-examination would necessarily have to be read in juxtaposition of the objection already raised by the defense counsel while the examination-in-chief of this witness was recorded by the learned Trial Court.

38. Moreover, even if for the sake of argument, it is accepted that the accused had admitted the existence of the alleged complaint (Ex. Ka. 95), it does not mean, by any stretch of imagination, that the accused has accepted the contents of the alleged complaint. The prosecution was still required to prove the contents of the complaint (Ex. Ka. 95). But even Sameer Bhati (P.W. 32) does not prove the contents of the document. In his examination-in-chief, he merely states that his father had received certain threats about which he had complained to the Police. Therefore, the learned Trial Court was unjustified in admitting the said document as a secondary piece of evidence.

39. In the case of U. Sree (supra), the Hon'ble Supreme Court has opined as under:-

17. Recently, in H. Siddiqui (Dead) by Lrs. v. A. Ramalingam, (2011) 4 SCC 240, while dealing with Section 65 of the Evidence Act, this Court opined though the said provision permits the parties to adduce secondary evidence, yet such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It has been further held that mere admission of a document in evidence does not amount to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

40. Once the document could not have been admitted, the question whether the document (Ex. Ka. 95) qualifies as a dying declaration or not, need not detain us. Since the very admission of the document is unsustainable, the learned Trial Court is unjustified in treating the document as a dying declaration of the deceased, Mahendra Singh Bhati. Hence, the first linking evidence against the appellant loses all its evidentiary value.

41. Moreover, in the case of Paltan Mallah & others (supra), the Hon'ble Supreme

Court was dealing with the issue whether entries in the diary made by the deceased could be treated as dying declaration, or not? The Apex Court opined as under:-

"11. The entries in the diary and certain statements of the deceased recorded on a microcassette were sought to be made admissible as evidence under Section 32 of the Evidence Act. Section 32 of the Evidence Act says that the statement, written or oral, of relevant facts made by a person who is dead, are themselves relevant facts, but this statement should have been made as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death when such question comes up for consideration by the court. It is true that when such statements were made, the maker of the statement need not be under the expectation of death. But nevertheless, these statements should give either the cause of his death or any of the circumstance which led to his death.

12. The entries in the diary and the representation Niyogi had submitted to the President of India were in general terms. He apprehended some danger at, the hands of some industrialists as the agitation of the workers had been going on and in some instances the henchmen of the industrialists had unleashed physical violence on the workers. Even though he had mentioned the names of some of the accused persons in the diary and in the cassette, that by itself may not be of any assistance to the prosecution, to prove the case as the entries in the diary and cassette do not refer to any event which ultimately was the cause of his death".

42. Similarly, in the present case, the deceased had made certain general statements about apprehending danger from the appellant and others. However, in the statement, he neither speaks about the cause of death, nor any other circumstance which would ultimately lead to his death. Hence, the said complaint (Ex. Ka. 95) could not have been treated as a "dying declaration".

43. Both the prosecution and the learned Trial Court have heavily relied upon the alleged recovery of AK-47 rifle from the possession of the appellant. Mamchand, Inspector (P.W. 27) informs the Court that on 18.06.1996, he was the SHO of Police Station Pehwa, District Kurukshetra in Haryana. On the said date, at night, they received an information that Pal Singh and Jaspal Singh were sleeping outside the house of Jessa Singh. Upon this information, he, along with Inspector Surendra Singh and other police personnel, went to the said village. He further claims that the police party divided themselves and surrounded each house of the village. Due to the commotion made by the police party, Pal Singh, Jessa Singh and others woke up. He further states that Pal Singh pulled out an AK-47 gun from the side of his bed, and pointed it towards the police personnel. Meanwhile, Jaspal Singh also pulled out a self-loading rifle from underneath the bed, and pointed it towards the police personnel. However, the police personnel overpowered both Pal Singh and Jaspal Singh, and recovered the firearms. Furthermore, he claims that the AK-47 rifle recovered from Pal Singh was loaded. Therefore, it was unloaded. According to him, the recovery memo was prepared

and it was marked as Ex. Ka. 81. According to the recovery memo (Ex. Ka. 81), the number written on the AK-47 is "K 01527/1949T". He further claims that on 03.07.1996, while he was the SHO at Police Station Pehwa, the CBI had taken both the AK-47 and the assault rifle in their custody. While taking the possession, the CBI had prepared receipts/seizure memo, which was marked as Ex. Ka. 83. The number written is "KO1527/1949T". In his cross-examination, he admits that the AK-47 was given to the CBI in an unsealed condition.

