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**(2016) 07 RAJ CK 0071**

**In the Rajasthan High Court**

**Case No :** Criminal Appeal Nos. 53 of 2012, 685 of 2006 and 267 of 2007

Salman Khan and Ors.

APPELLANT

Vs

State of Rajasthan and Ors.

RESPONDENT

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**Date of Decision :** 25-07-2016

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 164

Evidence Act, 1872 — Section 33

Wild Life (Protection) Act, 1972 — Section 51

**Citation :** (2016) 3 RajCriC 1004 : (2016) 4 RCRCriminal 172 : (2017) 1 RLW 668 : (2016) 4 WLC 379

**Hon'ble Judges :** Nirmaljit Kaur, J.

**Bench :** Single Bench

**Advocate :** Mahesh Bora, Sr. Advocate assisted by Nishant Bora, Hastimal Saraswat, Atul Dobhal and Aripit Mehta, Counsel for Salman Khan, for the Appellant; K.L. Thakur, Additional Advocate General assisted by Mahipal Bishnoi and K.L. Vishnoi, Asstt. Counsel for the

**Final Decision :** Dismissed

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## Judgement

Nirmaljit Kaur, J.—Before starting to write the judgment, it is important to note that three separate cases were registered for three different alleged incidents supposed to have occurred between a period of six days: (i) FIR No. 162/1998 was registered at Police Station Mathania, Jodhpur on 11.10.1998 for incident of hunting a deer, which allegedly took place on 26.09.1998 (Criminal Case No. 207/1999); (ii) FIR No. 163/1998 was also registered on 11.10.1998 at Police Station Mathania for the offence of allegedly killing another deer on 28.09.1998 (Criminal Case No. 206/1999); and (iii) FIR No. 93(26) of 1998 was registered with the Forest Department on 02.10.1998 for the incident of hunting, which allegedly took place on the intervening night of 01.10.1998 and 02.10.1998, for which, the trial is still going on (Criminal Case No. 66/2011).

2. For the incident of hunting, which is alleged to have taken place on 26.09.1998 and pertains to FIR No. 162/1998, accused-Salman Khan has been

convicted for the offence under Section 51 of the Wild Life Protection Act and sentenced to undergo one year's simple imprisonment along with fine of Rs. 5000/- vide judgment and order dated 17.02.2006 passed by Chief Judicial Magistrate, Jodhpur. He preferred an appeal against the said conviction before the Sessions Judge, Jodhpur, which was subsequently transferred to the High Court and presently heard by this Court now as S.B. Criminal Appeal No. 53/2012 titled as "Salman Khan v. State of Rajasthan". The State of Rajasthan, too, has preferred an appeal for enhancement of the sentence of one year awarded to the accused-Salman Khan by the Chief Judicial Magistrate, Jodhpur which is now registered as S.B. Criminal Appeal No. 267/2006. Another appeal has been filed by the State of Rajasthan against the acquittal of the co-accused as well as acquittal of accused-Salman Khan under Sections 143, 144, 148, 201, 149 of the IPC, which is registered as S.B. Criminal Appeal No. 685/2006.

3. In the second case, i.e. Criminal Case No. 206/1999, Accused-Salman Khan has further been convicted for five years for the alleged hunting of deer on 28.09.1998. The appeal preferred before the Sessions Court, too, was dismissed and now, the revision against the conviction S.B. Criminal Revision Petition No. 905/2007 is also being heard and shall be decided by a separate order. Along with the same, an appeal against the acquittal of co-accused Gordhan Singh S/o Madho Singh is also pending, which too is being decided along with S.B. Criminal Revision Petition No. 905/2007.

4. The trial in Criminal Case No. 68/2011 under the Arms Act pertaining to FIR No. 180/1998 dated 15.10.1998 registered at Police Station Luni, is still pending.

5. As stated above, FIR No. 93(26) of 1998 was registered for the alleged hunting, which took place on the intervening night of 01.10.1998 and 02.10.1998, by the Forest Department on 02.10.1998. During the investigation of this FIR, one Harish Dulani informed the Forest Department that a few days ago on 26.09.1998 as well as on 28.09.1998, deers were hunted by some persons. However, inspite of the alleged information having come to their knowledge on 02.10.1998 itself, the FIR No. 162/1998 for offence under Sections 147, 148, 149 of the IPC, Sections 9, 39, 51, 52 of the Wild Life Protection Act and Section 27 of the Arms Act was registered at Police Station Mathania against all the accused mentioned therein as late as on 11.10.1998 on the basis of the complaint (Exh. P/3) filed by Lalit Kumar Bora, the then Wild Life Conservator, Jodhpur (PW-2) before the Additional Superintendent of Police, Jodhpur. As per the said complaint, information about the hunting on 26.09.1998 was disclosed to them by Harish Dulani on 02.10.1998 during the investigation of FIR No. 93(26) of 1998 that on 26.09.1998, Salman Khan, Satish Shah, Yashpal Singh, Mahendra Bhati, Kuldeep Choudhary and Mahendra Pal Singh @ Raju Banna indulged in the illegal hunting of the deer. The complaint was accompanied by a copy of the statement of Harish Dulani (Exh. P/4A). Mohammad Hussain and Dushyant although not named in the FIR were arrested during the investigation. After investigation in the said case, challan was filed and charges were framed

against the accused (1) Salman Khan, (2) Yashpal Singh, (3) Mohammad Hussain, (4) Dushyant Singh, (5) Satish Shah, (6) Mahendra Singh S/o Ugam Singh, (7) Kuldeep and (8) Mahendra Pal Singh @ Raju Banna S/o Nathu Singh as under:--

"i) Charge against Salman Khan under Section 143, 144, 148, 201 read with Section 149 of the IPC and Section 27 of the Arms Act and 51 of the Wild Life (Protection) Act.

ii) Charge against accused Yashpal Singh under Sections 143, 148, 201 read with Section 149 of the IPC and Section 51, 39(B)(B) read with Section 51 of the Wild Life (Protection) Act.

iii) Charge against accused Mohammad Hussain under Section 201 of the IPC and Section 51 of the Wild Life (Protection) Act.

iv) Charge against accused Dushyant Singh under Section 201 and Section 51, 39(B)(B) read with Section 51 of the Wild Life (Protection) Act.

v) Charge against accused Satish Shah, Mahendra Singh S/o Ugam Singh, Kuldeep, Mahendra Pal Singh @ Raju Banna S/o Nathu Singh under Section 143, 201 read with Section 149, 148 of the IPC and Section 51 Wild Life (Protection) Act."

6. The trial court acquitted accused-Salman Khan for the offence under Sections 143, 144, 148, 201 read with Section 149 of the IPC and Section 27 of the Arms Act as not proved beyond reasonable doubt; however, convicted him under Section 51 of the Wild Life (Protection) Act to undergo sentence of one year's simple imprisonment and fine of Rs. 5000/-, in default of payment of fine, to further undergo one month simple imprisonment, whereas, all the other accused were acquitted from charges having not been proved against them beyond reasonable doubt.

In order to prove their case, the prosecution produced as many as 31 witnesses, 58 documents and 12 articles. The defence produced 6 documents, which were got exhibited as Exh. D/1 to Exh. D/6. Gypsy No. RJ-19 1C 2201 was recovered vide recovery memo Exh. P/5A dated 07.10.1998.

