
(1982) 03 P&H CK 0044
In the Punjab And Haryana At Chandigarh

State of Punjab

APPELLANT

Vs

Mohinder Singh and Others

RESPONDENT

Date of Decision : 31-03-1982

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 151, 24, 378, 401
Penal Code, 1860 (IPC) — Section 302, 304, 307, 34

Citation : (1983) CriLJ 466

Hon'ble Judges : M.M. Punchhi, J;C.S. Tiwana, J

Bench : Division Bench

Judgement

M.M. Punchhi, J.—A question of far-reaching importance has cropped up in one of the appeals being Criminal Appeal No. 614-DB of 1980, part of these triple matters placed before us for disposal. The question is whether this Court can require the State Government or its Public Prosecutor, as the case may be, to establish whether an appeal against acquittal u/s 378(1) of the Cr. P.C. was filed under directions postulated therein.

2. Bare-facedly, four men stood trial under Sections 302/34 and 307/34, penal Code, before the Sessions Judge, Bhatinda. Out of them, Mohinder Singh (appellant in Cr. A. No. 335-SB of 1980) alone was convicted u/s 304 Part-I, I.P.C. and sentenced to seven years rigorous imprisonment. The remaining three namely Gurcharan Singh, Jagvinder Singh and Bharpur Singh were acquitted having been given the benefit of doubt. These three are respondents in the State appeal against the order of acquittal being Criminal Appeal No. 614-DB-A of 1980. Along with them is the fourth respondent Mohinder Singh, the appellant in Criminal Appeal No. 335-SB of 1980. Plainly, these appeals have arisen from the same judgment and had to be heard together.

3. The facts of the case would be taken note of later since the deck has to be cleared before they are put to sail. Another set of facts need first be taken note of.

4. The State appeal against the order of acquittal against the four accused was

presented on 17-7-1980 in this Court. Prior thereto, Paramjit Singh son of Mander Singh (one of the deceased persons) had filed Criminal Revision No. 877 of 1980 in this Court against the order of acquittal. Both these matters came for hearing before the Motion Bench on Oct. 8, 1980. By that time it had come to notice that Mohinder Singh accused had filed Criminal Appeal No. 335-SB of 1980. Leave was granted and the State appeal was admitted. It was ordered to be heard with Cr. A. No. 335-SB of 1980. So far as Criminal Revision No. 977 of 1980 was concerned, the Motion Bench passed the following order:

Leave u/s 378(3) of the Cr. P.C. has been allowed in the petition filed by the State. In view of this, the revision petition has become infructuous dismissed.

5. While these appeals were pending, the accused moved Cr. M. No. 2045 of 1981 in the appeal against order of acquittal pointing out that the public Prosecutor had not been directed to file an appeal against the three acquitted accused and thus the appeal was incompetent or invalid. It was prayed therein that the validity of the appeal against the accused-respondents other than Mohinder Singh be gone into and holding the appeal to be invalid, they be discharged from their bail bonds. Such prayer was obviously based on the material available on the file containing the recommendations of the District Magistrate, Bhatinda and the file containing the sanction/direction of the Government. On notice to the Advocate General, Punjab, the initial stance of the State appeared to be of claiming privilege but when the Advocate for the State was directed on 8th May, 1981 to give an affidavit, the original record was produced instead on 21-5-1981 and was ordered by the Bench to be placed on the judicial file. Then Cr. M. No. 2500 of 1981 was preferred by the acquitted accused claiming that the file was deficient inasmuch as it did not contain the recommendations of the District Magistrate, Bhatinda along with the proposed grounds of appeal and the recommendations of the public Prosecutor, Bhatinda. It was also prayed therein that the sanction/permission file had been tampered with and that in fact no directions from the State of Punjab to file an appeal against an order of acquittal against the three acquitted accused had been received in the office of the Advocate General, Punjab. On notice being issued on the application, the requisite file was replenished and was ordered to be placed on the record on 23-6-1981. The other points raised by the acquitted accused were ordered to be decided at the time of hearing of the main appeal. And it is in this manner that we are heavily confronted with the competency of the appeal against acquittal,

