STATE OF UTTAR PRADESH & ORS.

v.

M/S. VAM ORGANIC CHEMICALS LIMITED

(Civil Appeal No. 1929 of 2004)

FEBRUARY 26, 2010

[S.H. KAPADIA AND AFTAB ALAM, JJ.]

U.P. Trade Tax Act, 1948:

ss. 4-B(2) and (4)(ii) proviso – Amendment of Recognition Certificate – Effective date – Writ petitions challenging show-cause notices issued to assessees for deletion of high speed diesel oil (HSD) from Recognition Certificates, allowed by High Court – HELD: High Court, without examining the nature of the power of Assessing Authority u/s 4-B(4)(ii), intervened at the show cause notice stage – Assessing Authority is vested with discretionary power to amend Recognition Certificate for which it has to give the assessee a reasonable opportunity of being heard – It is for this reason that the show cause notice was issued – However, the stand of Revenue that it seeks to delete HSD on the ground of mistake, is not tenable – 'Rectification' is different from 'amendment' – The word 'rectification' does not find place in the proviso – When a Recognition Certificate is issued to a dealer, he is given the benefit of concessional rate which cannot be withdrawn retrospectively – Matters remitted to Assessing Authority to treat the show cause notices as issued for purpose of amending the Recognition Certificate and decide the same in accordance with the procedure laid down in s.4-B(4)(ii) – Assessing Authority would also decide de novo the cases in which it has passed adjudication orders, and if an order amending Recognition Certificate is issued, the same will operate only from the date of issuance of show cause notice – Central Sales Tax Act, 1956 – s.7.

The respondents, manufacturers of notified chemicals, were given central registration u/s 7 of the Central Sales Tax Act, 1956 and also Recognition Certificates u/s 4-B of the Uttar Pradesh Trade Tax Act, 1948 for purchase of high speed diesel oil (HSD) at concessional rates. However, pursuant to the circular dated 20.6.2000 issued by the Additional Commissioner, Trade Tax, Meerut, U.P., notices were issued to the respondents for deletion of HSD from their Recognition Certificates. The writ petitions of the respondents challenging the show cause notices were allowed by the High Court.

In the instant appeals filed by the Revenue, the question for determination by the Court was: Whether the Department was right in issuing notices calling upon the Companies to show-cause as to why HSD should not be deleted as an item from their respective Recognition Certificates issued u/s 4-B(2) of the Uttar Pradesh Trade Tax Act, 1948?

Disposing of the appeals, the Court

HELD: 1.1. The High Court, in the instant case, has not examined the nature of the power exercised by the Assessing Authority u/s 4-B(4)(ii) of the Uttar Pradesh Trade Tax Act, 1948, and intervened at the show-cause notice stage. Power to grant exemption from payment of duty or to pay concessional duty is expressly conferred on the Assessing Authority. It is a case of conditional exemption. Under s.4-B(4)(ii) of 1948 Act, the Assessing Authority is vested with discretionary power to amend a Recognition Certificate granted under sub-section (2) of s. 4-B of 1948 Act either on its own motion or on the application of the dealer, for any sufficient reason. This pre-condition of "sufficiency of reasons" requires a show- cause notice to be given to the dealer in whose favour a Recognition Certificate exists, calling upon him

to show-cause as to why an item should not be deleted in a given case. Further, under the proviso to s.4-B(4)(ii) of 1948 Act, the words used are "no recognition certificate shall be cancelled or amended by Assessing Authority of its own motion except after reasonable opportunity of being heard". Therefore, each case needs to be examined by the Assessing Authority if it seeks to exercise its authority to delete an item from a Recognition Certificate. Same is the position if the Assessing Authority seeks to cancel a Recognition Certificate for the reasons indicated in the said sub-section. Not only that, while amending or cancelling a Recognition Certificate, the Assessing Authority is also required to give reasons for amending or cancelling the existing Recognition Certificate or for deleting an item therefrom. [Para 12-15] [11-A-B; 12-C-D, G-H; 13-A-C]

1.2. It is important to note that the word "rectification" does not find place in the proviso to s.4-B(4)(ii). Conceptually, the word "rectification" is different from the word "amendment". This point is relevant because, in the instant case, the stand of the Department is that HSD is inserted in the Recognition Certificate by mistake and it seeks to delete that item on the ground of mistake. That would not be possible. When a Recognition Certificate is issued, a benefit of concessional rate of tax is given to the dealer. He arranges his business affairs on those lines. Therefore, that benefit cannot be withdrawn retrospectively. Such benefit can be withdrawn, at the highest, from the date of the show-cause notice when the Assessing Authority proposes to delete an item from the Recognition Certificate. Such a show-cause notice has been given in each case. Accordingly, such show-cause notice is for amending the Recognition Certificate. [Para 15] [13-C-F]

1.3. All these cases are remitted to the Assessing Authority with a direction to treat the show-cause

notice(s) issued for the purposes of amending the existing Recognition Certificate(s). Each assessee will be given a hearing, and the amendment of Recognition Certificate will be decided on merits in accordance with the procedure laid down in s.4-B(4)(ii) of 1948 Act, uninfluenced by the decision of the High-Power Committee dated 12th June, 2000 or the Circulars issued by the Additional Commissioner on 20th June, 2000 or the observations made by the High Court in the impugned judgements. [Para 16] [13-G-H; 14-A-B]

1.4. In some of the cases, pursuant to the show-cause notice(s), the Assessing Authority has passed adjudication orders in terms of the Circulars issued by the Commissioner. The Assessing Officer would decide the said cases *de novo* on the basis of the show-cause notices and also uninfluenced by the observations made in the orders of adjudication earlier. In each case, the Assessing Officer will give a reasoned order. However, if an order amending the Recognition Certificate is issued by the Assessing Authority, the same will operate only from the date of issuance of show-cause notice. [Para 17] [14-C-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No.1929 of 2004.

From the Judgment & Order dated 25.3.2003 of the High Court of Judicature at Allahabad in C.M.W.P. No. 628 of 2000.

WITH

C.A. Nos.1930, 1931-1932, 1933 and 2810-2938 of 2004, 4298 and 4299 of 2009 and 2056 of 2010.

Sunil Gupta, S.K. Dwivedi, AAG, Aarohi Bhalla, Vandana Mishra, Manoj Kumar Dwivedi, Kamlendra Mishra, Gunnam Venkateswara Rao for the Appellants.

Dhruv Aggarwal, Nandini Gore, Debmalya Banerjee, Sonia Nigam, Kartik Bhatnagar, R.N. Karanjawala, Manik Karanjawala, Praveen Kumar, Rani Chhabra, Siddhartha Chowdhury, Mukesh Verma, Aftab Alam, Yash Pal Dhingra, Kavin Gulati, Rashmi Singh, Ruby Singh Ahuja, Manu Nair (for Suresh A. Shroff & Co.), Ashok Kumar Sinha, Sudhanshu Goil, B. Vijayalakshmi Menon, K.R. Sasiprabhu, Arvind Kumar Sharma, Naresh Kumar, B.K. Satija, Pravir Kumar Jain, E.C. Agrawala, Suruchi Aggarwal, Pramod Dayal, Nikunj Dayal, Rupesh Kumar, Rajesh Kumar, Krishna Kumar, R.S., K.S. Mahadewan, Sanjeev Malhotra, Prakash Kumar Singh, Jatin Zaveri and Shally Bhasin Maheshwari for the Respondent.

The Judgment of the Court was delivered by

S.H. KAPADIA, J. 1. Heard learned counsel on both sides.

2. Delay condoned.

3. Leave granted in the special leave petition.

4. In all these matters, respondents are manufacturers of notified goods. These respondents have been given central registration under Section 7 of the Central Sales Tax Act, 1956, and also Recognition Certificate under Section 4-B of the Uttar Pradesh Trade Tax Act, 1948, for purchase of high speed diesel oil at concessional rate. These certificates have been given on different dates by the appellants.

5. The lead matter is *State of Uttar Pradesh & Ors. vs. M/s. Vam Organic Chemicals Limited* [Civil Appeal No.1929 of 2004].

6. M/s. Vam Organic Chemicals Limited is a public limited company incorporated under the Indian Companies Act, having it's registered office at Amroha, Uttar Pradesh. It has established a continuous process chemical industry for the manufacture of Vinyl Pyridine, Picoline, etc. [for short, `chemicals']. The said Company is registered under the Uttar

Pradesh Trade Tax Act, 1948 [for short, `1948 Act'], as well as under the Central Sales Tax Act, 1956 [for short, `1956 Act'], as a dealer.

7. M/s. Vam Organic Chemicals Limited [for short, "Company"] was granted a Registration Certificate under Section 7 of 1956 Act in which a List of Items was annexed. As per the said List, the Company was entitled to purchase goods under 1956 Act. The Company was also granted a Recognition Certificate under Section 4-B of 1948 Act authorizing it to purchase goods on concessional rates. On the basis of the Recognition Certificate granted by the State, the Company became entitled to purchase various goods against Form III-B, which was issued by the Assessing Authority on payment of concessional rate of tax. Since the Company had obtained Registration Certificate under Section 7 of 1956 Act, it purchased high speed diesel oil [`HSD', for short] against Form-C from Indian Oil Corporation Limited. The Company had also bought HSD against Form III-B from Indian Oil Corporation Limited under which Indian Oil Corporation Limited charged the tax at the rate of two per cent against Form III-B.