7. Mr. Mahesh Bora, learned Senior Advocate assisted by Mr. Nishant Bora and Mr. Hastimal Saraswat, learned counsel for accused-Salman Khan while dealing with each of the evidence very minutely, which shall be dealt with in the later part of the judgment, submitted that accused-Salman Khan has been falsely enroped. No deer was hunted on the said date. He is only a victim of the circumstances and hype created by a false rumour having been spread and thereafter, in their desperate attempt to pacify the public, created multiple criminal cases of alleged hunting of 26.09.1998, 28.09.1998 and again intervening night of 01.10.1998 & 02.10.1998. All the evidence was collected during the investigation of FIR No. 93(26)/1998 but it has been used against accused in three separate cases. There was no need for the Forest Department to

lodge three separate cases, which was done only to corner Salman Khan and break him down to either save someone else or to save their own skin from the outcry which resulted from a rumour spread on account of a carcass of a killed deer found from a pit on 02.10.1998, which was badly mauled, probably torn by dogs.

8. Mr. K.L. Thakur, learned Additional Advocate General assisted by Mr. K.L. Vishnoi while arguing for the State submitted that the prosecution had fully proved its case against all the accused beyond any reasonable doubt. The delay in lodging the FIR has been explained by the Investigating Officer, PW-2 Lalit Kumar Bora and it does not raise the inference that the complaint was false. It is further argued that mere faulty investigation cannot be a ground for acquittal of the accused. The recoveries are duly proved by the official witnesses. The gypsy was in the same condition and remained intact in their possession till it reached the FSL. The statement of Harish Dulani inspires confidence and cannot be doubted as he has specifically mentioned that Salman Khan had stayed at Ummed Bhawan Palace in room No. 508, which is not denied. Hence, the entire statement of Harish Dulani should not be discarded. Similarly, from the statement of Rajendra Singh (PW-15), it is evident that he has verified the fact that Salman Khan was staying in room No. 508, which is admitted. Hence, his evidence too should not be discarded. Reliance was also placed on the statement of Aurn Kumar Yadav (PW-7), the driver of the gypsy. It was contended that he has corroborated the statement of Harish Dulani. Whatever was stated by Harish Dulani in his statement under Section 50 of the Forest Animal (Protection) Act, has also been stated by Arun Kumar Yadav. No doubt, the statement of PW-1 Narendra Panwar is on the basis of the hearsay evidence but as per his statement, he was informed by Khinvraj about killed deer having been brought to the Hotel Ashirwad by Dushyant and Yashpal. Further, the witnesses having turned hostile should not be taken against the prosecution. They have been won over. The Additional Chief Judicial Magistrate (PW-30) and similarly, the Chief Judicial Magistrate (PW-31), who recorded the statements of Bhanwar Singh and Narendra Panwar respectively, have stated that the statements of both the witnesses were made voluntarily and the Magistrate had specifically asked both of them whether they are making the statements voluntarily and without any pressure, to which they replied in the affirmative and if a prosecution witness turns hostile, the part of the statement of a hostile witness, which support the case of the prosecution should be taken into consideration. While meeting the argument of the learned counsel for the accused that Khinvraj was not examined on account of his death, Mr. Thakur submitted that as per Exh. P57, which is the statement of Khinvraj under Section 164 of the Cr.P.C., he has corroborated the statement of PW-1 Narendra Panwar that Dushyant, Yashpal and Pappsa @ Kuldeep had brought the shikar to the Hotel. Similarly, Exh. P/26 is the statement of Bhanwar Singh under Section 164 of the Cr.P.C. to the same effect. Even though Bhanwar Singh had turned hostile, he was cross-examined and he admitted in his cross-examination that he had duly made the statement before

the Magistrate under Section 164 of the Cr.P.C. While proceeding with his argument, Mr. Thakur argued that all these statements were recorded in FIR No. 93(26) of 1998 registered by the Forest Department, which is third case with respect to the incident that occurred on the intervening night of 01.10.1998 and 02.10.1998. The original record in the complaint case was called by the court and thereafter, the memo was prepared in the present case. Finally, while meeting with the argument of Mr. Bora that the gypsy was not recovered in the present case and therefore, it cannot be taken into consideration, Mr. Thakur argued that the gypsy was recovered vide Exh. P/5A on 07.10.1998. It could have only been recovered in one case and could not have been recovered thrice over. As per the FSL, the blood spot in the gypsy was of deer. The same is of the deer hunted on 26th September, 1998 and it cannot be held to be of the 1st October, 1998 because two deers killed on 1st were not loaded in the gypsy but were left at the spot.

Reliance was placed on the judgment rendered by the Apex Court in the case of *Sathya Narayanan v. State of Represented By Inspector of Police*, reported in 2013 (1) Criminal Court Cases 079(SC) to say that merely because the witness was declared as hostile, there is no need to reject his evidence in toto. In other words, the evidence of hostile witness can be relied upon at least to the extent, it supported the case of the prosecution. While relying on the judgment rendered by Apex Court in the case of *Surender Singh v. State of Haryana*, reported in 2006(1) Criminal Court Cases 989 (SC), it is contended that in case, the witness is turned hostile but admits the signatures on recovery memo, it is to be held that recovery is made in the presence of said witness. Further, the credibility of testimony of an Investigating Officer cannot be suspected when the same is wholly reliable, consistent and trustworthy as held in the case of *Sukhavasi Sivaiah v. State represented by its Public Prosecutor of A.P., Hyderabad*, reported in 2010(1) Criminal Court Cases 933 (A.P.). Further, reliance was placed on the judgment of the Supreme Court in the case of *State of U.P. v. Jagdeo & Ors.*, reported in 2003 Supreme Court Cases (Cri) 351 to suggest that mere faulty investigation cannot be a ground for acquittal of the accused and for the fault of the prosecution, the perpetrators of a ghastly crime cannot be allowed to go scot-free; and that delay in lodging FIR is not fatal in every case and for the same, reliance was placed on the judgment rendered in the case of *Amar Singh v. Balwinder Singh & Ors.*, reported in 2003 Supreme Court Cases (Cri) 641.

9. The learned counsel for the parties were heard at length and oral as well as documentary evidence was thoroughly considered. The written submissions were also submitted by the learned counsel for both the parties.

10. The FIR No. 162/1998, P.S. Mathania was accompanied by the statement of Harish Dulani giving a detail description of how the deer was hunted. In his statement under Section 164 of the Cr.P.C., Harish Dulani stated that he was the driver of the gypsy but the gypsy was being driven by Salman Khan accompanied by Satish Shah who was sitting next to Salman Khan and Yashpal who was sitting

at the back showing the way. Mahendra Bhati, Kuldeep Choudhary and Raju Banna were also sitting at the back. Salman Khan had fired three rounds. He missed the aim twice and managed to hit the deer only when he fired for the third time. Thereafter, Salman Khan got down and cut the throat of deer with his knife. It was further stated by him that he could identify the place of occurrence. It was also stated by him that all this while the gypsy was being driven by Salman Khan and on the same night, another deer was killed by Salman Khan, which he killed in the first round itself and in the same manner, once again cut the throat of the deer with his knife. Both the killed deers were put into the gypsy. Thereafter, Satish and Salman Khan were dropped at Ummed Bhawan Palace while the other went to Ashirwad Hotel. This time, the gypsy was being driven by Yashpal. Since everybody was sleeping at the Hotel Ashirwad, Yashpal said that they should go to the place of one Bhanwar Ji. When they reached the house of Bhanwar Ji, Yashpal called him out. However, Bhanwar refused to chop the deer. Thereafter, they came back to Ashirwad Hotel where the killed deers were unloaded and the gypsy was washed and cleaned by him the next morning. Harish Dulani further went on to give the detail of the 28th incident for which a separate case was registered. However, the present case concerns the hunting of 26th night.