6. From the original file/files produced by the State Government, it is plain that vide letter No. 22 dated 9-6-1980. the District Magistrate, Bhatinda recommended to the Advocate General, Punjab, Chandigarh, that an appeal be filed against the order of the Sessions Judge, Bhatinda dated 31-3-1980 pertaining to F.I.R. No. 24 dated 25-2-1979, police station sangat-State v. Mohinder Singh son of Partap Singh. Appended therewith was a copy of the judgment and the proposed grounds of appeal. In the proposal/grounds of

appeal prepared by the District Attorney, Bhatinda, he highlighted the incident and observed that out of four accused, Gurcharan Singh and Jagvinder Singh were found innocent during investigation conducted by a Deputy Superintendent of Police and even had initially not been challaned. They were, however, tried by the Court and were found innocent and acquitted by it. Along with them, the third accused Bharpur Singh's association was belied by independent circumstances and he too was found innocent by the Court. The District Attorney emphatically wrote that for these aforesaid reasons, he did not recommend appeal against the order of acquittal of those three accused distinguishing the case of Mohinder Singh convict-accused. He was of the view that the order of the learned Sessions Judge acquitting him of charge u/s 302, I.P.C., was erroneous and had led to grave miscarriage of justice. Now this proposal seemingly came to the office of the Advocate General for appropriate action. Signifying that the limitation for appeal was up to 18-7-1980, the case was earmarked to Shri S. K. Syal, Assistant Advocate General, for specific opinion.

7. Shri S. K. Syal, Assistant Advocate General, on 17-6-1980 wrote the following note;-

It is a fit case for appeal against acquittal (all). The proposal of D.M. Bhatinda be accepted.

8. Now the word "all" bracketed here for facility of pointedness, as would seem later, has raised the storm. For whatever it be, the Advocate General did not agree with Mr. Syal and wrote : "In my view appeal need not be filed in this case. Sd/- J. S. Wasu 27/6." The matter then went to the office of the Legal Remembrancer and Director Prosecution. The matter was dealt with by Shri M. B. Midha, the Assistant Legal Remembrancer and Director Prosecution. His note dated 7-7-1980 was concluded by the following words:

Besides, the motive was with the accused to mount the attack as their party had been apprehended u/s 107, Cr. P.C. The very fact that companions of Mander Singh were empty handed negated the theory of attack by them. Evidently on seeing Mander Singh and Bhura Singh passing near Ms house, Mohinder Singh accused etc. fired on them. They knew, that Mander Singh and others were to pass near their house on their return journey to their village. Appeal as proposed by A.A.G. may be filed.

(Emphasis supplied by us).

Thereon the Under Secretary Home for Secretary to Government Punjab, Deptt. of H. A. & Justice, passed the order as under:

As proposed by L.R. & D. P. L. at p. 2 ante." The matter having been referred back to the office of the Advocate General. the case was again marked to Shri Syal who was required to prepare the grounds of appeal. Accordingly, the grounds were prepared as also the leave application and those were filed in this Court. The grounds of appeal bore a certificate by Shri S. K. Syal, A. A. G. Punjab

to the effect; "Certified that the appeal is being filed with the permission of the Punjab Government, sd/- public Prosecutor. Punjab." The question posed is; was Sri Syal directed by the State Government to file an appeal against the three acquitted accused.

9. Shri Mohinderjit Singh Sethi, learned Additional Advocate General, Punjab, "laid emphasis on the words and expression emphasised by us earlier in the concluding note of Shri Midha to contend that the Assistant Legal Remembrancer and Director Prosecution had applied his mind for the filing of the appeal in plural terms and as a sequel the Under-Secretary Home exercising the power of the State Government had directed filing of the appeal against all accused persons. On the other hand, learned Counsel for the involved accused adopted the firm stand that the District Magistrate's letter sending proposal for filing an appeal against an order of acquittal was in singular terms and the proposed ground of appeal by the District Attorney too had categorically and emphatically recommended appeal against Mohinder Singh alone, To carry the chain further, learned Counsel emphasised that even Shri Syal, the Assistant Advocate General, vide his note dated 17-6-1980 had recommended that the proposal of the District Magistrate, Bhatinda be accepted. And it was asserted. had the Assistant Advocate General any difference of opinion with the proposal of the District Magistrate Bhatinda he would have employed specific and categorical language to recommend appeal against acquittal against all accused persons differing with the views of District Magistrate, Bhatinda, In the same strain, it was asserted that the A.L.R. (Shri Midha) had on his turn recommended the appeal as proposed by the A. A. G. to be filed which proposal was accepted by the State Government. Accordingly, it was contended that the source for the direction is grounded in the noting of Shri Syal and none other. And in the said noting, the word "all" is totally misfitted, not even in the same ink but apparently also not with the same pen. In other words, it was specifically claimed to have been interpolated so as to spell out a direction when none existed.