8. On 12th June, 2000, a meeting was organised by the Principal Secretary, Finance, Uttar Pradesh, in which a decision was taken that the benefit of Form III-B for purchase of HSD to be used in Diesel Generating Sets in the factory should not be given the benefit of concessional rate since such HSD was not directly used in the manufacture of notified goods [chemicals]; rather, it was used for generating electricity in the Generating Set which electricity was then captively used for manufacturing chemicals. On the basis of the said decision dated 12th June, 2000, the Additional Commissioner, Trade Tax, Meerut, Uttar Pradesh, issued a Circular on 20th June, 2000, to all the subordinate officers for it's implementation and, accordingly, all Trade Tax Authorities of the State, who, at the relevant time, were under the administrative control of the Commissioner, issued notices for deletion of HSD, an item

mentioned in the Company's Recognition Certificate. It is this show-cause notice which came to be challenged by M/s. Vam Organic Chemicals Limited and others by filing writ petitions in the Allahabad High Court.

9. In the writ petition filed by the Company, it was submitted that HSD was a fuel, which was absolutely essential for operating the Diesel Generating Set [D.G. Set] in the factory as the Company's factory was engaged in a continuous process chemical industry and, in the absence of HSD, the D.G. Set would become non-functional and if electricity cannot be generated, it would be impossible to produce chemicals. According to the Company, HSD is used in D.G. Sets to generate electric energy which is required for chemical industry. In this connection, reliance was placed on Explanation to Section 4-B of 1948 Act. In reply, it was the case of the Department that HSD is used in the D.G. Set for generating electric energy which is not only used for chemical industry but is also used for electrical appliances in office, factory and to supply electricity for working of lights, fans, etc. According to the Department, HSD is used in the Generating Set for production of electricity; that the unit of the Company was not registered/recognised for production of electricity; that it was not a public utility service under the relevant Electricity Act; and, hence, the Company cannot call HSD a fuel/raw-material used for production of electricity in this case. According to the Department, in the present case, the notified goods consisted of chemicals and not electricity, hence, HSD was not used in the process of production of chemicals directly. For the afore-stated reasons, the Department submitted that, on the facts and in the circumstances of this case, HSD cannot be included in the Recognition Certificate of the Company. By the impugned judgements, the High Court came to the conclusion that the stand of the Department was highly technical. According to the High Court, HSD was used by the Company for the manufacture of chemicals [notified goods], as mentioned in Section 4-B(2) of 1948 Act. According to it, the word "directly" is not mentioned

in Section 4-B(2) of 1948 Act. It further held that Section 4-B(2) of 1948 Act does not mention that the goods, referred to in sub-section (1), should be used directly for the manufacture of the notified goods. In the light of the said reasoning, the High Court came to the conclusion, by the impugned judgements, that the show-cause notices issued by the Department calling upon the Companies to show-cause as to why HSD should not be deleted from the Recognition Certificate based on the Circulars dated 20th June, 2000, etc., be set aside. That, it was not open to the Department to delete HSD, furnace oil, liquid fuels or gaseous fuels from the Recognition Certificate as such oil [HSD] constituted a fuel required for the manufacture of chemicals in terms of the Explanation to Section 4-B(2) of 1948 Act. Against the said judgements, the State has come to this Court by above-mentioned civil appeals. We may clarify that, in all, there are approximately 138 appeals against the impugned judgements of the Allahabad High Court in various writ petitions. Suffice it to state that common issue arises for determination in this batch of cases, namely, Whether the Department was right in issuing show-cause notices calling upon the Companies to show-cause as to why HSD should not be deleted as an item from their respective Recognition Certificates issued under Section 4-B(2) of 1948 Act?

10. Mr. Sunil Gupta, learned senior counsel appearing for the Department, invited our attention to Annexure CA(I) of the Paper Book, which is a List of Items registered under Section 4-B of 1948 Act. It appears to be a List annexed to the Registration Certificate. What is argued by the learned senior counsel is that, under Section 4-B(2) of 1948 Act read with Explanation thereto a dealer has to satisfy the Assessing Authority, empowered to issue Recognition Certificate, that he requires the duly itemised goods mentioned in the Recognition Certificate for use in the manufacture by him of any notified goods [final product]. According to the learned senior counsel, the Recognition Certificate, including the List of Items under Section 4-B(2) of 1948 Act, cannot be read in isolation. Each

Item in the List is duly recognised by the Assessing Authority looking to its requirement for use in the manufacture of the final product [notified goods]. In this connection, it was submitted that HSD does find place in the said List but if the said Item is used to make the Generating Set functional for generating electric energy which, in turn, is captively consumed in the manufacture of chemical goods, then, in that event, an assessee will not be entitled to the benefit of concessional rate of tax. Learned counsel invited our attention to several items in the said List, including air-conditioners, stabilizers, electrical panels and Diesel Generating Set. It was argued on behalf of the Department that if HSD is used in the Generating Set, it would not amount to it being used in the manufacture of chemical goods but it would amount to HSD being used to operate the machines. On the other hand, it was urged on behalf of the assessee(s) that, in the absence of HSD, it was not possible to operate the D.G. Set; that, the assessee(s) has installed several D.G. Sets in it's factory for the manufacture of electricity which Sets cannot function without the use of HSD. According to the assessee(s), there is nothing in sub- section (2) of Section 4-B of 1948 Act to suggest that HSD should be used directly in the manufacture of chemical goods. In any event, according to the assessee(s), in the List enclosed with the Recognition Certificate, Diesel Generating Set is mentioned. Therefore, HSD, in any event, is directly used to operate Diesel Generating Set. What is argued on behalf of the assessee(s) is that, if D.G. Set is an item duly recognised by the Assessing Authority, the machines cannot operate without the use of HSD and, in the circumstances, there is, in any event, a direct use of HSD in the working of the D.G. Set. As stated above, the High Court has accepted the contentions advanced on behalf of the assessee(s).

11. At the outset, we quote hereinbelow Section 4-B(2) with the Explanation as also Section 4-B(4)(ii) of 1948 Act:

"4-B. Specific Relief to certain manufacturers.--

[1] xxx xxx xxx

[2] Where a dealer requires any goods, referred to in sub-section (1) for use in the manufacture by him in the State, of any notified goods, or in the packing of such notified goods manufactured or processed by him, and such notified goods are intended to be sold by him in the State or in the course of inter-State trade or commerce or in the course of export out of India, he may apply to the assessing authority in such form and manner and within such period as may be prescribed, for the grant of a recognition certificate in respect thereof, and if the applicant satisfies such requirements including requirement of depositing late fee, and conditions as may be prescribed, the assessing authority shall grant to him in respect of such goods a recognition certificate in such form and subject to such conditions, as may be prescribed.

Explanation.-- For the purposes of this sub- section--

[a] `goods required for use in the manufacture' shall mean raw materials, processing materials, machinery, plant, equipment, consumable stores, spare parts, accessories, components, sub-assemblies, fuels or lubricants; and

[b] `notified goods' means such goods as may, from time to time be notified by the State Government in that behalf.

[4][ii] The assessing authority may amend a recognition certificate granted under sub- section (2), either of its own motion or on the application of the dealer, where the dealer has changed the name or place of his business or has closed down any branch or has opened a branch or for any other sufficient reason:

Provided that no recognition certificate shall be cancelled or amended by Assessing Authority of its own

motion except after reasonable opportunity of being heard has been given to the dealer."

12. We are looking at the present controversy from a different point of view. The High Court has not examined, in the present case, the nature of the power exercised by the Assessing Authority under Section 4-B(4)(ii) of 1948 Act. This point of view arises because, in this case(s), a show-cause notice has been issued to the assessee calling upon the assessee to show-cause as to why HSD mentioned in its Recognition Certificate should not be deleted as it is being used for generating electricity in the Generating Set which electricity is then consumed by the factory. A number of writ petitions were filed in the Allahabad High Court against the show-cause notices. The High Court intervened at the show-cause notice stage. If one looks at Section 4-B(4)(ii) of 1948 Act, one finds that the Assessing Authority is vested with discretionary power to amend the Recognition Certificate granted under sub-section (2) of Section 4-B of 1948 Act either on it's own motion or on the application of the dealer where the dealer has changed his name or place of business or has closed down his branch office or for any other sufficient reason. By way of proviso, it has been clarified that no Recognition Certificate shall be cancelled or amended by the Assessing Authority on it's own motion without giving reasonable opportunity of being heard to the dealer [assessee]. If one looks at the Scheme of Section 4-B of 1948 Act, one finds that a statutory power is given to the Assessing Authority to issue the Recognition Certificate in respect of the notified goods. There could be a number of notified goods. In fact, in 1998, "electricity" itself was one of the notified goods. In our view, under the Scheme of Section 4-B(2) of 1948 Act, the Assessing Authority is vested with the statutory power to issue Recognition Certificate in respect of items enumerated therein, which are required by the dealer for use in the manufacture of any notified goods. In the present case, the assessee(s) is manufacturing chemical goods. On issuance of the Recognition

Certificate, a concessional rate of tax becomes applicable in respect of items enumerated in such certificate. It is a conditional exemption which is given to the dealer [assessee]. It is important to bear in mind that a Recognition Certificate is issued under Section 4-B of 1948 Act in respect of notified goods [See sub-section (2A) of Section 4-B].

13. Power to grant exemption from payment of duty or to pay concessional duty is expressly conferred on the Assessing Authority. It is a case of conditional exemption. While exercising that power, generally no hearing or reasons are required to be given unless the Act so provides. In this case, a proviso is inserted in Section 4-B(4)(ii) of 1948 Act to say that no Recognition Certificate shall be cancelled or amended by the Assessing Authority without giving reasonable opportunity of being heard to the dealer. It is for this reason that, in the present case, the Assessing Authority has given show-cause notices to all the respondent-dealers calling upon them to show-cause as to why HSD, as an item, should not be deleted from the Recognition Certificate.