44. Naveen Chandra Jha (P.W. 41), the Deputy Superintendent of Police, CBI, in his cross-examination, also admits that since he had received the AK-47 rifle in an unsealed condition, he did not seal the said weapon. Even during the trial, the weapon was produced in the Court in an unsealed condition. According to this witness, the number on the weapon is "KD1527/4949F". Interestingly, this witness has not been declared as hostile with regard to the number of inscribed on the weapon.

45. Thus, there is a clear cut contradiction between the number recorded in the seizure memo (Ex. Ka. 81) and the number inscribed in the weapon produced in the Trial Court. According to the recovery memo (Ex. Ka. 81), the number is "KO", whereas according to Naveen Chandra Jha (P. W. 41), the number inscribed on the AK-47 rifle produced in the Court is "KD".

46. The Trial Court had the benefit of visually examining the AK-47 rifle, which was submitted as a material object by the prosecution. The learned Trial Judge clearly stated that on a visual examination of the AK-47 rifle, it discovered that the number written on the AK-47 gun is "KO1527" and under this number is the number "4949F". Needless to say even this number does not tally with the seizure memo (Ex. Ka. 81). For, according to the seizure memo, the number written on the AK-47 rifle is "KO1527/1947T". However, in order to align the letter "T", as mentioned in the seizure memo (Ex. Ka. 81), the learned Trial Court states that the letter "F" can be read as letter "T". The learned Trial Judge further states that on the bridge of the AK-47 rifle, the number inscribed is "KD1527". Surprisingly, he reads the letters "KD" as "KO" in order to harmonize the testimony of Naveen Chandra Jha (P.W. 41) and the number given in the seizure memo (Ex. Ka. 81).

47. The learned Trial Judge further observes that in the FSL report (Ex. Ka. 71), the number written is "KO1527/1949". However, even this is a misreading of the FSL report (Ex. Ka. 71). For, a bare perusal of the said document clearly reveals that the number written in the document is "K" and the next letter is unclear as the next letter is handwritten, rather than typed. Moreover, the remaining part of the numbers is "1527/1949T". Therefore, the learned Trial Court misreads the number shown in the FSL report (Ex. Ka. 71).

48. The learned Trial Judge further observes that different witnesses have given different numbers, or just part of the number inscribed on the AK-47 gun. But then surprisingly the learned Trial Court concludes that "even if there is a

contradiction about the numbers, it does not make the recovery a suspicious one". Needless to say, that each weapon is assigned a particular number by the manufacturer. Therefore, the only means of identifying a weapon is through its particular number inscribed upon it. The number on a weapon is similar to a chassis number in a car. In case there is confusion about the number inscribed on a weapon, or the number noted in a seizure memo, or about a number given by the prosecution witness, it will certainly create a grave doubt about the veracity of the said recovery. The contradiction between the seizure memo (Ex. Ka. 81) and the number given by the prosecution witness, the contradiction between the number given in the seizure memo (Ex. Ka. 81) and the number, which is visually apparent, has not been explained by the prosecution. This lacuna in the prosecution case cannot and should not have been filled in by the learned Trial Court by saying that the letter "F" can be read as letter "T", or the letter "O" can be read as letter "D". Moreover, the contradiction between the number "1949" and "4949" has been ignored totally by the learned Trial Court.

49. Since the very number inscribed on the AK-47 rifle is caught in a bundle of confusion, it is unclear as to which AK-47 rifle was allegedly recovered from the possession of the appellant. Moreover, since the weapon at the time of recovery was never sealed by the police, since the unsealed weapon was handed over to the CBI by the Police, the genuineness of the recovery of AK-47 rifle becomes highly suspect. Therefore, the recovery of the AK-47 rifle from the possession of the appellant cannot be believed.

50. The Hon'ble Supreme Court in the case of Pancho v. State of Haryana, [(2011) 10 SCC 165] has opined as under :-

"12. A2-Pancho was arrested on 16/8/1999 near Dabchick Modale. According to the prosecution, his search resulted in recovery of a country made pistol (Ex-P/12) of .315 bore. The recovery of country made pistol is made more than about six months after the date of incident. It is true that the report of FSL (Ex-PT) states that the country made pistol marked W/1 was test fired and that bullet marked BC/1 taken out from the body of deceased Kartar Singh had been fired from the said country made pistol. The report also states that the holes on the clothes of deceased Kartar Singh which were sent for examination, had been caused by bullet projectiles. We are, however, of the opinion that, on the basis of this report, it is difficult to come to a conclusion that A2-Pancho was responsible for the firearm injury caused to 1 deceased Kartar Singh. The prosecution has not led any evidence to show as to in whose custody this pistol was during the period of six months after the incident. In his statement recorded under Section 313 of the Code, A2-Pancho has denied that any such recovery was made from him. Even assuming that the recovery is proved, we are unable to hold in the absence of any other cogent evidence that it is sufficient to establish that A2-Pancho caused the fatal firearm injury to deceased Kartar Singh with the said pistol".