10. During the course of arguments, we had required of the learned Additional Advocate General to place before us an affidavit of a responsible official of the State Government to the effect that it was for all times intended and directed that the appeal against an order of acquittal be filed against four persons. We had expected that since two persons namely Shri Midha and Shri Syal had dealt with these matters, affidavits of both or at least of one of them, would be forthcoming and adoptingly the State Government would firm its shaky stand. At the adjourned hearing, Memo No. 2498/50/OP/82 dated 28-1-1982 was placed before us which is from A.L.R. and Director Prosecution to the effect that the Department had agreed with the proposal of the Assistant Advocate General, Punjab and it was for him to furnish the affidavit as to whether he recommended an appeal against all or not. Accordingly it was given out that the affidavit of Shri Midha could not be procured and placed before the Court. In the same breath, it was given out that though Shri S. K-Syal was working as an Assistant Advocate General, Punjab, his affidavit cannot be procured and placed before the Court

Shrugging off, the Additional Advocate General had required of us suo motu to undertake an enquiry on the subject and summon anyone for the purpose as according to him the appeal had competently been filed. This indeed is a sorry state of affairs. Instead of satisfying us to the competency of the appeal and rendering assistance for the purpose, this Court is being asked to undertake the exercise independently. We decline to do so and would examine the competency of the appeal on the present material. But before we do so let us take note of Section 378(1) of the Cr. P. C. whereunder an appeal against acquittal lies:

378. Appeal in case of acquittal:

(1) Save as otherwise provided in Sub-section (2) and subject to the provisions of Sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court or an order of acquittal passed by the Court of Session in revision.

11. It is plain from the language of the Section that the Public Prosecutor, who is an appointee of the State Government u/s 24 of the Cr. P. C is to receive directions before he can file an appeal against acquittal. Under this section, the Public prosecutor has no power to suo motu file an appeal against an order of acquittal. In the absence of any direction from the Government, the appeal filed by him would be incompetent. Though we are conscious that it is not necessary that a copy of the Government instructions requiring the Public Prosecutor to file the appeal should accompany the memorandum of appeal, yet by long standing practice, which can date back to antiquity a certificate is appended (as was done in this case as well) by the Public Prosecutor that the appeal has been filed with the sanction/permission/direction of the State Government. For in the nature of thing an ex-post sanction granted by the Government after the expiry of limitation for appeal cannot cure the defect, as otherwise the accused acquires a valuable right for the maintenance of the order of acquittal. In the very nature of things, the relationship of the public Prosecutor with the State Government is that of a counsel with his litigant. And a Full Bench of this Court in *Lal Singh Vs. State of Panjab and Others*, has observed that Section 378(1) of the Code may be construed as nothing more than a statutory equivalent of the litigant engaging or instructing its counsel to prefer an appeal against acquittal because by law the power to prefer the same has been vested exclusively in the State alone. Thus it is crystal clear that no appeal in this Court can be instituted by counsel unless he stood specifically authorised for the purpose. A counsel under the law is required to file a "Vakalatnama"/power of attorney to Institute a criminal appeal for a private person. But the public Prosecutor by virtue of his appointment u/s 24 of the Cr P. C. is not required to do so since he is appointed for purposes of conducting in this Court any prosecution, appeal or other proceeding on behalf of the State Government. In other words, he has a statutory function to perform as envisaged u/s 24 of the Code. But he that apart, an appeal against acquittal cannot be filed by him on his own unless he is specifically directed by the State

Government. And when- it is doubted, he should be able to dispel the doubt in clear terms. The long practised certification by the Public Prosecutor as part of the memorandum of appeal is grounded on the good sense of assuredness that he has been directed for the purpose. Normally, this Court will accept such statement to be correct unless it is doubted upon and questioned for substantial reasons. In that event, it is for the public Prosecutor to satisfy the Court that he had the requisite direction.

12. Now in the instant case we are confined to a record, and the small word "all" in the note of Shri Syal which is making the difference. We do not hesitate to observe that to the naked eye the word "all" seems inserted later written by a different pen and ink. Besides that it is patent that it is ill fitted in the context. It even grammatically does not make any sense. It is irreconcilable with the expression of the proposal of the District Magistrate, Bhatinda being accepted. In the absence of positive clarification forthcoming on the subject by persons who dealt with the case, by affidavit or otherwise, we have thus no option but to hold the appeal against the order of acquittal not to have been filed under directions of the State Government and thus incompetent against the three acquitted accused. Yet we hasten to add that the appeal is competent against Mohinder Singh accused who alone was covered in the recommendation of the Public prosecutor Bhatinda, the proposal of the District Magistrate, Bhatinda, the approval of the proposal by Shri Syal, Assistant Advocate General, the approval of the proposal of Shri Syal by Shri Midha. Assistant Legal Remembrancer, and as a sequel the State Government agreeing with the proposal of Shri Midha.

13. The learned Additional Advocate General was more keen to challenge our competency to go into such question relying on observations in Lal Singh's case 1981 Cri LJ 1069 (P&H) (FB) (supra) to the effect that the direction to the public Prosecutor cannot be divorced from the presentation of an appeal and it would be hypertechnical to dissect it from the same and treat it as an independent entity. These observations are in a different context for it was being determined as to when would power u/s 378 of the Code exhaust itself. It was spelled out that the administrative power of the State extended only UP to the time of presentation of the appeal in the High Court whereafter the matter enters squarely and irrevocably in the judicial field. In other words, prior to the filing of the appeal what transpired at the end of the State Government and between it and its Public Prosecutor was an administrative matter. We are not only bound, by the dictum of the Full Bench but are also in complete agreement with it. As is plain here we are confronted with the problem of an appeal having been filed by the Public prosecutor sans direction of the State Government. And surely when presentation of the memorandum of appeal is not by the party Himself, we are entitled to go into the credentials of his purported attorney when doubt arises.