11. The entire case is built around the statement of Harish Dulani. The statement of Harish Dulani was recorded under Section 164 of the Cr.P.C. However, he never appeared in the witness box and nor was examined. It is well settled proposition of law that statement under Section 164 cannot be taken into consideration, in case, a witness is not examined and nor cross-examined.

12. As per Section 33 of the Evidence Act, evidence given by a witness in judicial proceeding is relevant at a later stage in the same judicial proceeding only if the witness is dead or cannot be found, or is incapable of giving evidence or is not allowed to appear by the opposite party or his presence cannot be obtained without a reasonable delay or expense which is considered unreasonable by the court.

Section 33 of the Evidence Act read as under:--

"33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.-Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided- that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the

right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.-A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

13. Thus, one of the prime requisites for the statement to be admissible is that accused should have been granted an opportunity to cross-examine a witness whose statement is sought to be admitted into evidence. When a statement is recorded under Section 164 Cr.P.C., the accused does not have a right to cross-examine and nor he is given an opportunity to cross-examine such a witness. Hence, it is necessary that the said witness should not only be examined in court as witness but opportunity to cross-examine should also be granted and in case, the said condition is not fulfilled, the statement recorded under Section 164 of the Cr.P.C. cannot be read in evidence as per Section 33 of the Evidence Act.

14. The Apex Court in the case of Baij Nath Shah v. State of Bihar, 2010(3) Supreme Court p. 667 held in no uncertain terms that if the witness is not produced in court for evidence, the statement under Section 164 of the Cr.P.C. is not substantive evidence. In the said case, the allegation against the accused were of kidnapping and rape. He was convicted by the trial court on the basis of the statement under Section 164 of the Cr.P.C. The victim never came to record her evidence as she had been married in Nepal and her husband refused to let her return to India for the evidence. While acquitting the accused, the Apex Court observed:-

"We see from the judgments of the Courts below that the only material that has been used against the appellant is the statement under Sec. 164 of the Cr.P.C. This Court in Ram Kishan Singh v. Harmit Kaur and Another (1972) 3 SCC 280 has held that a statement of 164 Cr.P.C. is not substantive evidence and can be utilized only to corroborate or contradict the witness vis-&grave;-vis. statement made in Court. In other words, it can be only utilized only as a previous statement and nothing more. We see from the record that Suman Kumari was not produced as a witness as she had since been married in Nepal and her husband had refused to let her return to India for the evidence. In this light her statement under Section 164 cannot be used against the appellant."

Similar view has been held consistently by the Apex Court in various judgments and it is a settled proposition of law that accused has the right and should be given an opportunity to cross-examine such a witness. For non-fulfillment of this condition precedent alone, it is sufficient to hold that a statement of a witness recorded under Section 164, Cr.P.C. is not a statement, which can be admitted into evidence at the trial under Section 33 of the Evidence Act.

15. In the present case, it is pointed out that Harish Dulani has appeared in Criminal Case No. 206/1999. Thus, it is not the case of the prosecution that he could not be found or was incapable of giving evidence or his presence could not be procured for whatever reason. Hence, his statement in the present case is hit

by Section 33 of the Evidence Act and, therefore, cannot be read in evidence.

16. Besides the above reason, the statement of Harish Dulani under Section 164 of the Cr.P.C. is highly unreliable. The said statement of Harish Dulani under Section 164 of the Cr.P.C. was recorded while he was in custody of the Forest Department. In order to prove this fact, the learned counsel for the appellant Salman Khan read out the statement of the gypsy owner, Arun Kumar Yadav (PW-7). As per PW-7, father of Harish Dulani had told him that Harish was in the custody of Forest Department after the alleged incident and that whenever he (PW-7) went to the Forest Department along with the father of Harish, he too saw that Harish was always present. He had also gone to the Forest Department to plead for Harish. The father of Harish used to come to Arun Kumar Yadav to ask about whereabouts of Harish Dulani, upon which he would inform that Harish Dulani was with the Forest Department. Thus, it is apparent from the statement of their own prosecution witness PW-7 that Harish Dulani remained in the illegal custody of the Forest Department after the alleged hunting incident was reported and he continued to remain in the confinement till his statement was recorded both by the Forest Department and by the learned Magistrate under Section 164 of the Cr.P.C. The sanctity of a statement which is recorded while in custody is always doubtful and one wonders if that was the reason why Harish Dulani did not come back to record his statement in this case.

17. In fact, a doubt is created as to whether Harish Dulani was actually an eyewitness? In his statement under Section 164 of Cr.P.C., Harish Dulani went overboard and attributed Salman Khan with multi tasks of not only driving the gypsy but simultaneously shooting the deer, getting down to cut the neck of the deer and then taking over the wheels again. The prosecution has heavily relied on the statement of Arun Kumar Yadav (PW-7) to say that Gypsy No. RJ-19 1C 2201 was used by the film unit but then Aurn Kumar Yadav, the owner of the gypsy appeared as PW-7 submitted that Harish Dulani had told him that film unit crew did not take him along with them and he was left behind by them at Ummed Bhawan Palace thereby negating the prosecution version that Harish Dulani was present in the gypsy at the time of hunting and was thus an eyewitness. Thus, the statement of prosecution witness Arun Kumar Yadav certifying that Harish Dulani was left behind at Ummed Bhawan Palace at the time of hunting and he remained in the custody of the Forest Department till the recording of the statement coupled with the fact that Harish Dulani subsequently never appeared as witness renders the prosecution story totally weak and uncorroborated.

18. Faced with this situation, the State filed an application under Section 391 of the Cr.P.C. read with Section 33 of the Evidence Act on 15.03.2016 after the arguments had concluded, praying that the certified copy of the document i.e. the statement of Harish Dulani recorded as PW-1 in Criminal Case No. 206/1999, his statement recorded in presence of accused-Salman Khan on 13.10.1998 (Ex. P/89 in Criminal Case No. 66/2011) as also the statement of Lalit Kumar Bora

recorded as PW-1 in Criminal Case No. 66/2011 and the statement of witness (Ex. P/89) recorded by the forest department may be taken on record on the ground that the said statement under Section 164 of the Cr.P.C. was recorded in FIR No. 162/1998 (in the present case) as well as FIR No. 163/1998 both, meaning thereby that the said statement Ex. P/3 is common in both the trial and also because the witness Harish Dulani though did not turn up in the present case but his statement has been recorded before the trial court in second case and he has also been cross-examined. They are the public documents in terms of Section 74 of the Evidence Act and there is presumption under Section 80 of the Evidence Act that they are genuine.