14. In the present case, the Department submitted, before us, that, by mistake, HSD has been included in the List. The Department seeks to rectify that mistake. The question, before us, is - whether the Department is precluded from doing so? This question has not been answered by the High Court. In our view, under Section 4-B(4)(ii) of 1948 Act, the Assessing Authority is vested with discretionary power to amend a Recognition Certificate granted under sub-section (2) of Section 4-B of 1948 Act either on it's own motion or on the application of the dealer for any sufficient reason. This pre-condition of "sufficiency of reasons" requires a show- cause notice to be given to the dealer in whose favour a Recognition Certificate exists calling upon him to show- cause as to why an item should not be deleted in a given case. Therefore, in our view, each case needs to be examined by the Assessing Authority if it seeks to exercise it's authority to delete an item

from a Recognition Certificate. Same is the position if the Assessing Authority seeks to cancel a Recognition Certificate for the reasons indicated in the said sub- section. Not only that, while amending or cancelling a Recognition Certificate, the Assessing Authority is also required to give reasons for amending or cancelling the existing Recognition Certificate or for deleting an item therefrom.

15. One more aspect needs to be highlighted. Under the proviso to Section 4-B(4)(ii) of 1948 Act, the words used are "no recognition certificate shall be cancelled or amended by Assessing Authority of its own motion except after reasonable opportunity of being heard". It is important to note that the word "rectification" does not find place in the said proviso. Conceptually, the word "rectification" is different from the word "amendment". This point is relevant because, in the present case, the stand of the Department is that HSD is inserted in the Recognition Certificate by mistake. The Department seeks to delete that item on the ground of mistake. That would not be possible. When a Recognition Certificate is issued, a benefit of concessional rate of tax is given to the dealer. He arranges his business affairs on those lines. Therefore, that benefit cannot be withdrawn retrospectively. Such benefit can be withdrawn, at the highest, from the date of the show-cause notice when the Assessing Authority proposes to delete an item from the Recognition Certificate. In our view, such a show-cause notice has been given in each of the cases before us. Accordingly, we construe such show-cause notice to be for amending the Recognition Certificate in the facts and circumstances of this case, particularly because, in some of the cases, we find that Recognition Certificates have been issued as far back as in 1980.

16. For the reasons given hereinabove, we remit all these cases to the Assessing Authority with a direction to treat the show-cause notice(s) issued for the purposes of amending the existing Recognition Certificate(s). Each assessee will be given

a hearing. Each case for amendment of Recognition Certificate will be decided in accordance with the procedure laid down in Section 4-B(4)(ii) of 1948 Act. The Assessing Authority will decide each case on it's own merits uninfluenced by the decision of the High- Power Committee dated 12th June, 2000. It will also decide each of such cases uninfluenced by Circulars issued by the Additional Commissioner dated 20th June, 2000, and others. The Assessing Officer will decide each case on it's own merits uninfluenced by the observations made by the High Court in the impugned judgements.

17. One more clarification needs to be mentioned. In some of these cases, pursuant to the show-cause notice(s), the Assessing Authority has also passed adjudication orders in terms of the Circulars issued by the Commissioner. In view of our order herein, we direct the Assessing Officer to decide these cases de novo on the basis of the show-cause notices and also uninfluenced by the observations made in the orders of adjudication earlier. In each case, the Assessing Officer will give a reasoned order. However, if an order amending the Recognition Certificate is issued by the Assessing Authority, the same will operate only from the date of issuance of show-cause notice.

18. Subject to what is stated hereinabove, this batch of civil appeals filed by the State of Uttar Pradesh stand disposed of with no order as to costs.

R.P. Appeals disposed of.

DALCO ENGINEERING PRIVATE LTD.

v.

SHREE SATISH PRABHAKAR PADHYE AND ORS.

(Civil Appeal No.1886 of 2007)

MARCH 31, 2010

[R.V. RAVEENDRAN, R.M. LODHA AND C.K. PRASAD, JJ.]

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 – ss.2(k) and 47 – Establishments, within the meaning of that expression in s.2(k) – Company incorporated under the Companies Act (other than a Government company) – Whether an "establishment" as defined in s.2(k) – Applicability of s. 47 – Requirement relating to non-discrimination of employees acquiring disability during course of service, as embodied in s.47 – To be complied with only by authorities falling within the definition of State (as defined in Article 12 of the Constitution), or even by private employers – Held: The definition of 'establishment' as in s.2(k) includes only 'Government Companies' as defined in s.617 of the Companies Act which necessarily and impliedly excludes all other types of companies registered under the Companies Act,1956, from the definition of 'establishment' – S.47 applies only to establishments specifically defined as 'establishment' under s.2(k) –Benefit intended to be restricted to a particular class of employees, i.e. employees of enumerated establishments (which fall within scope of 'State' under Article 12 of the Constitution) – Private employers, whether individuals, partnerships, proprietary concerns or companies (other than Government companies) are clearly excluded from the 'establishments' to which s.47 will apply – Constitution of India, 1950 – Article 12 – Companies Act, 1956 – s.617.

Interpretation of Statutes – Socio-economic legislation –

Held: To be interpreted liberally – However, Courts cannot expand the application of a provision in a socio-economic legislation by judicial interpretation, to levels unintended by the legislature, or in a manner which militates against the provisions of the statute itself or against any constitutional limitations – Express limitations placed by socio-economic statute cannot be ignored, so as to include in its application, those who are clearly excluded by such statute itself.

Interpretation of Statutes – Marginal Note – Held: Though the marginal note may not control the meaning of the body of the section, it usually gives a safe indication of the purport of the section to the extent possible.

Words and Phrases –'establishment' – Meaning of, in the context of s.2(k) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

In these appeals, dispute arose as to whether having regard to the definition of the word 'establishment' in section 2(k) of the Act, the requirement relating to non-discrimination of employees acquiring a disability during the course of service, embodied in Section 47, is to be complied with only by authorities falling within the definition of State (as defined in Article 12 of the Constitution), or even by private employers.

The questions which consequently arose for consideration before this Court were (i) whether a company incorporated under the Companies Act (other than a Government company as defined in section 617 of the Companies Act, 1956) is an "establishment" as defined in section 2(k) of the Act and (ii) whether the respondent in C.A.No.1886 of 2007 and the first appellant in C.A No.1858 of 2007 are entitled to claim any relief with reference to section 47 of the Act.

Allowing C.A.No.1886 of 2007 and dismissing C.A

No.1858 of 2007, the Court

HELD: 1.1. The term "establishment" employed in Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is defined in Section 2(k) of the said Act. The definition of the word 'establishment' in section 2(k) is an exhaustive definition, and the categories of employers covered by it are: (i) a corporation established by or under a Central, Provincial, or State Act; (ii) an authority or a body owned or controlled or aided by the Government; (iii) a local authority; (iv) a Government company as defined in Section 617 of the Companies Act, 1956; and (v) Departments of a Government. [Para 6] [27-E-G]

1.2. The words "a Corporation established by or under a Central, Provincial or State Act" is a standard term used in several enactments to denote a statutory corporation established or brought into existence by or under statute. The term is always used to denote certain categories of authorities which are 'State' as contrasted from non-statutory companies which do not fall under the ambit of 'State'. [Para 8] [27-F-G; 28-D]

1.3. A 'company' is not 'established' under the Companies Act. An incorporated company does not 'owe' its existence to the Companies Act. An incorporated company is formed by the act of any seven or more persons (or two or more persons for a private company) associated for any lawful purpose subscribing their names to a Memorandum of Association and by complying with the requirements of the Companies Act in respect of registration. Therefore, a 'company' is incorporated and registered under the Companies Act and not established under the Companies Act. Per contra, the Companies Act itself establishes the National Company Law Tribunal and National Company Law

Appellate Tribunal, and those two statutory authorities owe their existence to the Companies Act. [Para 10] [30-F-H; 31-A]

1.4. Where the definition of 'establishment' uses the term 'a corporation *established* by or under an Act', the emphasis should be on the word 'established' in addition to the words 'by or under'. The word 'established' refers to coming into existence by virtue of an enactment. It does not refer to a company, which, when it comes into existence, is governed in accordance with the provisions of the Companies Act. When the words "by and under an Act" are preceded by the words "established", it is clear that the reference is to a corporation established, that it is brought into existence, by an Act or under an Act. In short, the term refers to a statutory corporation as contrasted from a non-statutory corporation incorporated or registered under the Companies Act. [Para 11] [31-B-C; 31-G-H; 32-A]

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``````e category of companies incorporated under the Companies Act, that is the 'Government Companies' as defined in Section 617 of the Companies Act. If, as contended by the employee, all Companies incorporated under the Companies Act are to be considered as 'establishments' for the purposes of Section 2(k), the definition would have simply and clearly stated that 'a company incorporated or registered under the Companies Act, 1956' which would have included a Government company defined under Section 617 of the**
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Companies Act, 1956. The inclusion of only a specific category of companies incorporated under the Companies Act, 1956 within the definition of 'establishment' necessarily and impliedly excludes all other types of companies registered under the Companies Act, 1956, from the definition of 'establishment'. It is clear that the legislative intent was to apply section 47 of the Act only to such establishments as were specifically defined as 'establishment' under section 2(k) of the Act and not to other establishments. The legislative intent was to define 'establishment' so as to be synonymous with the definition of 'State' under Article 12 of the Constitution of India. Private employers, whether individuals, partnerships, proprietary concerns or companies (other than Government companies) are clearly excluded from the 'establishments' to which section 47 of the Act will apply. [Para 12] [32-B-G]