14. Accordingly, we answer the question posed at the very outset in the affirmative and further hold that the appeal against three accused-respondents namely Gurcharan Singh, Jagvinder Singh and Bharpur Singh is incompetent. But

there is more to it.

15. We recall that Criminal Revision No. 977 of 1980 preferred by the complainant Paramjit Singh was dismissed as infructuous in view of the admission of the State appeal against acquittal. Apprehending danger on that front, Cr. M. No. 522 of 1982 was preferred by the revision petitioner with a prayer that the State should be asked to file an affidavit as to whether an appeal had been filed against all or only against Mohinder Singh and in case the State would not take a clear stand, then an enquiry be conducted in the whole affair. Further prayer made therein is that criminal revision petition filed by the complainant be reheard and the accused be punished suitably. We issued notice in the application and had ordered it to be heard with the main appeal. Since a prima facie case to grant leave to file an appeal had been made out at the instance of the State and an appeal against the order of acquittal had been admitted, we have chosen to recall this Court's order dated 8-10-1980 since the basis of its being dismissed as infructuous has been wiped out.

16. Now treating the revision petition to be formally admitted, substitutedly for the appeal against the order of acquittal, we have in sum and substance granted full opportunity of being heard to the three acquitted accused through their Advocate Shri Karnail Singh Doad in the spirit of Section 401(2) of the Cr. P.C. We heard learned Counsel for the parties on the merits of the case to their hearts' content for they were made aware that in the event of the appeal against the order of acquittal being held to be incompetent, simultaneously the formality of admitting the revision petition would be taken observed for in either of the two situations, the acquitted accused had to be given an opportunity of being heard and they have availed of, their opportunity through their Advocate. Now it is time to switch over to the merits of the case.

17. Gurcharan Singh and Bharpur Singh accused are brothers. Jagvinder Singh accused is the son of Gurcharan Singh. Mohinder Singh accused "is the first cousin of Gurcharan Singh and Bharpur Singh accused. All of them resided in village Mohalan. The charge against Mohinder Singh was u/s 302, I.P.C. and against rest was u/s 302/34. I. P. C, for having caused twin murders of two brothers Mander Singh and Bhura Singh sons of Sarwan Singh with the aid of firing by fire-arms. They were further charged u/s 307/34 I.P.C. for the attempted murder of Gurjant Singh P. W. Village Mohalan is situated at a distance of four miles from the Police Station. Sangat.

18-25. xx xx xx xx xx (After considering the medical and other evidence, the Hon'ble "Judge proceeds}).

26. The trial Court, as has been noticed earlier, passed an order of acquittal against the three accused respondents namely Gurcharan Singh. Jagvinder Singh and Bharpur Singh holding that the three eye-witnesses of the crime were chance witnesses and there were other tell-tale circumstances which caused considerable doubt on the prosecution case. Accepting partially the statement of

the fourth accused-respondent Mohinder Singh, it while acquitting him of the charge u/s 302, I, P. C. convicted him u/s 304 part-I, I. P. C, extending to him the right of private defence of property and person, though exceeded. Though the entire matter is before us, yet in the measure in which it has to be dealt with is fairly demarcated. We are confined to the guilt or innocence of Mohinder Singh accused in Criminal Appeals Nos. 614-DB-A/1980 and 335-SB/1980, the offence committed by him and the measure of punishment. Our powers as an appellate Court in the aforesaid two matters are fairly wide and we can correct the errors having crept therein. But in the third matter (Criminal Revision No. 977 of 1980), our power to, interfere in an order against acquittal is fairly limited and cannot be lightly .exercised except in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality or the prevention of a gross miscarriage of justice. In the exercise of it, we cannot merely correct the lower Court if in our view it has taken a wrong view of the law or mis-appreciated the evidence on the record. Yet in the exercise of such jurisdiction if we discover that material evidence hag been overlooked by the trial Court, we can certainly interfere in the matter and pass appropriate orders. See in this connection K. Chinnaswamy Reddy Vs. State of Andhra Pradesh, and Rameshchandra J. Thakkar Vs. Assandas Parmanand Jhaveri, State of Maharashtra, . In the same strain, we can interfere in a case where serious injustice has been caused by an error of law. See Satyendra Nath Dutta and Another Vs. Ram Narain, .