19. Whereas, the present appeal was filed in the year 2006 but no application for taking additional evidence on record was filed by the State since then. The same has been filed not only after the arguments have been concluded but the State is also seeking to place on record a statement of Harish Dulani, which was recorded by the Chief Judicial Magistrate in Criminal Case No. 206/1999 way back on 24.01.2002. Even otherwise, Section 391 of the Cr.P.C. deals with calling of a witness for deposition before the court, which includes an opportunity to cross-examine. There is no prayer of the State to call the witness Harish Dulani. In these circumstances, the statement of Harish Dulani recorded in Criminal Case No. 206/1999, if taken on record, without an opportunity to the accused to cross-examine would not only be illegal but result in prejudice to the accused. Section 391 of the Cr.P.C. allows the evidence to be recorded by the appellate court, which means oral evidence and does not mean a statement of a witness recorded in another proceeding to be taken on record without any opportunity of cross-examination. No doubt, as per Section 33 of the Evidence Act, a prior evidence given by the witness in a judicial proceedings can be taken into consideration in the subsequent judicial proceedings. However, once again, the same is subject to cross-examination of the said witness in the earlier proceedings. Salman Khan was not granted any opportunity to cross-examine the witness Harish Dulani in Criminal Case No. 206/1999 and as already discussed above, in the absence of cross-examination, the statement under Section 164 of the Cr.P.C. cannot be taken into consideration. With respect to the prayer of placing the statement of Lalit Kumar Bora, suffice it to say that Lalit Kumar Bora has duly appeared in the present case. He was cross-examined at length and a prayer to produce his statement recorded in another case is only to fill the lacuna in the present case. When he has appeared as witness and cross-examined at length in the present case, there is no necessity to place on record his statement recorded in another case. The application accordingly stands dismissed.

20. Once the statement under Section 164 of Cr.P.C. is held to be inadmissible in evidence for more reasons than one as mentioned above, the prosecution is left with only circumstantial evidence to prove its case. This Court, accordingly, proceeds to deal with each of the same.

1. The evidence with respect to use of gypsy: Arun Kumar Yadav was the owner

of the gypsy and was produced as PW-7. He deposed that in the month of September, 1998, Harish Dulani was his driver. One Gani Khan, who was working in Water Works Department, was his customer. He told him that his friend Dushyant works with Maharaja Travels and a vehicle has to be arranged for certain guests, who were coming for film shooting. Accordingly, he sent his vehicle along with driver Harish Dulani to Ummed Bhawan Palace on 23.09.1998.

The story of the prosecution that the gypsy was deputed with the film unit along with his driver Harish Dulani rests on the testimony of PW-7 only. There is no documentary evidence to prove that the alleged gypsy was hired and the driver Harish Dulani was deputed to the film unit. The said evidence of PW-7 has also not been corroborated by the evidence either of Harish Dulani or Gani Khan. Harish Dulani did not give his evidence and Gani Khan though appeared as PW-23 but did not support the prosecution story.

2. Whether the evidence with respect to the recovery of blood stains from gypsy on 07.10.1998 be co-related to the incident of 26.09.1998: The prosecution alleged that gypsy was searched on 07.10.1998. It was during the search conducted on 07.10.1998 that certain blood like stains underneath the matting in the back portion of the gypsy were noticed, whereas, PW-7 Arun Kumar Yadav deposed that the gypsy came to his shop on 29.09.1998 and he took the same to his house. It is admitted by him in his testimony that he saw the gypsy on 29.09.1998 but there were no blood stains or smell. However, when he saw the gypsy on 02.10.1998, there were blood drops on the back seat and it smelled blood. He got the gypsy washed in his presence on 04.10.1998 but the smell still did not go. In case, the gypsy had been used on 26th and again on 28th and two killed-deers had been loaded in it, it is not understood as to how the owner did not see the blood stain, hair or smelled blood when he saw the gypsy on 29.09.1998. On the said date, he did not suspect anything. Therefore, how can the blood which is allegedly noticed by the owner on 02.10.1998 and hair which were recovered on 10.09.1998 could be related to the hunting of 26th and in between, the gypsy is stated to have been used again on 28th for hunting and thereafter, in the intervening night of 1st and 2nd as well. Another witness Satyamani Tinwari has been examined by the prosecution as PW-14. It was stated by him that he travelled in the gypsy with Salman Khan on 29.09.1998. He is a Police Officer. He, too, has made no reference to either any blood stain or any smell of blood in his testimony. The prosecution has failed to establish that the blood stain was of the alleged hunted deer of 26.10.1998.

3. The evidence with respect to recovery of hair and pellets from gypsy on 12.10.1998: The gypsy was seized on 07.10.1998 and on the said date, no pellet or hair was recovered. Only blood stains are stated to have been noticed, which were just few spots and that too inside of the matting. Even on 12th, the gypsy was inspected again vide Exh. P/11A. It is also evident from Exh. P/11A that it was a detailed examination so much so that even, the white paint on the gypsy was found missing and blackening was found in the inner part of bonnet of gypsy

but surprisingly, no hair or blood or pellets were noticed on that day. Thereafter, the hair and the pellets are stated to have been recovered on 12.10.1998, for which, the recovery memo Exh. P/9A was prepared. One is left wondering as to how hair and pellets which were recovered on 12.10.1998 could not be found on 07.10.1998 although the gypsy was examined so minutely that even tiny spots of blood like were noticed on the plastic of matting of the back seat. In Exh. P/11A, there is no mention that any pellets or hair were noticed and in Exh. P/9A, there is no mention that white paint on gypsy was missing and blackening was found in the inner part of bonnet of gypsy although both inspection are of same date. In any case, it is an admitted position that when the gypsy was examined on 07.10.1998, no pellet or hair was found. Thus, how come they were found on 12.10.1998."

21. The evidentiary value of the recovery of the alleged blood stain, alleged hair and alleged pellets has been questioned. As per the evidence, the gypsy was in the possession of Arun Kumar Yadav (PW-7) from 02.10.1998 to 07.10.1998. He got the gypsy washed on 04.10.1998 and also got the seats of the gypsy cleaned thoroughly. He did not see any pellets. Thereafter, as per Exh. P/5A, the gypsy was searched again on 07.10.1998. No pellets were found even on 07.10.1998. However, only blood stains were noticed. The blood stains, if so found and got picked up by the Investigating Officer, PW-2-Lalit Kumar Bora, on 07.10.1998, then the matting or the piece of the matting along with the blood stain should have either been cut or removed and sent for FSL on the same day. Instead, the entire gypsy was sent for FSL examination as late as on 24.10.1998, which is evident from Exh. P/12A and as affirmed by Kailash Giri (PW-25) i.e. after almost 17 days. It is alleged that during this period, the gypsy was kept at Coal Depot but no such documentary evidence i.e. either in the form of malkhana register or otherwise has been produced to prove the proper custody of gypsy from 07.10.1998 to 24.10.1998 before it was sent for FSL. Even, as per the Investigating Officer, Lalit Kumar Bora (PW-2), the gypsy was not sealed and at one time he says that it was under supervision of two Forest Guards and then says that it was parked in the garage. The said two Forest Guards are Angad Lal (PW-17) and Gordhan Singh (PW-24). Angad Lal simply states that they had taken gypsy to Coal Depot where it was kept in a garage, whereas, Gordhan Singh specifically states that gypsy was parked in the open area at Coal Depot and that it remained in open place till it was sent to FSL. Thus, the prosecution has not been able to prove that the said gypsy was kept in safe custody and there was no chance of its access to any one. PW-25 Kailash Giri has been examined to show that he had taken the gypsy for FSL on 23.10.1998 but the office was shut and hence, the gypsy was deposited on 24.10.1998. He simply says that he kept it in Coal Depot and was in his possession. There is nothing to say that it was guarded or kept under lock and key on the said night. The gypsy lying unattended and unsealed is a serious infirmity strengthening the view that the chances of the pellets having been planted cannot be ruled out, especially when they were not found in the gypsy on 07.10.998 when it was thoroughly

examined by the Investigating Officer, PW-2 Lalit Kumar Bora on 07.10.1998 but were mysteriously found on 12.10.1998.