1.6. There is yet another indication in section 47, that private employers are excluded. The caption/marginal note of section 47 describes the purport of the section as non-discrimination in *Government* employment. The word 'government' is used in the caption, broadly to refer to 'State' as defined in Article 12 of the Constitution. If the intention of the legislature was to prevent discrimination of persons with disabilities in any kind of employment, the marginal note would have simply described the provision as 'non-discrimination in employment' and sub-section (1) of section 47 would have simply used the word 'any employer' instead of using the word 'establishment' and then taking care to define the word 'establishment'. The non-use of the words 'any employer', and 'any employment' and specific use of the words 'Government employment' and 'establishment' (as defined), demonstrates the clear legislative intent to apply the provisions of Section 47 only to employment under the State and not to employment under others. While the

marginal note may not control the meaning of the body of the section, it usually gives a safe indication of the purport of the section to the extent possible. [Para 13] [32-G-H; 33-A-D]

2. Though socio-economic legislations should be interpreted liberally, it is also true that Courts should adopt different yardsticks and measures for interpreting socio-economic statutes, as compared to penal statutes, and taxing statutes. But the courts cannot expand the application of a provision in a socio-economic legislation by judicial interpretation, to levels unintended by the legislature, or in a manner which militates against the provisions of the statute itself or against any constitutional limitations. In this case, there is a clear indication in the statute, that the benefit is intended to be restricted to a particular class of employees, that is employees of enumerated establishments (which fall within the scope of 'State' under Article 12 of the Constitution). Express limitations placed by the socio-economic statute cannot be ignored, so as to include in its application, those who are clearly excluded by such statute itself. The words "corporation established by or under a Central, Provincial or State Act" is a term used in several enactments, intended to convey a standard meaning. It is not a term which has any special significance or meaning in the context of the Disabilities Act or any other socio-economic legislations. It is a term used in various enactments, to refer to statutory corporations as contrasted from non-statutory companies. Any interpretation of the said term, to include private sector, will not only amount to overruling the clear enunciation in an earlier Supreme Court decision which has held the field for nearly three decades but more importantly lead to the erasure of the distinction maintained in the Constitution between statutory corporations which are 'State' and non-statutory bodies

and corporations, for purposes of enforcement of fundamental rights. The interpretation put forth by the employee would make employees of all companies, public servants, amenable to punishment under the provisions of Indian Penal Code and Prevention of Corruption Act; and would also result in all non-statutory companies and private sector companies being included in the definition of 'State' thereby requiring them to comply with the requirements of non-discrimination, equality in employment, reservations etc. [Para 15] [37-A-H]

S. S. Dhanoa v. Municipal Corporation, Delhi and Ors. **1981 (3) SCC 431, affirmed.**

Executive Committee of Vaish Degree College v. Lakshmi Narain, **1976 (2) SCC 58 – relied on.**

Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, **1975 (1) SCC 421;** *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd*. **1987 (1) SCC 424:** *Workman of American Express International Banking Corporation v. Management of American Express International Banking Corporation* **1985 (4) SCC 71 and** *Kunal Singh v. Union of India* **- 2003 (4) SCC 524, referred to.**

3. As the appellant in CA No. 1886/2007 and the third respondent in CA No. 1858/2007, are not establishments, within the meaning of that expression in Section 2(k) of the Act, section 47 of the Act will not apply. In so far the CA No. 1858 of 2007, there is an additional factor. Third respondent therein was not the employer of any persons with disability. Therefore, in that case, the entire question is academic. In neither of the cases, any relief can be granted under section 47 of the Act. However, this will not come in the way of employee of any private company, who has been terminated on the ground of disability, seeking or enforcing any right available under any other

statute, in accordance with the law. [Paras 17 and 18] [39-A-B; 39-D]

Case Law Reference:

1975 (1) SCC 421	**referred to**	**Para 3**
1981 (3) SCC 431	**affirmed**	**Para 3**
1976 (2) SCC 58	**relied on**	**Para 9**
1987 (1) SCC 424	**referred to**	**Para 14.1**
1985 (4) SCC 71	**referred to**	**Para 14.2**
2003 (4) SCC 524	**referred to**	**Para 14.3**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1886 of 2007.

From the Judgment & Order dated 23.12.2005 of the High Court of Judicature at Bombay in Writ Petition No.1117 of 2002.

WITH

C.A. No. 1858 of 2007.

Ajay Majithia, Rajesh Kumar, Dr. Kailash Chand, Vinay Navare, Abha R. Sharma for the Appellant.

K.V. Vishwanathan, Gaurav Mitra, Bina Madhavan, Antima Bazaz (for Lawyer's Knit & Co.), Ajay Bhargava, Vanita Bhargava, Abhijeet Swaroop, Kaitan & Co., Shankar Chillarge Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J.

Facts in CA No.1886/2007 :

1. The appellant is a private limited company incorporated under the provisions of the Companies Act, 1956. The

respondent – S.P. Padhye – (also referred to as 'the employee') was employed as a Telephone Operator by the appellant for more than two decades. The respondent's service was terminated by the appellant with effect from 31.12.2000 on the ground that he had become deaf (85% reduction in ability to hear). The respondent complained to the Disability Commissioner, Pune, in regard to such termination, alleging that he was fit, able and normal when he joined service of the appellant and as he acquired the hearing impairment during the period of service, he should have been continued in employment in some suitable post. The Disability Commissioner made an order dated 12.10.2001 suggesting to the employer to undertake a social responsibility, by re-employing the respondent to discharge any other work. The suggestion was not accepted by the employer.

2. According to the respondent, the Commissioner, instead of making a mere suggestion, ought to have issued a direction to the employer, in exercise of jurisdiction under section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ('the Act', for short). He therefore filed a writ petition seeking the following reliefs (i) quashing of the order dated 12.10.2001; and (ii) a direction to implement the provisions of the Disabilities Act by directing the employer to reinstate him in service in a suitable post, with retrospective effect from 1.1.2001, in the same pay-scale and service benefits. The High Court allowed the said writ petition by judgment dated 23.12.2005, and directed the employer to reinstate the respondent and shift him to a suitable post with the same pay-scale and service benefits and with full back-wages. The High Court held that the respondent, though a private limited company, was an "establishment" as defined under section 2(k) of the Act and consequently section 47 of the Act enjoined it not to dispense with the services of its employee who acquired a disability.

Facts in CA No.1858/2007 :

3. The first Appellant is a Public Trust (for short the 'Trust') working for the benefit of the physically and mentally challenged persons, took up a house-keeping contract from the third respondent Company on 24.7.2000. The appellant employed several physically handicapped persons for executing the said contract. The third respondent terminated the appellant's contract on 18.7.2006. Feeling aggrieved, the appellant filed a complaint dated 22.7.2006 with the Disability Commissioner, Pune followed by a writ petition in the High Court for quashing the notice terminating the contract. The appellant also sought a direction for rehabilitation of the persons with disabilities who were employed by it for executing the said house-keeping contract, under the provisions of the Act. A Division Bench of the Bombay High Court by judgment dated 19.9.2006 dismissed the writ petition holding that the third respondent was not an "establishment" within the meaning of section 2(k) of the Act and, consequently, the provisions of the Act did not apply and that the Disability Commissioner had no jurisdiction to issue any direction to the third respondent. It also held that the earlier decision in *S.P. Padhye* (which is the subject matter of the first case) was *per incuriam* as it ignored two binding decisions of this court - the Constitution Bench decision in *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi* [1975 (1) SCC 421] and the decision in *S.S. Dhanoa v. Municipal Corporation, Delhi* [1981 (3) SCC 431]. Feeling aggrieved, the appellants have filed this appeal.

Questions for decision

4. The employee relies on section 47 which provides that no *establishment* shall dispense with, or reduce in rank, an employee who acquires a disability during his service. Section 47 of the Act is extracted below :-

"47. Non-discrimination in Government employment.— (1) No establishment shall dispense with, or reduce in rank,

SCC 627; *Municipal Corporation of Greater Bombay vs. Industrial Development Investment Co. Pvt. Ltd. & Ors.* **AIR 1997 SC 482;** *State of Rajasthan & Ors. vs. D.R. Laxmi & Ors.* **(1996) 6 SCC 445;** *Northern Indian Glass Industries vs. Jaswant Singh & Ors.* **AIR 2003 SC 234;** *Haryana State Handloom & Handicrafts Corporation Ltd. vs. Jain School Society* **AIR 2004 SC 850, relied on.**

Case Law Reference:

AIR 1984 SC 1020	**Relied on.**	**Para 6**
AIR 1974 SC 2077	**Relied on.**	**Para 7**
AIR 1975 SC 2190	**Relied on.**	**Para 8**
(1980) 2 SCC 83	**Relied on.**	**Para 8**
AIR 1992 SC 1414	**Relied on.**	**Para 8**
(1995) 5 SCC 583	**Relied on.**	**Para 8**
AIR 1995 SC 1991	**Relied on.**	**Para 8**
AIR 1996 SC 497	**Relied on.**	**Para 8**
(1997) 2 SCC 627	**Relied on.**	**Para 8**
AIR 1997 SC 482	**Relied on.**	**Para 9**
(1996) 6 SCC 445	**Relied on.**	**Para 10**
AIR 2003 SC 234	**Relied on.**	**Para 11**
AIR 2004 SC 850	**Relied on.**	**Para 11**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 11023-11026 of 2009.

From the Judgment & Orders dated 30.5.2009, 25.9.2009 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 8794, RP 337 in CWP 8794 of 2009, Civil Writ Petition No. 8761 of 2009, RP No. 338 in CWP 8761 of 2009.