27. Having recounted these principles, it is time to get into grips with the judgment of the learned Sessions Judge for that is a seal cover for purposes of the revision petition. Somewhere in the middle of paragraph 5 of the judgment, the learned trial Judge adverted to the evidence of Ronak Singh, Sham Kaur and Gurjant Singh eye-witnesses as it was the mainstav of the prosecution case. The learned trial Judge adverted to the evidence of Ronak Singh skeletally in a precis and confined it solely to the broad factors of the incident. He disposed of the evidence of Sham Kaur and Gurjant Singh eye-witnesses by observing that it was almost along the same lines and to give resume" of their evidence to be pointless. He cautioned himself that Gurjant Singh out of them was a stamped witness, as the hackneyed phrase goes, and that the other two Ronak Singh and Sham Kaur were near relations of the deceased. But he dubbed all of them as chance witnesses on the ground that they resided at village Dhunike and not as such expected to be present in village Mohalan in the normal course. He further observed that they had to invent some excuse or the other to show their presence there. Bahal Singh Vs. The State of Haryana, he observed that if by coincidence or chance, a person happens to be at the place of occurrence at the time it is taking place, he is called a chance witness. And if such a person happens to be a relative or friend of the victim and inimically disposed towards the accused, then his being a chance witness is viewed with suspicion, Such a piece of evidence is not necessarily incredible or unbelievable but does require caution/ close scrutiny. He certified all the three eye-witnesses as chance

witnesses since Gurjant Singh was a partner in cultivation with Mander Singh deceased and residing at village Dhunike. The fact that he had injuries on his person, according to the trial Judge, ensured his presence and not his veracity and it was possible that to demonstrate emotional solidarity with Ronak Singh and Sham Kaur etc., he was toeing their line and bolstering up a false story at their instance. He thus cautioned himself that the evidence of the three eyewitnesses had to be scrutinised with the utmost care.

28. In the entire judgment, the evidence of the three prosecution witnesses has not been scrutinised at all. All the three of them had individually given reasons for their presence at village Mohalan taking out the sting of their being called chance witnesses. And it cannot be forgotten that the villages Dhunike and Mohalan are about limiles apart and the deceased in this case being two brothers. And being agriculturists. they in the normal course of rural behaviour Would have kept community of interests and social rapport. New Ronak Singh P. W. 5 in his statement had said that he was present in village Mohalan when the earlier occurrence took place between Gobind Singh and Gurdev Singh on the one side and Bhura Singh deceased on the other. In the same breath he said that he, his father Mander Singh, his grandmother Sham Kaur and their siri Gurjant Singh had all come to village Mohalan to enquire about Bhura Singh. According to Gurjant Singh, he, Ronak Singh, Sham Kaur and Mander Singh deceased had gone to village Mohalan to meet and enquire about Bhura Singh. According to Sham Kaur P. W. 7, all of them had gone to Mohalan to enquire about Bhura Singh. It stood proved on the record that Bhura Singh had complained against Gurdev Singh and Gobind Singh in the morning and the matter had been reported at the police station vide D.D.R. No. 33 at 8 A. M. vide Exhibit P. Y. A. S. I. Har-baris Singh had come to village Mohalan and rounded up Gobind Singh and Gurdev Singh u/s 107/151, Cr. P.C. and they were locked up at the police station. Bhura Singh had even received injuries on his person as was indicative from Exhibit P. H. Now Bhura Singh having met with an untoward accident, it could not be called unnatural for his brother, mother, nephew accompanied by their servant to pay him a visit immediately after having heard of it when the distance between the two villages was comparatively negligible. The reason for their being present at the time of the occurrence was grounded on the morning incident which had no element of doubt. In the situation, the reasons advanced by the eye-witnesses for their presence at the spot had to be judged independently before these three eye-witnesses could be dubbed as chance witnesses to the crime. This material piece of evidence having been ignored by the trial Judge alone makes out a case for interference in the order of acquittal as also the legal infirmity by calling them as chance witnesses without considering their explanation.

29. The presence of Ronak Singh P. W. was doubted by the trial judge on the ground that he was a student at Government College, Bhatinda in T.D.C. Part-I Class carrying roll number 1102 and was shown to be present attending College on 24-2-1979, the day of the occurrence, as also on 26-2-1979 and 27-2-1979.