51. In the present case, AK-47 gun was allegedly recovered after the lapse of

four years. The prosecution has not produced any evidence to show that the said AK-

47 gun was continuously in the possession of the appellant for the four years. Therefore, the said recovery cannot be believed.

52. As far as the testimony of Abhijeet Dey (P.W. 25), the Ballistic Expert, and the ballistic report (Ex. Ka.71) are concerned, both the testimony and the FSL Report (Ex. Ka. 71) lose their evidentiary value as the prosecution has failed to establish the recovery of AK-47 rifle from the possession of the appellant. Since the recovery itself is doubtful, the FSL report (Ex. Ka. 71), which is based on the alleged recovery, stands on extremely weak grounds. Therefore, even if Abhijeet Dey (P.W. 25) claims that the bullets which were recovered from the scene of the crime were fired from the AK-47 rifle produced before the FSL, even the said testimony loses all its significance. Therefore, the prosecution has singularly failed in proving that the appellant is the author of the fatal injury. Hence, the appellant's conviction for the offence under Section 302 IPC is legally unsustainable.

53. The prosecution has heavily relied upon the disclosure statement made by the appellant under Section 27 of the Evidence Act. According to the appellant, he had gotten the car serviced in September, 1992. Although, he had taken the police to the Somko Automobiles in Gurgaon, and identified the same, although the police claims that it has recovered a Service Register (Ex. Ka. 78) from the said service station, but even then this evidence is on a weak wicket.

54. Mr. Tara Chand (P.W. 26) informs the Court that he has been working with the Somko Automobiles besides New Cont, Gurgaon for the last ten years. According to him Somko Automobiles is an authorised service station. Moreover, according to him, when a car comes, there is a job card that is prepared and history register is maintained. He further claims that the service history register is with him. According to him, he recognizes the signature and the handwriting of Mr. M.S. Kaushik, who was the Manager in the year 1992 and 1993. He further claims that at Page No. 726, the name of the customer is shown as Harpal Singh, resident of A-197 Vikaspuri, Delhi and the number of the car to be serviced is DL-4C-3597. According to him, this car was serviced on 09.07.1992. It was the first free service of the car. He further admits in his examination-in-chief that at Page No. 726 earlier the name of Mr. G.R. Yadav, resident of 22-A Apna Bazar, Gurgaon, was written. The said name of G.R. Yadav was crossed out, and the name of Harpal Singh was written. According to him, this was done as the service details of Mr. G.R. Yadav's vehicle were already noted at Page No. 628. Therefore, the name of G.R. Yadav, noted at Page No. 726, was crossed over, and the name of Harpal Singh was entered.

55. In his cross-examination, he further admits that the original entry at Page No. 726 is of Car No. 3017. The said number has been crossed over, and another car number, namely DL-4CB-3597, has been written. He further admits that he

did not know when the overwriting was done.

56. A bare perusal of the register at Page No. 726 clearly reveals that originally the name of Mr. G.R. Yadav was written. The said name has been crossed out, and the name of Mr. Harpal Singh has been overwritten. Originally, the number of the car was noted as DL4C/B 3017. However, subsequently, the number 3017 has been crossed over, and the number 3597 has been written in its place. Interestingly, even where the words and numbers have been crossed out, there is no signature of the person, who has overwritten on the page.

57. The explanation given by this witness is clearly untenable. For, all the pages are written chronologically. According to Tara Chand (P.W. 26), the name of G.R. Yadav had to be crossed out as the history card of this vehicle was already shown at Page No. 628. However, a perusal of Page No. 628 reveals that even on this page the name of G. R. Yadav is overwritten. Moreover, even if for the sake of argument, it is accepted that G.R. Yadav's car service history was shown at Page No. 628 and was inadvertently recorded in Page No. 726, even then there is no reason why the name Harpal Singh, and the registration number of the car should have been inserted in Page No. 726. The normal course of human conduct would have been to create a fresh service card, rather than overwriting an old one. Therefore, the explanation given by Tara Chand (P.W. 26) seems to fly in the face of normal human conduct. Hence, this explanation is rather strange. Furthermore, there is too much of interpolation in the Service Register (Ex. Ka. 78). The interpolation creates a grave doubt about the genuineness of the Service Register (Ex. Ka. 78).

58. Most importantly, the appellant had claimed that he had gotten the car serviced in September, 1992. Yet, the date of service shown in Page No. 726 is 09.07.1992. Therefore, it does not relate to the disclosure statement. Thus, the Service Register (Ex. Ka. 78) recovered by the CBI does not strengthen the case of the prosecution against the appellant. The recovery of the Service Register (Ex. Ka. 78) does not prove the fact that the getaway car was serviced in September, 1992, just a few weeks before the commission of the alleged crime.