Dinesh Verma, Rajat Sharma, R.V. Kameshwaran for the Petitioners.

The Order of the Court was delivered by

ORDER

DR. B.S. CHAUHAN, J. 1. These special leave petitions reveal a very sorry state of affair and make it evident that litigants are eager to abuse the process of the Court, having no idea for the law of limitation/delay and laches.

2. These special leave petitions have been filed against the judgment and order of the Punjab and Haryana High Court dated 30.5.2009 by which the Civil Writ Petition Nos. 8794 of 2009 and 8761 of 2009 have been dismissed only on the ground of delay. The Review Petitions were filed which were also time barred by 48 days. The same stood dismissed vide order dated 25.9.2009. These special leave petitions have been filed with an inordinate delay of 172 days. Petitioners sought relief of quashing the land acquisition proceedings in respect of which the award had been made under Section 11 of the Land Acquisition Act, 1894 (hereinafter called as "Act 1894") on 27.4.2004.

3. The facts and circumstances giving rise to these petitions are that the respondent - State of Haryana issued a notification under Section 4 of Act 1894 in respect of a huge chunk of land including some land of the petitioners on 2nd May, 2001. Substance of the said notification was published in two newspapers on 5.5.2001. The respondents issued a declaration under Section 6 of Act 1894 on 30.4.2002 and the substance thereof was also published in local newspapers immediately thereafter. The Land Acquisition Collector made an award on 27.4.2004 and in pursuance thereof, the respondents took possession of the land and removed the trees from the land of the petitioners.

4. Petitioners approached the High Court by filing Writ

Petition Nos. 8794/2009 and 8761/2009 on 28.5.2009 praying for quashing the notification dated 2.5.2001 under Section 4 and declaration dated 30.4.2002 under Section 6 of Act 1894. The High Court dismissed both the petitions on the ground of delay observing that the award under Section 11 of Act 1894 had already been made on 27.4.2004. Being aggrieved, petitioners filed Review Petitions with 48 days' delay which have also been dismissed vide order dated 25.9.2009. These petitions have been filed with 172 days' delay. There is further delay of 37 days' in re-filing of the same.

5. The issue involved in these petitions is as to whether the acquisition proceedings can be challenged at a belated stage. The issue is no more *res integra* as the issue has been considered by this Court time and again.

6. When a person challenges Section 4 Notification on any ground, it should be challenged within a reasonable period, and if the acquisition is challenged at a belated stage, the petition deserves to be dismissed only on this count. (Vide *Hari Singh & Ors. Vs. State of U.P.,* AIR 1984 SC 1020).

7. A Constitution Bench of this Court, in *Aflatoon & Ors. Vs. Lt. Governor, Delhi & Ors.* AIR 1974 SC 2077, while dealing with the issue, observed as under:–

> "....to have sat on the fence and allowed the government to complete the acquisition on the basis that notification under Section 4 and the declaration under Section 6 were valid and then to attack the notification on the grounds which were available to them at the time when the notification was published, would be putting a premium of dilatory tactics. The writ petitions are liable to be dismissed on the ground of laches and delay on the part of the petitioner."

8. Same view has been reiterated by this Court observing that acquisition proceedings should be challenged before the same attain finality, in *State of Mysore Vs. V.K. Kangan* AIR

1975 SC 2190; *P.T. Girdharan Prasad Missir Vs. State of Bihar* (1980) 2 SCC 83; *Bhoop Singh Vs. Union of India* AIR 1992 SC 1414; *State of Orissa Vs. Dhobei Sethi & Anr.* (1995) 5 SCC 583; *State of Maharashtra Vs. Digambar* AIR 1995 SC 1991; *State of Tamil Nadu Vs. L. Krishnan* AIR 1996 SC 497; and *C. Padma & Ors. Vs. Dy. Secretary to Govt. of Tamil Nadu & Ors.* (1997) 2 SCC 627.

9. In *Municipal Corporation of Greater Bombay Vs. Industrial Development Investment Co. Pvt. Ltd. & Ors.* AIR 1997 SC 482, this Court observed as under:–

> "If the interested person allows the grass to grow under his feet by allowing the acquisition proceedings to go on and reach its terminus in the award and possession is taken in furtherance thereof and vest in the State free from all encumbrances, the *slumbered interested person would be told off the gates of the Court that his grievance should not be entertained when there is inordinate delay in filing the writ petition* and when all steps taken in the acquisition proceedings have become final, the Court should be loath to quash the notifications. (Emphasis added)

10. Similar view has been reiterated in *State of Rajasthan & Ors. Vs. D.R. Laxmi & Ors.,* (1996) 6 SCC 445, wherein this Court has held that even the void proceedings need not be set at naught if the party has not approached the Court within reasonable time, as judicial review is not permissible at a belated stage. This Court held as under:

> "……Delay in challenging the notification was fatal and writ petition entails with dismissal on grounds of laches. It is thus, well-settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have become final, the Court should be loath to quash the notifications……. *The order or action, if ultra vires the power, becomes void and it does not confer any right. But the action need not*

necessarily be set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void. The net result is that extraordinary jurisdiction of the Court may not be exercised in such circumstances." (Emphasis Added)

11. Similar view has been reiterated by this Court in *Northern Indian Glass Industries Vs. Jaswant Singh & Ors.* AIR 2003 SC 234; and *Haryana State Handloom & Handicrafts Corporation Ltd. Vs. Jain School Society* AIR 2004 SC 850.

12. In the instant case, it is not the case of the petitioners that they had not been aware of acquisition proceedings as the only ground taken in the writ petition has been that substance of the notification under Section 4 and declaration under Section 6 of Act 1894 had been published in the newspapers having no wide circulation. Even if, the submission made by the petitioners is accepted, it cannot be presumed that they could not be aware of acquisition proceedings for the reason that very huge chunk of land belonging to large number of tenure holders had been notified for acquisition. Therefore, it should have been a talk of the town. Thus, it cannot be presumed that petitioners could not have knowledge of the acquisition proceedings.

13. In such circumstances, we do not find any fault with the impugned judgment and order. The petitions are dismissed on the ground of delay.

N.J. Petitions dismissed.

STATE OF MAHARASHTRA

v.

M/S. HINDUSTAN CONSTRUCTION COMPANY LTD.

(Civil Appeal No. 2928 of 2010)

APRIL 1, 2010

[R.V. RAVEENDRAN AND R.M. LODHA, JJ.]

Arbitration and Conciliation Act, 1996 – ss. 34 and 37 – Disputes between respondent-company and appellant-State – Arbitral award – Application by appellant u/s. 34 for setting aside the award rejected – Appeal by appellant u/s. 37 – Subsequent application by appellant for amendment in memorandum of appeal to raise additional/new grounds – Rejected by High Court on the reasoning that new grounds for setting aside the arbitral award could not be permitted to be raised beyond the period of limitation prescribed in s. 34(3) – Justification of – Held: On facts, justified – The grounds sought to be added in the memorandum of arbitration appeal by way of amendment were absolutely new grounds for which there was no foundation in the application for setting aside the award – Such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration application for setting aside the award – Moreover, no prayer was made by appellant for amendment in the application u/s. 34 before the concerned court or at the appellate stage – In the circumstances, it cannot be said that discretion exercised by the High Court in refusing to grant leave to appellant to amend the memorandum of arbitration appeal suffers from any illegality.

Pleadings – Amendment of – Power of appellate court to grant leave to amend the memorandum of appeal – Discussed – Code of Civil Procedure, 1908 – Order XLI, rr. 2 and 3 and Order VI, r. 17.

Respondent construction company had entered into a contract with the appellant-State. Disputes arose between the parties in respect of the work carried out by respondent, which were referred to the Arbitral Tribunal. The Tribunal awarded a specified amount to the respondent. Appellant filed an application under s.34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award on various grounds viz., waiver, acquiescence, delay, laches and *res judicata*. The District Judge rejected the application for setting aside the award.

The appellant filed arbitration appeal under s.37 of the Act before the High Court. Subsequently, the appellant filed an application seeking amendment to the memorandum of arbitration appeal by adding new grounds. The application for amendment was rejected by the High Court on the reasoning that the new grounds for setting aside the arbitral award could not be permitted to be raised beyond the period of limitation prescribed in s.34(3) of the Act.

In appeal to this Court, the question which arose for consideration was whether in an appeal under Section 37 of the Act from an order refusing to set aside the arbitral award, an amendment in the memorandum of appeal to raise additional/new grounds can be permitted.