Ronak- Singh had stated that on 24-2-1979, he had missed all his classes and had not attended the college. The learned trial Judge observed that he stood clearly falsified by the weighty evidence of Ramesh Lal D. W. 2, a clerk in the Rajindera Government College, Bhatinda. and Professor Kulwinder Singh D. W. 3 of that college. Considering the evidence of Ramesh Lai D. W, 2, it was found that in the relevant attendance registers, Ronak Singh was recorded present on 24-2-1979 in both the classes pertaining to the subjects of Economics and Political Science which he was supposed to have attended. Professor Kulwinder Singh as D. W. 3 stated that on 24-2-1979 he had taken the Economics class and referring to the attendance register, he deposed that Ronak Singh was marked present there. Now the learned trial Judge observed in his judgment that the said Professor unequivocally testified that Ronak Singh attended the class taken by him on 24-2-1979. On going through the evidence of professor Kulwinder Singh D. W. 3, it is found that the evidence has been totally misread. The witness rather stated that "he must have been present and that is why he has been marked as such" and further "since long time has elapsed. I may not be personally able to identify Ronak Singh at present". There was nothing unequivocal about it except to the fact that the professor gave out the method of calling the roll call and claimed to have observed the method meticulously. Presuming the common course of events and regard being had to student behaviour, proxy is dated back to olden times. But be that apart, this is an instance where both the defence witnesses stated that there was marked distinction in the colour of the ink with regard to the entry of presence of roll number 1102 on 24-2-1979 vis-a-vis others and similar was the case with regard to the presence of that roll number on 26-2-1979 and 27-2-1979. putting weight on the evidence of these two defence witnesses, the learned trial Judge observed that if Ronak Singh was not present at village Mohalan on that day, the very bottom of the prosecution case would be knocked off because Ronak Sinch was the pivotal witness in the story, as has been told by the three prosecution witnesses. The shading of ink was not dealt with in the context.

30. In Para 10 of the judgment, the learned trial Judge observed that according to the eye-witnesses, Mander Singh deceased was empty-handed when he was fatally fired at while sitting on the tractor and so was Bhura Singh, It was observed that Mander Singh's licensed mauser pistol was lying near his dead body besides a holster thereof and the belt containing twenty rounds of that mauser, including three missed rounds, when Mohinder Singh S. I. reached the spot and made a local inspection early next morning. It was also observed that in addition thereto, a fired cartridge Exhibit C. 3 of that mauser pistol was found lying there and that there was no indication or even suggestion that Mohinder Singh S. I. had in the meantime secured the mauser pistol and the cartridges thereof from Mander Singh's house from village Dhunike and planted the same near the dead body. Reliance was placed on the recovery memo, Exhibit PO/1, in which the recovery of the mauser, the holster and the belt of the cartridges find mention. Memo, Exhibit PO/1, as also other memos were shown to have been

written by A. S. I. Nachhattar Singh and attested to by Baldev Singh P. W. 8 and one Harpal Singh. The suggestion of the prosecution was that Mohinder Singh S. I. had got mixed up with Joginder Singh, Deputy Superintendent of Police, who was relation of the accused. But despite that, the learned trial Judge observed that the evidence of Mohinder Singh S. I. was shown to be forthright and he had no reason to doubt the same. He went on to disbelieve Baldev Singh P. W. 8, who on some documentary material was shown to be inimical towards Gurcharan Singh and Bharpur Singh accused. On that analysis, the learned trial Judge held that Mander Singh was not empty-handed when he was shot at and the high probability was that he was quick with his licensed mauser and even fired there from towards Mohinder Singh accused and his companions if he was really accompanied by any. He further held that this was the explanation why a few missed cartridges of his mauser pistol could be found lying besides one of its fired cartridge cases.

31. Now here again is an instance of material evidence being overlooked on this aspect of the case and legitimate inferences drawable. None of the eyewitnesses had stated that Mander Singh deceased was armed with a mauser or that he had fired with the same. Doubtless, there is no injury on the person of the accused or any other circumstantial mark at or near the scene of the occurrence wherefrom it could be deduced that the mauser was used. Questions put to Ronak Singh P. W. in cross-examination only went to the extent of getting from him that his father had a licence for a mauser pistol. And the suggestion that his father had used the mauser pistol in the first instance which gave rise to Mohinder Singh accused firing in self-defence met with denial. It is worthy of recall that the Sub-Inspector on having reached the spot at 1.45 A. M. did not guard the spot personally and rather left it to a constable accompanying him. The name of that constable or his affidavit is not on the file. Whether the scene of occurrence was left uninterfered with is a matter for inference. Whether that constable was immune from pressures is again a matter of inference. The relevant columns in the inquest reports of both the deceased were found vacant which mandatorily require that articles found at or near the dead body had to be mentioned. The mauser, the holster and the belt of twenty rounds were not mentioned therein and these were prepared by Mohinder Singh S. I. And significantly, the three missed cartridges were found in the belt as per recital in memo, Exhibit PO/1, which says "and one holster of black colour in which are placed twenty cartridges, out of whom three are missed." The presence of the three missed cartridges in the belt could rule out the possibility of their being used at the time of the occurrence for how else could they have found their way back in the belt. And yet the learned trial Judge ignoring that aspect held that these were found lying there as evidence of Mander Singh firing towards Mohinder Singh and his companions if he was really accompanied by any. Added to this is the fact that memo, Exhibit PO/1, was drawn" by Mohinder Singh S. I. and the memo of recovery of the fired cartridge. Exhibit DE, was written by Nachhattar Singh A. S. I. who has not been produced to prove it and it was taken to be proved on the