22. In the case of Ramesh Babulal Doshi v. State of Gujarat, reported in (1996)9 SCC 225, the Apex Court acquitted the accused as the prosecution had relied on the recovery of blood-stained clothes and other articles recovered from the flat of the appellant on September 9, whereas, no incriminating evidence was found on September 4 and 5 on an earlier search.

23. Similarly, in the case of Prem Singh v. State of Haryana (Criminal Appeal No. 925 of 2009), decided on 02.09.2013, the Apex Court held the recovery of weapons to be highly doubtful as no recovery was made from the spot on 21.09.1994; yet, on 22.01.1994 & 23.01.1994 the two fire arms were recovered in spite of the fact that they were not hidden, and no linkage could be established between bullets recovered from the dead body and fire arms recovered from the accused.

4. The evidence with respect to recovery of gypsy: The date and time when the gypsy was recovered is doubtful. The prosecution placed reliance on the testimony of Lalit Kumar Bora (PW-2), Angad Lal (PW-17) and Gordhan Singh (PW-24) to state that Lalit Kumar Bora had gone along with Angad Lal, Forester and Gordhan Singh, Forest Guard, to the house of Arun Kumar Yadav and recovered the gypsy vide Exh. P/5A. The recovery memo of gypsy Exh. P/5A does not carry the signature of driver i.e., Harish Dulani. The other witnesses are Forest Guards. Thus, no independent witness has supported the recovery of gypsy on 07.10.1998. PW-2 Lalit Kumar Bora says that Harish Dulani had signed the recovery memo but his signatures are not there. Thus, it is not clear as to when the gypsy was recovered because if the same was recovered on 07.10.1998, then how the blood stains were not collected and sent for FSL till 24.10.1998. Finally, instead of just sending a piece of matting where the blood spot was found or the mat itself for the FSL, the entire gypsy was sent on 24.10.1998.

24. It is admitted by Lalit Kumar Bora (PW-2) that the investigation was initially with the Deputy Conservator Forest, M.S. Sonal, and it was subsequently transferred to him by M.S. Sonal on 07.10.1998. He was an important witness who investigated the case before it was handed over to Lalit Kumar Bora on 07.10.1998. M.S. Sonal authorized Lalit Kumar Bora to investigate the case. Surprisingly, M.S. Sonal, the first Investigating Officer, was never produced as witness because in case, he had been produced, he may have disclosed that he had recovered the gypsy on 02.10.1998 itself and had found no incriminating evidence at that time.

5. The evidence with respect to recovery of weapons from the room of Salman Khan vide Exh. P/7A and vide Exh.-P/6A from Uday Raghwan: Exh. 7A is the seizure memo of camera & reel, air gun (1HP350 NATIONAL AIR RIFLE.22 CALIBER), telescope and pellets on 10.10.1998 from the room of Salman Khan;

Exh. P/8A is seizure memo of Air rifle from Saif Ali Khan by the Forest Department; and Exh. P/9A is the seizure memo of pellets and hairs from gypsy on 12.10.1998. A perusal of all these documents show that they pertain to the recovery of FIR No. 93(26) dated 02.10.1998."

25. The prosecution tried to prove the documents Exh. P/7A by producing Rajendra Singh as PW-15 and Mahendraraj Vyas as PW-12 as independent witnesses by stating that Rajendra Singh admitted his signature on Exh. P/7A and he has also proved that Salman Khan was staying in room No. 508 of Ummed Bhawan Palace, whereas, the fact is that Rajendra Singh (PW-15) turned hostile and in his cross-examination by the Public Prosecutor, he stated that his signatures were obtained while he was in his office and nor he had read the memo before signing. The Investigating Officer, PW-2 Lalit Kumar Bora, has admitted that said witness Mahendraraj Vyas (PW-12) is his friend. It is the prosecution case that the alleged search and recovery from the gypsy took place at Coal Depot, Rai-ka-Baag at 9.25 a.m on 12.10.1998 and the search and recovery from room No. 508 of Ummed Bhawan Palace also took place on the same day at 4:00 p.m. using the same witness. It is too much of a co-incidence that Mahendraraj Vyas (PW-12) was present at both places unless he was favourite witness. The said document is stated to be also witnessed by Soheli Khan, M.S. Sonal and Shrawan Kumar but Soheli Khan has not been produced; the first Investigating Officer, M.S. Sonal, too, has not been produced for the reasons best known to them, whereas, Shrawan Kumar has since died.

26. The prosecution has heavily relied on the signatures of Salman Khan on Exh. P/7A to contend that the said recovery memo having been signed by Salman Khan is sufficient proof of the recovery. However, the following facts have emerged which does not leave a good taste in the mouth:-

"(i) Exh. D/3 is a document, which shows that a search was conducted in the room of Salman Khan at Ummed Bhawan Palace on 10.10.1998 but no weapon was recovered. This document was concealed by the prosecution.

(ii) A search was conducted in the room of Salman Khan at Ummed Bhawan Palace on 10.10.1998 but no weapon was recovered. The search was conducted once again on 12.10.1998. This time, as per Exh. P/7A, Camera & reel, pellets as well as an Air gun 1 HP35D National Air Rifle .22 caliber along with the cover and telescope were recovered. When nothing was recovered on 10.10.1998, it is not clear as to why the room was searched again on 12.10.1998. It is admitted by Lalit Kumar Bora (PW-2), the Investigating Officer of the Forest Department that there was neither any statement under Section 27 of the Evidence Act nor any information to say that the weapons were lying in the room, in pursuance to which the room was searched again on 12th. It is also not clear as to why the accused would keep the arms lying around openly in the room on 12.10.1998 when he knows that the search etc. is going on. It is obvious that the recovery is not genuine. Moreover, PW-2 Lalit Kumar Bora, the Assistant Conservator of Forest, who was investigating the case No. 93(26) dated 02.10.1998, admits that

the name of recovery witness as marked "I" to "J" i.e. Rajendra Singh, Security Officer of Ummed Bhawan Palace was added later on after the statement had been prepared.

(iii) Besides, the recovery as per Exh. P/7A from the room of Salman Khan, recovery memo Exh. P/6A has been produced showing the recovery of one .32 bore Revolver S&W made in USA No. 7011 and one .22 Rifle No. 2118 empty. The said weapons were allegedly brought by Uday Raghwan from Mumbai to Jodhpur on the asking of Salman Khan and presented before the Investigating Officer on 15.10.1998. The prosecution has tried to prove the said document by producing PW-9 Shivchand Bohra, PW-16 Om Prakash Joshi, who stated that one Uday Raghwan known to Salman Khan produced one rifle, one revolver and licence of weapon in their presence and that Uday Raghwan has produced the said weapons on the asking of Salman Khan. The license of the weapon was in the name of Salman Khan and he, too, has stated that the said weapons belong to him. Apart from that, Exh. P/6A was prepared in the presence of Salman Khan and Uday Raghwan and both of them have admitted the same in their own handwriting. A perusal of Exh. P/6A shows that Salman Khan has written in his own handwriting as under:-

"I, Salman Khan, have only sent my .32 bore revolver to Mumbai and a air gun and on the request of the Forest Department I got them back plus my .22 rifle which was never brought to Jodhpur by requesting my friend Uday Raghwan to get it here."

Uday Kumar Raghwan, too, has written in his own handwriting that:--

"I, Uday Kumar Raghwan, am not aware of whether any weapon was send to Bombay from Jodhpur. I have only brought what was given to me in Bombay at Salman's Residence which Salman had asked me to get to Jodhpur on 15.10.1998."