Dismissing the appeal, the Court

HELD: 1.1. Pleadings and particulars are required to enable the court to decide true rights of the parties in trial. Amendment in the pleadings is a matter of procedure. Grant or refusal thereof is in the discretion of the court. But like any other discretion, such discretion has to be exercised consistent with settled legal principles. Insofar as Code of Civil Procedure, 1908 is concerned, Order VI Rule 17 thereof provides for amendment of pleadings. It

says that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. [Paras 14 and 15] [56-E; 57-B-C]

1.2. Order XLI Rule 2 CPC makes a provision that the appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court. Order XLI Rule 3 CPC provides that where the memorandum of appeal is not drawn up as prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended. The aforesaid provisions in CPC leave no manner of doubt that the appellate court has power to grant leave to amend the memorandum of appeal. [Paras 20, 21] [60-F-H; 61-A-B]

1.3. No doubt an application for setting aside an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 has to be made within time prescribed under sub-section (3) i.e., within three months and a further period of thirty days on sufficient cause being shown and not thereafter. However, if incorporation of additional grounds by way of amendment in the application under Section 34 is treated to tantamount to filing a fresh application in all situations and circumstances, it would follow that no amendment in the application for setting aside the award, howsoever material or relevant it may be for consideration by the Court, can be added nor existing ground amended after the prescribed period of limitation has expired although application for setting aside the arbitral award has been

made in time. This is not and could not have been the intention of Legislature while enacting Section 34. Moreso, Section 34(2)(b) enables the Court to set aside the arbitral award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India. The words in Clause (b) "the Court finds that" do enable the Court, where the application under Section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interest of justice. [Para 25][64-F-H; 65-A-C]

1.4. The Courts would, as a rule, decline to allow amendments, if a fresh claim on the proposed amendments would be barred by limitation on the date of application but that would be a factor for consideration in exercise of the discretion as to whether leave to amend should be granted but that does not affect the power of the court to order it, if that is required in the interest of justice. There is no reason why the same rule should not be applied when the Court is called upon to consider the application for amendment of grounds in the application for setting aside the arbitral award or the amendment in the grounds of appeal under Section 37 of the Act. However a fine distinction between what is permissible amendment and what may be impermissible, in sound exercise of judicial discretion, must be kept in mind. Every amendment in the application for setting aside an arbitral award cannot be taken as fresh application. [Paras 25, 26][65-C-E; 66-C]

L.J. Leach and Company Ltd., v. Jardine Skinner and *Co.* **(1957) SCR 438;** *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil and Others* **(1957) SCR 595;** *Jai Jai Ram*

Manohar Lal v. National Building Material Supply, Gurgaon **(1969) 1 SCC 869;** *Vastu Invest & Holdings Pvt. Ltd., Mumbai v. Gujarat Lease Financing Ltd., Mumbai* **(2001) 2 Arb. LR 315 (Bombay);** *Union of India v. Popular Construction Co.* **(2001) 8 SCC 470;** *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and Others* **(2008) 7 SCC 169;** *Madan Lal v. Sunder Lal and Another*; **AIR 1967 SC 1233;** *Bijendra Nath Srivastava* v. *Mayank Srivastava and others* **(1994) 6 SCC 117;** *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi* **1987 (Supp.) SCC 93;** *Ganesh Trading Co. v. Moji Ram* **(1978) 2 SCR 614;** *Clarapede & Company v. Commercial Union Association* **Vol XXXII Vol XXXII The Weekly Reporter 262;** *Charan Das and Others v. Amir Khan and Others* **(1920) LR 47 IA 255 and** *Harcharan v. State of Haryana* **(1982) 3 SCC 408, referred to.**

2. In the present case, in the application for setting aside the award, appellant set up five grounds viz., waiver, acquiescence, delay, laches and *res judicata.* The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the concerned court or at the appellate stage. As a matter of fact, the High Court observed that the grounds of appeal which are now sought to be advanced were not originally raised in the arbitration petition and that the amendment that is sought to be effected is not even to the grounds contained in the application under Section 34 but to the memo of appeal. In the circumstances, it cannot be said that discretion exercised by the High Court in refusing to

grant leave to appellant to amend the memorandum of arbitration appeal suffers from any illegality. [Para 28][66-F-H; 67-A-C]

Case Law Reference:

(1957) SCR 438	**referred to**	**Para 10**
(1957) SCR 595	**referred to**	**Para 10**
(1969) 1 SCC 869	**referred to**	**Para 10**
(2001) 2 Arb. LR 315 (Bom)	**referred to**	**Para 11**
(2001) 8 SCC 470	**referred to**	**Para 12**
(2008) 7 SCC 169	**referred to**	**Para 12**
AIR 1967 SC 1233	**referred to**	**Para 12**
(1994) 6 SCC 117	**referred to**	**Para 12**
1987 (Supp.) SCC 93	**referred to**	**Para 12**
(1978) 2 SCR 614	**referred to**	**Para 14**
Vol XXXII Vol XXXII The Weekly Reporter 262	**referred to**	**Para 15**
(1920) LR 47 IA 255	**referred to**	**Para 16**
(1982) 3 SCC 408	**referred to**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2928 of 2010.

From the Judgment & Order dated 9.1.2009 of the High Court of Judicature at Bombay in Civil Application No. 21 of 2008 in Arbitration Appeal No. 6 of 2007 in Arbitration Application No. 44 of 2003.

Shekhar Naphade, Sanjay V. Kharde, Chinmoy A. Khaladkar Asha Gopalan Nair, Subhangi Tuli for the Appellant.

Ashok H. Desai, Bhavesh V. Panjvani, Sameer Parekh, D.P. Mohanty Ranjeeta Rohatgi, Rajat Nair (for Parekh & Co.) for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. The question presented in this appeal by special leave is : whether in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') from an order refusing to set aside the award, an amendment in the memorandum of appeal to raise additional/new grounds can be permitted.

3. M/s. Hindustan Construction Company Limited (respondent) and the State of Maharashtra (Irrigation Department, the Executive Engineer - appellant) entered into a contract on March 14, 1992 being ICB Contract No. II/1992 for the construction of civil work of Pressure Shafts and Power House Complex at Koyana Hydro Electric Project, Stage-IV. The contract work was completed by respondent within the extended period i.e., by March 31, 2000. However, it appears that disputes arose between the parties in respect of the work carried out by respondent in relation to (a) revision of percentages for hidden expenses, over breaks and profit for further additional cases of extra items/rate revision; (b) claim for extended stay at site; (c) revision of rate for Pressure Shaft excavation; (d) fixation of new rate on account of variation in the item of Transformer hall arch concrete; and (e) fixation of new rate on account of variation in the item of Transformer Hall excavation. These disputes were referred to the Arbitral Tribunal. The Arbitral Tribunal made award on June 26, 2003 and a signed copy thereof was forwarded to the appellant along with the letter dated June 30, 2003. By the said award the Arbitral Tribunal awarded an amount of Rs. 17,81,25,152/- to respondent and further directed that if the said amount was not

paid by appellant within two months from the date of the award, then the awarded sum shall carry an interest at the rate of 15 per cent per annum from June 27, 2003.

4. Not satisfied with the award dated June 26, 2003, appellant made an arbitration application on August 22, 2003 for setting aside the award. The appellant also relied upon Sections 28, 33 and 16 of 1996 Act in assailing the award being in contravention of the provisions of 1996 Act and set up the grounds viz., (i) waiver (final bill was accepted by respondent without protest and the claims are not arbitrable); (ii) acquiescence (contract ceased to exist after accepting final payment which was made on March 30, 2001 after completion of maintenance period); (iii) delay (claims are time barred under the provisions of the Limitation Act); (iv) laches (respondent's Arbitrator was not appointed before expiry of 30 days from the defect liability and, therefore, the claimant was not entitled to bring claim Nos. 3, 4 and 5 to arbitration) and (v) *res judicata* (claim No. 1 was referred to the earlier Arbitration Panel in the year 1998 and hence the said claim is barred by principles of *res judicata*).

5. The District Judge, Ratnagiri vide order dated June 29, 2006 rejected the application for setting aside the award dated June 26, 2003.

6. The appellant aggrieved thereby preferred an appeal under Section 37 of 1996 Act on February 6, 2007 before the High Court of Judicature at Bombay.

7. On June 23, 2008, appellant made an application before the High Court seeking amendment to the memorandum of arbitration appeal by adding additional grounds, namely, that the Arbitral Tribunal exceeded jurisdiction in awarding revision of percentage for hidden expenses over-heads and profits for further additional items (Claim No. 1); that the Arbitral Tribunal acted beyond the scope of arbitration with regard to extended stay charges (Claim No. 2); the Arbitral Tribunal exceeded

jurisdiction and, in fact, committed error of jurisdiction in granting claim pertaining to revision of rate for pressure shaft excavation and mis-conducted themselves in awarding escalation considering March 2000 Indices.

8. The aforesaid application was opposed by respondent on diverse grounds, inter alia, that the additional grounds sought to be incorporated in the memorandum of arbitration appeal cannot be allowed at this stage after the expiry of period prescribed in Section 34(3) as that would tantamount to entertaining a challenge after and beyond the period of limitation and that the award has not been challenged by the appellant on any of the grounds sought to be urged/added through the amendment application.

9. On January 9, 2009, learned Single Judge dismissed the application for amendment in the memorandum of arbitration appeal. Learned Single Judge held that the ground not initially raised in a petition for setting aside the arbitral award cannot be permitted to be raised beyond the period of limitation prescribed in Section 34(3). It was also observed that the proposed amendments in the memorandum of arbitration appeal are not even sought to the grounds contained in the application under Section 34.

10. Mr. Shekhar Naphade, learned senior counsel for the appellant submitted that there is no nexus between pleadings and limitation and it is the relief that determines the limitation. The grounds/objections in the petition under Section 34 of 1996 Act are in the nature of pleadings and any amendment thereto must be guided by the same principles which govern amendments to the pleadings. He heavily relied upon the decisions of this Court in *L. J. Leach and Company Ltd., v. Jardine Skinner* and *Co.*[1] *and Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil and Others*[2] in support of his

1. (1957) SCR 438.
2. (1957) SCR 595.

contention that delay does not affect the power of the court to order amendments if that is required in the interest of justice. Learned senior counsel also placed reliance upon decision of this Court in *Jai Jai Ram Manohar Lal* v. *National Building Material Supply, Gurgaon*[3] and submitted that the Court always grants leave to amend pleadings of a party, unless it is mala fide or that the other side can not be compensated for by an order of costs.