statement of Mohinder Singh S. I. The evidence of Exhibit DE was inadmissible in the absence of Nachhattar Singh A. S. I. having come to the witness-box to prove its contents. Though Baldev Singh P. W. 8 had said in his evidence that he had attested memo. Exhibit DC, relating to the lifting of the fired cartridge case, yet he could not say as to which fired cartridge case did this memo relate. The witnesses stated that he was asked to attest the other memo besides the one prepared at the spot seven or eight days later. In addition thereto, with regard to Exhibit PO/1, he had stated that he had signed the memo when it was partly written and had volunteered that the writing, Exhibitt PO/1, had been completed subsequently, Now a Plain look at Exhibit P/O1, shows that perhaps the witness is not altogether wrong. The writing of it starts as if the writer was hard pressed for space but then gradually the space is widened to ridiculous measures. These two memos. one regarding the recovery of mauser and other regarding the recovery of fired cartridge, Exhibit C. 3, were overlooked by the learned trial Judge for their intrinsic worth. No inferences were drawn by the trial Judge for Nachhattar Singh A. S. I. not being examined to explain away the writing which S. I. Mohinder Singh claims to have been dictated by him, On these counts also, a case for interference in revision has been made out,

32. The next circumstance which weighed with the trial Judge was that Bharpur Singh accused was said to have fired his pistol at the left tyre of the tractor and that from the tube thereof 12 bore shot gun and not any bullet was found. Since Bharpur Singh accused was found to be a licensee of. .765 mm. pistol capable of emitting of, bullet and not a pellet, the presence of eye-witnesses at the scene of occurrence was doubted. Explanation of Ronak Singh P. W. that the pellet fired from Bharpur Singh's pistol had slipped off the tyre and not piercing it was held to be naive It was held that neither the explanation was natural nor had been given to the police. Now here again in arriving at such conclusions, the learned-trial Judge has overlooked material evidence as none of the prosecution witnesses had stated that Bharpur Singh was equipped with his licensed .765 mm. pistol. All what they said was that he was armed with a pistol. It is Bharpur Singh who himself on being arrested surrendered his licensed pistol. None of the prosecution witnesses was shown during cross-examination that the said accused was armed with that licensed pistol and none other. On the other ground, it suffices to be mentioned that it is Bharpur Singh who is alleged to have started the assault by firing at the front tyre of the tractor. Then the attention of Ronak Singh P. W. would be on the steerwheel of the trailer and direction of proceeding. It would be hairsplitting to assume that the witness would see the bullet emerging out of the pistol and grazing past the tyre. These were spelled out impressions and could be Judged in the light of the broad features of the occurrence. In the same strain can be disposed of another dig made by the learned trial Judge to the prosecution case as treating whatever was found absent in the first information report to be a case of improvement. It has been settled as a matter of law that all omissions are not necessarily contradictions or improvements and that the first information report is not the encyclopedia of the

prosecution case. These are patent errors in the judgment involving legal principles.

33. Some argument had been raised before the learned trial judge on the basis of the injuries on the deceased and the medical opinion. It was based on the assumption that the place where the accused were standing and the tractor passing between the two sets, every space was even ground. Ronak Singh P. W. said that where the two accused on each side were standing, there was comparatively higher ground than the passage on which the tractor and trailer were moving. The learned trial Judge held it to be even ground on the strength of the evidence of Mohinder Singh S. I. and the Draftsman. Now here again, an important piece of evidence has been overlooked and these are the photographs. A bare look at them would show that the wheel track in the street is eroded causing a depression and the side-tracks emerged out as raised. This too the trial Court should have taken into consideration before finding conflict with the eye-witnesses' account and the medical evidence, and there is thus an addition of a legal infirmity.

34. The learned trial judge also believed Mohinder Singh S. I. on the score that the said Mohinder Singh and Bhura Singh deceased accompanied by Baldev Singh P. W. and Master Kaur Singh of Kot Guru had come to him at 6 P. M. to enquire about the case of the morning day and had left the police station after staying there for about half an hour. In the same strain, he believed Hansa Singh D. W. 5, Teja Singh D. W. 6 and Darshan Singh D. W. 7 to infer that the occurrence had taken place at 9.30 P. M., as alleged by the defence, for the two deceased could not have been in the village at 6-30 P. M. as indicated by Mohinder Singh S. I. Surprisingly, Mohinder Singh S. I. recorded the first information report given out by a raw youth Ronak Singh stating that the occurrence had taken place at 6.30 P. M. and did not even contradict him on that count. The Sub Inspector, when confronted with such situation, said that he had to record what was being stated to him. But then, according to him, he mentioned in the case diary that Bhura Singh and Mander Singh deceased had visited him at 6 P. M. The learned trial Judge held that it was the proper thing for him to do in such circumstances. Mohinder Singh S. I. was thus a witness like Hansa Singh D. W. 5, Teja Singh D. W. 6 and Darshan Singh D.W. 7 to the displacement of the time of occurrence. He could have desisted from recording the first information report himself and even having done so to have refrained himself from investigating it. No wonder then he held that belief and propounded that theory. He perhaps had every jolt to give. The learned trial Judge ignored this material inference which was capable of being drawn from the evidence.