27. Thus, the weapons were brought from Mumbai on 15.10.1998 as per the written note by Uday Raghwan and Salman Khan on Exh. P/6A in their own handwriting. However, there is no evidence that they were ever sent from Jodhpur to Mumbai except the hand-note written by Salman Khan on which the prosecution is placing heavy reliance. Either this note is to be accepted fully or rejected fully. It cannot be partly accepted or partly rejected. As per the written note, Salman Khan had brought with him .32 bore Revolver and air gun from Mumbai, which he sent back. It is known fact that an air gun cannot be used for hunting a deer and nor there is any evidence of using .32 bore Revolver. That leaves us with .22 rifle (firearm) but there is no evidence that it was brought to Jodhpur. As per the aforesaid written note, .22 rifle was never brought to Jodhpur prior to the incident. The prosecution has relied on the written note of Salman Khan in his own hand writing. If it is to be relied, then as per his statement, .22 rifle (firearm) was brought on the request of Forest Department after the incident. It was never at Jodhpur on the date of the incident.

28. In order to show that rifle (.22 bore No. 2118) [firearm] was present at Jodhpur during the alleged incident, the prosecution has produced Satyamani Tiwari as PW-14. Satyamani Tinwari (PW-14) is the traffic Inspector, who was orally deputed by the Superintendent of Police to maintain the law and order during shooting of the film. As per his statement, Salman Khan told him on 29.09.1998 that his revolver was missing from his room. He accompanied with Dinesh Gavre, who was Salman Khan's Assistant along with the Manager of the Ummed Bhawan Palace, Sarkar Singh and Security Officer Rajendra Singh searched the room of Salman Khan. It is stated that one of the employees of Palace, namely, Berisal Singh was also with him. He found .22 rifle assembled with a telescope in the room as well as an Air gun which was also found assembled with telescope; and the revolver wrapped up in bed-sheet was found in the shelf of the bathroom, whereas, the entire statement of Satymani Tiwari is surrounded with suspicion as evident from the following:-

"(a) Satyamni Tiwari was informed about the missing of weapon at Luni Fort where they were staying overnight. Instead of looking for the weapon in Luni Fort, it is not understood as to why he rushed to Ummed Bhawan Palace to search it.

(b) He found the weapon in the room without much effort. In case, the rifle and the air gun were lying in the room, it is not understood as to why only the revolver was wrapped in a big bed-sheet and kept in closet in the bathroom, especially when there is no allegation that it was used. It is highly improbable. There is no reason for Salman Khan to lie or state so on 29.09.1998 that he had lost the weapon because from 29.09.1998 to till 02.10.1998, there was no allegation or any enquiry or investigation or complaint or even a whisper about any hunting. Obviously, the witness has been planted only to show that the rifle, air gun and the pistol were very much in Jodhpur prior to the hunting of the deer.

(c) No rojnamcha was produced to show that Satyman Tiwari was put on duty with the film unit. As per his cross-examination, he knew that the validity date of the licence had expired but in spite of the same, he did not get any FIR registered.

(d) How could the Inspector giving security to Salman Khan search the room without his permission. Even if it is believed that he took the liberty to check the room because Salman Khan's Assistant was present but none of the witnesses, namely, Dinesh Gawre (Salman Khan's Assistant), Sarkar Singh (Manager of Ummed Bhawan Palace) and Balesar Singh (an employee of the Palace), who allegedly accompanied Satyamani Tiwari to the room, was produced as witness, whereas, Rajendra Singh is not questioned on this point."

29. Even, the trial court in its para 47 of the judgment acquitted Salman Khan of the offence under Section 27 of the Arms Act on the ground that the prosecution has not been able to prove that accused Salman Khan used either .32 revolver or the rifle (firearm) for illegal hunting on that day without license. The translation

of the relevant part of para 47 of the judgment as supplied by learned counsel for the accused, reads as under:

"..... According to my opinion, the prosecution has been unable to prove this fact beyond the reasonable doubt as it has also been discussed earlier that there is no such evidence that accused Salman Khan has used his .32 bore revolver or his .22 bore rifle in illegal hunting and the important witness of prosecution PW-2 Lalit Bora, PW-28 Boraj Singh and PW-29 Ashok Patni Investigating officer have admitted clearly in their evidence that whether the hunting has been done specifically with that revolver or rifle, they cannot tell this fact with certainty. In addition to it, none of the empty cartridges in regards to either of the weapons were recovered, therefore, inference cannot be drawn without any perfect evidence that accused has used both the weapons in the present case. Therefore, the said charge upto this point against accused Salman Khan is not proved beyond reasonable doubt."

In spite of the same, in order to ascertain the truth, this Court has proceeded to re-examine the evidence as to which weapon was used for killing the deer, if any.

Following articles are stated to have been recovered in the present case:-

Exh. P/6A [weapons produced by Uday Ragvanas brought from Mumbai]

1. Revolver one - S&W .32 bore made in USA No. 87011
2. Rifle one - .22 bore No. 2118 empty."

There is no evidence that either of the two were used. No corresponding bullet or cartridge was recovered. This leaves us with the air rifle/gun.22 (not a firearm), which was recovered vide Exh. P/7A.

Exh./7A [recovered from the room of Salman Khan]

1. Camera- one PENTAX K1000 empty made Japan
2. Reel Kodak- No. 125047 GB-36
3. Air Gun along with cover - 1HP 350 NATIONAL AIR RIFLE .22 caliber No.26180  
Gun Telescope - ONE WIDE ANGLE 4 X 32 Coted IMAGE MADE IN JAPAN
4. Air rifle pellets- 1 Packet full

MARKS MANSHOT 1 Packet loose 76 item.

Cong Range double Head.

Exh.P/9A(recover from the gypsy]

1. Pallet 8 mm item one } The lenth of the pellet has been mentioned. instead of the dimension.
2. Pallets 5 mm item five }

### 3. Hair 6-7 pieces

Exh. P/8A is the seizure memo of .22 air rifle produced by Saif Ali Khan.

As per Exh. P/18A, packet "A" is the weapon recovered from Saif Ali Khan. Packet "B" is the weapon recovered from Salman Khan. Packet "C" is the pellets recovered from gypsy and packet "D" relates to the recovery of pellets from the room of Salman Khan. Para (5) & (6) of the FSL report reads as under:-

"(5) Three hundred sixty nine .22 Air gun lead pellets and one hundred six .22 steel Air gun pellets from packet A, C and D can be used in submitted .22 Air rifles (W/1 & W/2). However, five .177 lead Air gun pellets from packet "C" could not be used in .22 Air rifles (W/1 & W/2).

(6) Fifty Eight .22 lead and thirty six .22 steel Air gun pellets were test fired in the laboratory."

30. As per the FSL report, three hundred sixty nine .22 air gun lead pellets and one hundred six .22 steel air gun pellets from packet A, C and D can be used in both .22 air rifles i.e. W/1 and W/2 (both are not firearm). Therefore, it has not been established as to which one of the two air rifles, which are not firearm, were used i.e. whether the one belonging to Salman Khan or the one belonging to Saif Ali Khan.