11. Mr. Shekhar Naphade submitted that although the Arbitral Tribunal is bound to decide in accordance with the terms of the contract, as mandated by Section 28 of 1996 Act, in the present case respondent got the relief from the Arbitral Tribunal beyond the terms of contract and, therefore, in the interest of justice, the amendments sought for by the appellant for addition of grounds in the memorandum of arbitration appeal ought to have been granted. He also contended that decision of the Division Bench of Bombay High Court in *Vastu Invest & Holdings Pvt. Ltd., Mumbai v. Gujarat Lease Financing Ltd., Mumbai*[4] does not lay down the correct law.

12. Mr. Ashok Desai, learned senior counsel for the respondent, on the other hand, submitted that recourse to a court against an arbitral award could be made only by way of an application under Section 34 for setting aside such award and sub-section (3) thereof stipulates that such an application may not be made after three months have elapsed from the date on which the party making the application has received the arbitral award. Proviso to Section 34(3) empowers the Court, if satisfied of sufficient cause, to entertain the application for setting aside award within a further period of thirty days but not thereafter. He would submit that the time limit prescribed under Section 34 to challenge an award is absolute and unextendible by Court. He relied upon two decisions of this Court in this regard, namely (i) *Union of India* v. *Popular*

3. (1969) 1 SCC 595.

4. 2001 (2) Arb. LR 315 (Bombay).

Construction Co.[5] and *Consolidated Engineering Enterprises* v. *Principal Secretary, Irrigation Department and Others*[6]. He submitted that Bombay High Court in *Vastu Invest and Holdings Private* Limited[4] has rightly held that new ground/s cannot be permitted to be introduced into an arbitration petition for setting aside of the award beyond the period of four months stipulated in Section 34(3) of the 1996 Act. He also relied upon decisions of this Court in *Madan Lal* v. *Sunder Lal and Another*[7]; *Bijendra Nath Srivastava* v. *Mayank Srivastava and others*[8] and *Dhartipakar Madan Lal Agarwal* v. *Rajiv Gandhi*[9].

13. Mr. Ashok Desai submitted that more than five years after the award, the appellant was not entitled to seek amendment in the memorandum of arbitration appeal by adding new grounds which were not taken in the application for setting aside the award. He, thus, submitted that High Court was not unjustified in rejecting the application for amendment in the memorandum of arbitration appeal.

14. Pleadings and particulars are required to enable the court to decide true rights of the parties in trial. Amendment in the pleadings is a matter of procedure. Grant or refusal thereof is in the discretion of the court. But like any other discretion, such discretion has to be exercised consistent with settled legal principles. In *Ganesh Trading Co. v. Moji Ram*[10], this Court stated:

> "Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleading in civil cases are meant to give to each side intimation of the case of the other so that it may be met,

5. (2001) 8 SCC 470.

6. (2008) 7 SCC 169.

7. AIR 1967 SC 1233.

8. (1994) 6 SCC 117.

9. 1987 (Supp.) SCC 93.

10. (1978) 2 SCR 614.

to enable Courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take."

15. Insofar as Code of Civil Procedure, 1908 (for short 'CPC') is concerned, Order VI Rule 17 provides for amendment of pleadings. It says that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The matters relating to amendment of pleadings have come up for consideration before courts from time to time. As far back as in 1884 in *Clarapede & Company* v. *Commercial Union Association*[11] - an appeal that came up before Court of Appeal, Brett M.R. stated:

"..... The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made....."

16. In *Charan Das and Others* v. *Amir Khan and Others*[12], Privy Council exposited the legal position that although power of a Court to amend the plaint in a suit should not as a rule be exercised where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time, yet there are cases in which that consideration is outweighed by the special circumstances of the case.

17. A four-Judge Bench of this Court in *L.J. Leach and Company Ltd.*, v. *Jardine Skinner and Co.*[1] while dealing with the prayer for amendment of the plaint made before this Court whereby plaintiffs sought to raise, in the alternative, a claim for damages for breach of contract for non-delivery of the goods relied upon the decision of Privy Council in *Charan Das & Others*[12]; granted leave at that stage and held:

"It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendments should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice."

18. Again, a three-Judge Bench of this Court in *Pirgonda Hongonda Patil*[2] in the matter of amendment of the plaint at appellate stage reiterated the legal principles exposited in *L.J. Leach and Company Ltd.*[1] and *Charan Das and others*[12]. This Court observed:

"Recently, we have had occasion to consider a similar prayer for amendment in *L.J. Leach & Co.* v. *Jardine Skinner & Co., 1957 SCR 438,* where, in allowing an amendment of the plaint in an appeal before us, we said: "It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendments should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice." These observations were made in a case where damages were originally claimed on the footing of conversion of goods. We held, in agreement with the learned Judges of the High Court, that on the evidence the claim for damages on the footing of conversion must fail. The plaintiffs then applied to this Court for amendment of the plaint by raising, in the

11. Vol XXXII The Weekly Reporter 262.

12. (1920) LR 47 IA 255.

alternative, a claim for damages for breach of contract for non-delivery of the goods. The application was resisted by the respondents and one of the grounds of resistance was that the period of limitation had expired. We accepted as correct the decision in *Charan Das* v. *Amir Khan, (1920) LR 47 IA 255* which laid down that "though there was full power to make the amendment, such a power should not as a rule be exercised where the effect was to take away from a defendant a legal right which had accrued to him by lapse of time; yet there were cases where such considerations were outweighed by the special circumstances of the case".

As pointed out in *Charan Das case* the power exercised was undoubtedly one within the discretion of the learned Judges. All that can be urged is that the discretion was exercised on a wrong principle. We do not think that it was so exercised in the present case. The facts of the present case are very similar to those of the case before Their Lordships of the Privy Council. In the latter, the respondents sued for a declaration of their right of pre-emption over certain land, a form of suit which would not lie having regard to the proviso to s. 42 of the Specific Relief Act (1 of 1877). The trial Judge and the first appellate court refused to allow the plaint to be amended by claiming possession on pre-emption, since the time had expired for bringing a suit to enforce the right. Upon a second appeal the court allowed the amendment to be made, there being no ground for suspecting that the plaintiffs had not acted in good faith, and the proposed amendment not altering the nature of the reliefs sought. In the case before us, there was a similar defect in the plaint, and the trial Judge refused to allow the plaint to be amended on the ground that the period of limitation for a suit under O. XXI, r. 103 of the Code of Civil Procedure, had expired. The learned Judges of the High Court rightly pointed out that the mistake in the trial Court was more that of the learned

pleader and the proposed amendment did not alter the nature of the reliefs sought."

19. In *Jai Jai Ram Manohar Lal*[3], this Court was concerned with a matter wherein amendment in the plaint was refused on the ground that the amendment could not take effect retrospectively and on the date of the amendment the action was barred by the law of limitation. It was held:

> "....Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertance or even infraction of the Rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

This Court further stated:

> "..... The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations."

20. Do the principles relating to amendment of pleadings in original proceedings apply to the amendment in the grounds of appeal? Order XLI Rule 2 CPC makes a provision that the appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court. Order XLI Rule 3 CPC provides that where the memorandum of appeal is not drawn up as prescribed, it may

be rejected, or be returned to the appellant for the purpose of being amended.

21. The aforesaid provisions in CPC leave no manner of doubt that the appellate court has power to grant leave to amend the memorandum of appeal. As a matter of fact, in *Harcharan v. State of Haryana*[13], this Court observed that the memorandum of appeal has same position like the plaint in the suit. This Court said:

> ".....When an appeal is preferred the memorandum of appeal has the same position like the plaint in a suit because plaintiff is held to the case pleaded in the plaint. In the case of memorandum of appeal same situation obtains in view of Order 41, Rule 3. The appellant is confined to and also would be held to the memorandum of appeal. To overcome any contention that such is not the pleading the appellant sought the amendment....."

22. In light of the aforesaid legal position governing the amendment of pleadings in the suit and memorandum of appeal, the immediate question to be considered is: whether the same principles must govern the amendment of an application for setting aside the award or for that matter, amendment in an appeal under Section 37 of 1996 Act. In *Madan Lal*[7], this Court with reference to the provisions of the Arbitration Act, 1940 (for short, '1940 Act') stated that under the scheme of 1940 Act there has to be an application to set aside the award; such application has to be made within the period of limitation and any objection to the award after the limitation has elapsed cannot be entertained. This Court observed:

> "**8.** It is clear, therefore, from the scheme of the Act that if a party wants an award to be set aside on any of the

13. (1982) 3 SCC 408.

> grounds mentioned in S. 30 it must apply within 30 days of the date of service of notice of filing of the award as provided in Art. 158 of the Limitation Act. If no such application is made the award cannot be set aside on any of the grounds specified in S. 30 of the Act. It may be conceded that there is no special form prescribed for making such an application and in an appropriate case an objection of the type made in this case may be treated as such an application, if it is filed within the period of limitation. But if an objection like this has been filed after the period of limitation it cannot be treated as an application to set aside the award, for if it is so treated it will be barred by limitation.
>
> **9.** It is not in dispute in the present case that the objections raised by the appellant were covered by S. 30 of the Act, and though the appellant did not pray for setting aside the award in his objection that was what he really wanted the court to do after hearing his objection. As in the present case the objection was filed more than 30 days after the notice it could not be treated as an application for setting the award, for it would then be barred by limitation. The position thus is that in the present case there was no application to set aside the award on grounds mentioned in S. 30 within the period of limitation and therefore the court could not set aside the award on those grounds. There can be no doubt on the scheme of the Act that any objection even in the nature of a written-statement which falls under S. 30 cannot be considered by the court unless such an objection is made within the period of limitation (namely, 30 days), though if such an objection is made within limitation that objection may in appropriate cases be treated as an application for setting aside the award."