35. The learned trial Judge held the evidence of Surjit Singh D. W. 1, a workshop owner of Samrala, to be impeccable since a receipt dated 24-2-1979 was produced during investigation, said to have been signed by Jagvinder Singh accused before him as price of a thrasher. And the said witness was held to be disinterested. The learned trial Judge ignored material evidence of the order

book produced by the witness which, if read together with the receipt, could lead to the conclusion that the business accounts of Surjit Singh D. W. 1 were not regularly kept so that the dating could be vouchsafed.

36. The prosecution had led evidence to show *hat the cartridge case recovered from the spot had been married to the licensed gun belonging to Mohinder Singh accused. According to his defence version, he owned the responsibility for himself firing upon the two deceased persons when Mander Singh deceased armed with a mauser and Bhura Singh armed with a gun, were advancing towards his house around 9.30 P. M., exhorting each other that Mohinder Singh should be finished off and his house burnt down. According to him, Mander Singh and Bhura Singh started firing at him while he was standing in his courtyard but he luckily escaped and then fired back from his own gun towards the deceased persons in the exercise of right of private defence. The learned trial Judge came to the view that as per recoveries from the spot, no gun was found lying near Bhura Singh or any other fire-arm for that matter, except the mauser. The learned trial Judge observed that there was no suggestion that Bhura Singh's gun had been removed and if that was so Mander Singh's mauser too could be removed. He concluded that there were only two persons at the spot who confronted Mohinder Singh and these were Mander Singh armed with a mauser and Bhura Singh empty-handed. He probabilised that Mander Singh deceased fired first at Mohinder Singh and then Mohinder Singh fired in return. He also observed that from the presence of the bodies of the two deceased persons, as revealed from the photographs, they were at a considerable distance (one in front of the tractor and the other fairly behind the tractor-trailer, On that score, the learned trial Judge found that the accused directing the shot towards Bhura Singh was only after he had injured or killed Mander Singh, because his apprehension of danger was from Mander Singh alone, and not from Bhura Singh. It is in these circumstances that the learned trial Judge held that Mohinder Singh accused firing on Bhura Singh empty handed was not justified when, particularly, it could be avoided and it was hardly necessary to kill him also from the point of view of self-defence. Now having held so, the learned trial Judge surprisingly conceded to Mohinder Singh the right of private defence of killing not only Mander Singh but Bhura Singh as well, and held that this was in exceeding such right. Thus, disbelieving the exculpatory portion of Mohinder Singh's statement with regard to Bhura Singh being armed and believing the inculpatory portion thereof that he caused his death, he recorded an order of conviction u/s 304 Part-I, I.P.C. The learned Counsel for the State was at pains to contend that even on this finding, the learned trial Judge should have recorded conviction u/s 302, I.P.C. for the murder of Bhura Singh atleast besides attempted murder of Gurjant Singh, who too was injured in the incident. The learned trial Judge seemingly did not advert to this aspect of the case as also with regard to Gurjant Singh's injuries. On the other hand, the learned Counsel for Mohinder Singh appellant was at pains to contend that Bhura Singh deceased too was armed and that the right of private defence had not been exceeded.

37. For all the material evidence which has been ignored by the learned trial Judge and detected by us above, we are of the considered view that the order of acquittal must be set aside, as this has led to the judgment being rendered illegal which has resulted in gross miscarriage of justice. We direct the learned trial Judge in the interest of justice to write a fresh judgment after considering all the material evidence which had earlier been left out and having regard to the illegalities pointed out herein. At the same time, we need caution the learned trial Judge that anything said herein on the merits of the case should be treated as done solely for purposes of disposal of these matters and not in any way to influence his mind. As a necessary sequel, the appeals of the State as also of Mohinder Singh accused have been rendered infructuous and have to be dismissed as such.

38. Resultantly, we allow Criminal Revision No. 977 of 1980 and dismiss both the appeals, namely Criminal Appeal No 614-DB-A of 1980 and Criminal Appeal No. 335-SB of 1980, as infructuous directing the learned trial Judge to write a fresh judgment and then pass appropriate orders in accordance with law. The orders with regard to the presence of the accused before the trial Judge, whether in custody or otherwise, would activate as heretofore existing at the trial.