31. As per Exh. P/7A, the recovery is 1 HP35D National Air Rifle .22 caliber. It is admitted that the said air rifle is not a firearm. Reliance was placed by the learned counsel for accused on literature downloaded from the Air Rifle Hunting Basics (<http://thebestairrifle.com>) to say that .177 or .22 caliber is used for hunting small game like birds, rabbits, squirrels, hares, woodchucks etc. For killing wild pigs and even deer, normally air rifle like .45 and .50 caliber is used. The question has also been raised whether the pellets recovered can be used to kill an animal as big as deer, for which again, the following table has been provided:-

".50 PCP: Large game (deer), target shooting

.45 PCP : Large game (deer), target shooting

9mm PCP : medium game(coyotes), target shooting

.25 PCP : medium game (wild cats), target shooting

.22 PCP : medium game(racoons), large birds, target

.177 PCP : medium game(ground hogs), large birds, target

.25 Spring-Action : Small game (squirrels), medium birds, target

.22 Spring-Action : small game (squirrels), medium birds, target

.177 Spring-Action : small birds, target shooting, plinking

.177 CO2 & PCP Competition : small birds, target, plinking"

32. It shows that .177 or .22 Air gun lead pellets can only kill small game like bird, squirrels, rabbit etc., whereas, for a little large game like a deer at least .45 PCP and .50 PCP is required. In the present case, the pellets recovered from the gypsy are only .177 and .22. The recovery from the gypsy is of single head pellet, but from the room of Salman Khan, double head pellets were recovered. Hence, there is nothing to show that how the alleged hunting, if any taken place, can be attributed to Salman Khan. As per the FSL report, .177 pellets which were recovered from the gypsy cannot be used in the .22 air rifle. If they cannot be used in the air rifle .22, how were they present in gypsy and whom did they belong? No doubt, one solitary single-headed .22 pellet was recovered from the gypsy but while the arguments were being heard in S.B. Criminal Revision Petition No. 905/2007 (Salman Khan v. State of Rajasthan), the pellets recovered from the room of Salman Khan as well as from the gypsy and Saif Ali Khan were produced on the asking of the Court. On scrutiny, the alarming feature that came to the notice of this Court was that none of the pellets recovered either from the room of Salman Khan or that of Saif Ali Khan matched with ones recovered from the gypsy. Therefore, who did the pellets recovered in the gypsy belong to? In any case, the prosecution has not been able to prove that they belonged to Salman Khan. In the document Exh. P/7A, the length of pellets has been mentioned instead of dimension. Even if, for the sake of argument, it is accepted that the rifle (air gun) recovered from the room vide Exh. P/7A was used by Salman Khan, none of the pellets recovered can be used for killing a deer although it can kill a small game like rabbit, squirrel, bird, etc.

33. The prosecution also admits that they did not know and nor could make out as to which weapon was used by the accused. PW-2 Lalit Kumar Bora has stated in no uncertain terms that he could not arrive at the conclusion that the deer was hunted by an air rifle or any other firearm. Similarly, PW-29 Ashok Patni, the third Investigating Officer of the Rank of Additional Superintendent of Police, too, has admitted that he cannot not make out which weapon was used for killing the deer. PW-28 Boraj Singh, S.H.O. who filed challan, too, admitted that he could not conclude as to which weapon was used. Hence, it is not understood as to how the Magistrate came to the conclusion that air gun was used in killing a deer especially in view of the discussion above. The prosecution has tried hard to convince this Court that fatal injuries can also be caused with an air gun. However, those are freak incidents where the aim is from close quarter by putting weapon so close that it is almost touching the skin. Learned counsel for the State referred to the literature of Air weapon fatalities as authored by C.M. Milroy, J.C. Clark, N. Carter, G. Rutty, N. Rooney to substantiate that even an air gun injury can be fatal. However, the said study of five cases of fatal air gun injury as identified by Department of Forensic Pathology and Histopathology, are the cases of firing at contact range to commit suicide; one person shot himself in the head, the other in the chest i.e. after the air gun was placed on the skin itself.

34. The Investigating Officer, Lalit Kumar Bora (PW-2) admitted that he could not arrive at any conclusion with respect to the weapon whether the hunting was by air rifle or by igneous weapons, and further admitted that it is true that in this case neither the FSL nor medical report nor postmortem is available to match the use of weapon with the injury or to state that any such weapon has been used. Thus, the prosecution has totally failed to prove the use of either fire arm or even the air gun as recovered from Salman in the alleged killing of the deer.

6. The evidence with respect to the recovery of knife from Sohail Khan: The knife was recovered from Sohail Khan in pursuance to the statement of Salman Khan under Section 27 of the Evidence Act vide Exh. P/45. As per the prosecution, Salman Khan used the knife to cut the throat of the deer. This version is based on the statement of Harish Dulani. Harish Dulani did not appear for being examined. As discussed in the earlier part of the judgment, the statement of Harish Dulani cannot be considered. A perusal of the statement of PW-5 Sumnesh Limba shows that it was brand new and no blood was found on it. Moreover, this Court called for the alleged knife to be produced. The same was a pocket knife which can be opened and closed into a hand. It was not a kind of the knife that one can use either to kill or cut the throat of an animal. Thus, the suggestion by the prosecution that the deer must have fallen on receiving injuries and then killed with knife is highly improbable. The carcass of the deer was never recovered in this case and hence, there is no medical evidence that the said deer was killed by knife or the said knife was used as suggested. There is no evidence to establish the said theory. It is necessary to match the recovered weapon with the injuries, which is totally missing herein."

35. The Supreme Court in the case of Hukam Singh v. State of Rajasthan, reported in AIR 1977 SC 1063, acquitted the appellant in the said case on the ground that it could not be established that the recovery of the gun and the pellets had actually been from the gun seized. The Supreme Court while acquitting the accused held in para 3 of the judgment as under:-

".....We shall presently examine these three circumstances but before we do so, we may refer briefly to the recovery of the gun and the pellets and gun powder as a result of the disclosure statement made by the appellant. The recovery of these articles was assailed on behalf of the appellant, but for the purpose of the present discussion, we shall assume that this recovery was genuine, particularly since it has not been doubted either by the High Court or by the Sessions Court. But this recovery does not in any way help the prosecution, because the evidence of the ballistic expert was that it was not possible for him to say whether the gun powder and pellets recovered from the place of occurrence or from the dead bodies of Bhanwar Singh and Inder Kanwar had actually been fired from the gun seized as a result of the disclosure by the appellant. This circumstance of recovery of the gun and the pellets and gun powder was. therefore, rightly not relied upon by the High Court..... "

7. The evidence with respect to the recovery of blood stains from Hotel

Ashirwad: Exh. P/44 is the recovery memo of blood stains seen at Ashirwad Hotel dated on 13.10.1998. The said recovery memo is signed by witness Khinvraj and Shyamlal, who are workers at Hotel Ashirwad. The prosecution had received the information on 02.10.1998 itself. However, the sample of the blood was taken from the hotel as late as on 13.10.1998 after 17 days of the alleged incident. Shyamlal (PW-3), who was sweeper at Ashirwad Hotel, in his cross-examination admits that he used to clean the floor of the Hotel thrice a day and it was his duty to keep it clean and during the said period, he used to clean the hotel. In spite of the same, dried blood stains were still found near washbasin after 17 days of the alleged hunting. Exh. P/47A is the report of the Scene of Crime visited on 13.10.1998 in connection with FIR No. 162/1998, P.S. Mathania as well as of Hotel Ashirwad. The said document shows that the FSL team was present and all the suspected stains in the hotel were chemically tested but surprisingly, the sample was not collected for being sent to the RFSL, Jodhpur by the said Team, instead, the Investigating Officer was instructed to do so."