59. Surprisingly, the learned Trial Court has neither examined the Service Register (Ex. Ka. 78), nor discussed the fact that there are overwritings both in the name and in the registration number of the car. Therefore, there is a lack of critical assessment of the evidence readily available on record. Further, the learned Trial Court has blindly relied upon the fact that a disclosure statement (Ex. Ka. 113) was made by the appellant, and a Service Register (Ex. Ka. 78) was allegedly recovered from the Somko Automobiles in order to read the said evidence as incriminating evidence—a link in the chain of circumstances against the appellant. Thus, the learned Trial Court has accepted a piece of evidence without critically examining its genuineness, and its relevancy.

60. The entire Service Register is available before this Court. In order to verify the veracity of the explanation given by Tara Chand (P.W. 26), this court has

examined the Service Register. The entire Service Register runs into 957 pages, and each page bears a number. This Court has also examined Page No. 628. Interestingly, on Page No. 628, the original name of the owner of the car was written as D.R. Yadav. The letters "D.R." have been crossed over and the letters "G.R." have been written. There is no explanation offered by Tara Chand for the overwriting of the letters "D.R.", and substituting it with the letters "G.R.". The overwriting, both on Page No. 628 and Page No. 726, envelopes the entire case of the prosecution in a shroud of mystery.

61. With the help of the testimony of Satpal Tandon (P.W. 3), the prosecution has tried to prove that Pal Singh used his pseudonym, namely Harpal Singh. According to Satpal Tandon (P.W. 3), in September and November, 1992, he was running the Rainbow Guest House. He claims that he had maintained a Register where the name of the client, staying in his guest house, was entered along with their address. According to him, the entry is to be made by the guest himself. But many a times, it is also made by the staff. However, the register had to be signed by the guest. He claims that in Page No. 55, Sr. No. 52, dated 25.09.1992, at 06:40, one Mr. Harpal Singh S/o Gurbachan Singh, resident of 397 Gaon Rumala, Delhi had made the said entry. Harpal Singh had come with two other persons. These three persons were allotted Room No. 13. They left the guest house on 26.09.1992 at 08:30 A.M.

62. However, in his cross-examination, Satpal Tandon (P.W. 3) readily admits that he is not in a position to identify the person, who had come to his guest house as Harpal Singh. Since this witness could not identify the appellant, the fact that the Guest Register does bear the name of one Harpal Singh loses all its relevance. Therefore, the prosecution has failed to establish the fact that the appellant, Pal Singh, uses the pseudonym of Harpal Singh.

63. The last piece of evidence read against the appellant is the alleged absconding by him. Although the prosecution claims that the appellant was an absconder, no evidence has been produced to indicate that any step was taken by the prosecution to have the appellant declared as an absconder under Section 82 of Cr. P. C. Moreover, in catena of cases the Hon'ble Supreme Court has held that absconding is not incriminating evidence. For, even innocent person tend to leave the place of commission of crime. Therefore, absconding by itself cannot form the basis of conviction of the appellant.

64. Section 27(2) of the Arms Act punishes a person who uses any prohibited arms or prohibited ammunition in contravention of Section 7 of the Act. The punishment shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine.

65. In the present case, the prosecution has singularly failed to establish the fact that the appellant had "used AK-47 gun" for commission of the crime. Therefore, his conviction, under Section 27 of the Arms Act, is clearly unsustainable.

66. Despite the fact that the evidence produced by the prosecution is incoherent,

chaotic, unacceptable and mysterious, the learned Trial Court has inter-linked the evidence in order to complete a chain, which would unerringly point towards the guilt of the appellant.

67. It is, indeed, a settled principle of criminal jurisprudence that the prosecution must travel the distance between "may be true" and "must be true". In the present case, the prosecution has failed to cover this long distance. Therefore, the prosecution continues to exist in the realm that the prosecution case "may be true".

68. However, as discussed hereinabove, neither the evidence taken individually, nor holistically, unerringly point towards the guilt of the appellant. Therefore, the prosecution has failed to establish its case against the appellant.

69. For the reasons stated above, this appeal is, hereby, allowed. The judgment dated 28.02.2015/ 10.03.2015, passed by the IIIrd Additional Sessions Judge/ Special Judge (C.B.I.), Dehradun qua the appellant is, hereby, set aside. Since the prosecution has failed to establish its case, and since the prosecution case continues to be an animated suspension of "may be true", this Court acquits the appellant by giving him the benefit of doubt. Hence, the appellant is acquitted of the offences punishable under Sections 302, 307 & 326 IPC, and Section 27 of the Arms Act. Since the appellant is on bail, his bail bonds shall stand discharged.