36. In any case, the sample was taken after 17 days of the alleged incident, and the age of the blood, too, was not tested. It is worthwhile to mention that no person who gave the chemical report has been examined. Khinvraj and Shyamlal are attesting witnesses of the document (Exh. P/44) i.e. recovery of blood stains. Khinvraj was not examined as he had died. Shyamlal was examined as PW-3 but no question was put to him about the said document. Anoparam (PW-4), who worked as a waiter in Hotel Ashirwad turned hostile, and leaving no evidence to the effect that the killing deer were ever brought by anyone or it was Yashpal and Dushyant who brought deer prey from Hotel Ashirwad to Umed Bhawan Palace. Shyamlal (PW-3) in his cross-examination, too, has denied that Yashpal and others brought the hunted deer and it was cooked in the hotel. He also denied that he made such statements to the said effect to the police. Similarly, Anopa Ram (PW-4) who used to work in Hotel Ashirwad turned hostile and admitted that he had not seen any blood stain and meat lying in Ashirwad. Thus, there is no evidence worth the name to prove that killed deer was brought to Ashirwad Hotel or that it was cooked. Therefore, it was not surprising that Dushyant and Yashpal, who were alleged to have brought the killed deer to the hotel, were acquitted. The only statement is of Narendra Panwar (PW-1) but his statement is of hearsay evidence. Besides, it was admitted by him that he was taken by the police for interrogation and was kept at Udaimandir Police Station prior to his statement being recorded by the police and also by the court. He even blamed the Magistrate and alleged that learned Magistrate did not record the certain statement made by him. The prosecution story stands wholly negated by the testimony of PW-8 Mohd. Ali, who has categorically stated that (i) he does not know Narendra (PW-1), and Narendra was not working in the hotel, nor did Narendra tell him that Dushyant and Yashpal brought meat of deer or cleaned it or kept it in the fridge, (ii) Dushyant, Yashpal and Hussain did not come to the hotel or cook any meat or carried any deer meat from Hotel Ashirwad to Umed Bhawan Palace. The testimony of Mahendra Singh Shekhawat (PW-22), another

worker at Hotel Ashirwad, is also against the prosecution on these counts viz. he had not seen bloodstains, or any meat kept in the fridge, nor had Yashpal or Dushyant come to the hotel that day, nor did anyone take cooked meat from there. The only evidence produced by the prosecution to prove that the cooked meat has been brought to Ummed Bhawan Palace is of Bhanwar Singh (PW-11). As per the prosecution story, first of all, the accused Yashpal Singh, Mahendra Singh and Kuldeep Choudhary along with driver of gypsy after hunting of deer went to the house of Bhanwar Singh in the night of 26.09.1998 for cleaning the killed deer but he did not allow them to clean it in his house. The statement of Bhanwar Singh was recorded under Section 164 of the Cr.P.C. and has been produced on record as Exh. P/26. However, Bhanwar Singh did not support the prosecution version in the court and stated that he was kept in police guest house against his will and he was threatened by the police to give false statement. He was taken to the court in police vehicle and was threatened that in the event he complains to the Magistrate to the said effect, they will implicate him in false case. In these circumstances, the statement of CJM, Jodhpur recorded as PW-31 that they were recorded before him is not of much help. Even otherwise, the prosecution was required to establish as to whether blood stains recovered from the Hotel Ashirwad can be related to the incident of 26th. The sample of the blood-stain was taken on 13.10.1998, after 11 days of the information on 02.10.1998 and 17 days after the incident. As stated above, Shyamlal (PW-3), who was sweeper at Ashirwad Hotel, in his cross examination admits that he used to clean the floor of the Hotel thrice a day and it was his duty to keep it clean. In spite of the same, dried blood stains were still found near wash-basin as late as on 13.10.1998 after 17 days. Hence in these circumstances, how it can be said that the blood stain is of the deer allegedly killed on 26.09.1998. One cannot rule out that there was no other kill brought to the hotel during this period from 26.09.1998 to 13.10.1998 especially when a particular hotel, if, is open to receiving and entertaining prey of protected and prohibited animals.

37. From the above discussion, it is evident that the evidence on record is grossly inadequate. Sometimes, if not quite often, as a consequence of aftermath of such frenzy and emotional outbreak by public, there is immense pressure on the Investigating Agency to immediately arrest the alleged accused and thereafter prove as quickly as possible that they have been able to "solve" the case. Under the circumstance, to prove and justify, the facts and evidence are sometime concocted to nail the alleged accused. In the process, either an innocent gets convicted or the real culprit gets away. This casts a heavy responsibility on the court to ensure that there is dispassionate measurement of law and facts, free from any kind of influence, pressure, threat or fear. As noticed above, over here as many as three FIRs were registered on the basis of one statement of witness Harish Dulani. In this case, the alleged eyewitness Harish Dulani was neither examined nor cross-examined. During the trial in pursuance to the present FIR, he did not even appear in the witness box to record his

statement as prosecution witness. According to the owner of the gypsy Arun Kumar Yadav, Harish Dulani did not accompany the accused as told to him by Harish Dulani himself giving rise to the suspicion as to whether he was an eyewitness at all. This leaves the prosecution to prove the case only on circumstantial evidence. In a circumstantial evidence, all the incriminating facts and circumstances should be fully established by cogent and reliable evidence. In short, the evidence must show and lead only to one conclusion that only the accused person and none other committed the crime, whereas, in the present case: (i) The place of incident was never got identified; (ii) No carcass of deer was found to establish that any deer at all was killed on 26.09.1998; (iii) There is nothing to show that tiny spots of blood from Ashirwad Hotel and gypsy allegedly recovered as late as on 13.10.1998 & 12.10.1998 pertain to the alleged hunting of 26.10.1998 when admittedly the hotel was cleaned every day and gypsy got washed by its owner; (iv) Two bloods samples allegedly recovered from the hotel and gypsy were not compared; (v) The owner of the gypsy did not smell blood on 29.09.1998 when the gypsy was collected by him but he surprisingly smelled blood on 02.10.1998; (vi) When the gypsy was searched on 07.10.1998, no pellets were found but they were suddenly found on 12.10.1998; (vii) The room of Salman Khan was searched on 10.10.1998 but no weapons were found but they were suddenly found on 12.10.1998 lying openly; (viii) The Investigating Officer and the prosecution admitted that they were not able to conclude as to which weapon was used for hunting; (ix) There is no medical and postmortem report to establish as to which weapon or any weapon at all or whether the knife was used as suggested; (x) Salman Khan was acquitted of the offence under Section 27 of the Arms Act; (xi) It is next to impossible to kill a deer with an air gun, which is not a firearm; (xii) The .177 pellets recovered from gypsy cannot be used in any of the recovered weapon; (xiii) The .22 pellet recovered from gypsy do not match with ones recovered from Salman Khan or Saif Ali Khan; and (xiv) The recovered pellets are used for hunting small animal like rabbit or birds but not a big animal. In these circumstances, this Court is left with no alternate except to set aside the judgment dated 17.02.2006 to the extent vide which, appellant-Salman Khan was convicted for the offence under Section 51 of the Wild Life Protection Act and sentenced to undergo one year's simple imprisonment along with fine of Rs. 5000/-.

38. Accordingly, the appeal filed by Salman Khan is allowed. The judgment and order dated 17.02.2006 passed by the learned Chief Judicial Magistrate, Jodhpur in Criminal Case No. 207/1999 to the extent vide which, the appellant-Salman Khan was convicted for the offence under Section 51 of the Wild Life (Protection) Act is set aside. The conviction and sentence awarded to him are also set aside. He is acquitted of the charges levelled against him.

39. For the same reasons as recorded above, the appeals filed by the State i.e. S.B. Criminal Appeal Nos. 685/2006 and 267/2007 are also dismissed.