23. In *Popular Construction Company*[5] this Court, while considering the question whether the provisions of Section 5 of Limitation Act, 1963 are applicable to an application

challenging an award under Section 34 of the 1996 Act, held:

"12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result.

13. Apart from the language, "express exclusion" may follow from the scheme and object of the special or local law:

> "[E]ven in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation."

14. Here the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendible by court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995 which preceded the 1996 Act stated as one of its main objectives the need "to minimise the supervisory role of courts in the arbitral process". This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms:

> "5. *Extent of judicial intervention*.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

15. The "Part" referred to in Section 5 is Part I of the 1996 Act which deals with domestic arbitrations. Section 34 is contained in Part I and is therefore subject to the sweep of the prohibition contained in Section 5 of the 1996 Act."

24. Again in *Consolidated Engineering Enterprises6,* this Court observed:

"19. A bare reading of sub-section (3) of Section 34 read with the proviso makes it abundantly clear that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 will have to be made within three months. The period can further be extended, on sufficient cause being shown, by another period of 30 days but not thereafter. It means that as far as application for setting aside the award is concerned, the period of limitation prescribed is three months which can be extended by another period of 30 days, on sufficient cause being shown to the satisfaction of the court."

25. There is no doubt that application for setting aside an arbitral award under Section 34 of 1996 Act has to be made within time prescribed under sub-section (3) i.e., within three months and a further period of thirty days on sufficient cause being shown and not thereafter. Whether incorporation of additional grounds by way of amendment in the application under Section 34 tantamounts to filing a fresh application in all situations and circumstances. If that were to be treated so, it would follow that no amendment in the application for setting aside the award howsoever material or relevant it may be for consideration by the Court can be added nor existing ground amended after the prescribed period of limitation has expired although application for setting aside the arbitral award has

been made in time. This is not and could not have been the intention of Legislature while enacting Section 34. Moreso, Section 34(2)(b) enables the Court to set aside the arbitral award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India. The words in Clause (b) "the Court finds that" do enable the Court, where the application under Section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interest of justice. L.J. Leach and Company Ltd.[1] and Pirgonda Hongonda Patil[2], seem to enshrine clearly that courts would, as a rule, decline to allow amendments, if a fresh claim on the proposed amendments would be barred by limitation on the date of application but that would be a factor for consideration in exercise of the discretion as to whether leave to amend should be granted but that does not affect the power of the court to order it, if that is required in the interest of justice. There is no reason why the same rule should not be applied when the Court is called upon to consider the application for amendment of grounds in the application for setting aside the arbitral award or the amendment in the grounds of appeal under Section 37 of 1996 Act.

26. It is true that, the Division Bench of Bombay High Court in *Vastu Invest and Holdings Pvt. Ltd.*[4] held that independent ground of challenge to the arbitral award cannot be entertained after the period of three months plus the grace period of thirty days as provided in the proviso of sub-section (3) of Section 34, but, in our view, by 'an independent ground' the Division Bench meant a ground amounting to a fresh application for setting aside an arbitral award. The dictum in the aforesaid decision was not intended to lay down an absolute rule that in no case an amendment in the application for setting aside the arbitral award can be made after expiry of period of limitation provided therein. Insofar as *Bijendra Nath Srivastava*[8] is

concerned, this Court did not agree with the view of the High Court that the trial court did not act on any wrong principle while allowing the amendments to the objections for setting aside award under 1940 Act. This Court highlighted the distinction between 'material facts' and 'material particulars' and observed that amendments sought related to material facts which could not have been allowed after expiry of limitation. Having held so, this Court even then went into the merits of objection introduced by way of amendment. In our view, a fine distinction between what is permissible amendment and what may be impermissible, in sound exercise of judicial discretion, must be kept in mind. Every amendment in the application for setting aside an arbitral award cannot be taken as fresh application.

27. In the case of *Dhartipakar Madan Lal Agarwal*[9] this Court held that a new ground cannot be raised or inserted in an election petition by way of an amendment after the expiry of the period of limitation. It may not be proper to extend the principles enunciated in *Dhartipakar Madan Lal Agarwal*[9] in the context of the provisions contained in Section 81 of the Representation of the People Act, 1951 to an application seeking amendment to the application under Section 34 for setting aside an arbitral award or an appeal under Section 37 of 1996 Act for the reasons we have already indicated above.

28. The question then arises, whether in the facts and circumstances of the present case, the High Court committed any error in rejecting the appellant's application for addition of new grounds in the memorandum of arbitration appeal. As noticed above, in the application for setting aside the award, appellant set up only five grounds viz., waiver, acquiescence, delay, laches and *res judicata*. The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these

grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the concerned court or at the appellate stage. As a matter of fact, the learned Single Judge in paragraph 6 of the impugned order has observed that the grounds of appeal which are now sought to be advanced were not originally raised in the arbitration petition and that the amendment that is sought to be effected is not even to the grounds contained in the application under Section 34 but to the memo of appeal. In the circumstances, it cannot be said that discretion exercised by learned Single Judge in refusing to grant leave to appellant to amend the memorandum of arbitration appeal suffers from any illegality.

29. The result is, appeal has no force and is dismissed with no order as to costs.

B.B.B. Appeal dismissed.

SUVARNALATA

v.

MOHANANANDRAO DESHMUKH & ANR.

(Civil No. 2994 of 2010)

APRIL 5, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Hindu Marriage Act, 1955 – ss. 13(1)(iii) and 25 – Petition for divorce by husband – Alleging mental disorder of wife – Decree of divorce by Family Court – The order affirmed by High Court – On appeal, wife not challenging decree of divorce, but findings relating to mental disorder – Also claiming lump sum amount of Rs. 75 lakhs towards permanent alimony – Held: Findings relating to alleged mental disorder not acceptable – Claim for permanent alimony justified – Matter remitted to Family Court to ascertain the estimated income of husband and thereafter to send the same to Supreme Court for final order.

Respondent-husband filed petition for divorce in Family Court on the ground that appellant-wife was a patient of Schizophrenia. Family Court passed decree of divorce. The order was affirmed by High Court. Review petition against the same was dismissed.

In appeal to this court, notice was issued only on the question of the findings relating to the mental disorder of the appellant and on the question of payment of lump-sum amount by the husband, as the appellant stated that she did not wish to challenge the final decree of divorce. Appellant-wife prayed for Rs. 75 lakhs as a lump sum amount as permanent alimony.

Adjourning the matter, and in the meanwhile remitting the matter to Family Court for ascertaining the estimated income of respondent, the Court

HELD: 1. The findings regarding the appellant's alleged mental disorder/schizophrenia is not acceptable and could not be agreed to and such findings cannot be sustained and have been rightly rejected by the Judge of the Family Court. The Court is inclined to accept the subsequent finding arrived at by the same Judge of the Family Court, in the custody proceedings who had decreed the suit of respondent No.1 for divorce. [Para 10] [69-C-D]

2.1. The prayer for permanent alimony u/s. 25 of the Hindu Marriage Act is not only maintainable but also justified in the facts and circumstances of the instant case. The list of assets owned by respondent No.1, set out as Annexure-1 to the rejoinder affidavit, indicates that respondent No.1 is sufficiently well-off to provide for a suitable lump sum amount towards permanent alimony as maintenance to the appellant and her daughter, though may not be to the extent as claimed by the appellant. [Para 11] [73-E-H]

2.2. Since it is not possible for this Court, on the general information supplied, to arrive at the estimated income of respondent No.1, it is, therefore, ordered that the appeal be kept pending for a period of three months in this Court and the records be remitted to the Judge, Family Court to take additional evidence relating to the estimated income of respondent No.1, keeping in mind the list of assets annexed by the appellant to her Rejoinder Affidavit and to send back the same to this Court for final disposal of the instant appeal. [Para 11] [74-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2994 of 2010.

From the Judgment & Order dated 18.11.2003 of the High Court of Judicature of Bombay at Aurangabad in Family Court Appeal No. 30 of 2003 and dated 30.8.2005 in Review Petition

No. 9108 of 2005.

Nandita Rao, Supriya Yadav Kavita Wadia for the Appellant.

Anantbhushan Kanade, Aribam Guneshwar Sharma, N.L. Yadav for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. In this appeal the appellant has challenged two orders passed by the Aurangabad Bench of the Bombay High Court. The first is the judgment and order dated 18th November, 2003, dismissing Family Court Appeal No. 30 of 2003 and the second is the judgment and order dated 30th August, 2005, passed in Review Petition No. 9108 of 2005, dismissing the Review Petition as well.

3. At the very beginning it may be mentioned that the respondent-husband filed a petition for divorce in the Family Court at Aurangabad on 29th July, 1999, on the ground that the appellant therein is a patient of schizophrenia. The said petition came to be allowed by the Judge, Family Court and decree of divorce was passed in favour of the respondent-husband.

4. Aggrieved by the decree, the appellant moved the High Court which affirmed the judgment and decree of the Family Court.

5. This appeal arises out of Special Leave Petition (C) No. 9482 of 2007 and when notice was issued on 14th May, 2007, the same was limited to the question of the findings of the Courts below relating to the mental disorder of the appellant. Notice was also issued as to payment of a lump sum amount by the respondent-husband to the appellant since it was expressly stated on her behalf that she did not wish to challenge the final decree of divorce granted in favour of the respondent-husband. When the matter came up for final hearing, Ms.

Nandita Rao, learned Advocate appearing for the appellant, urged that the respondent has remarried after obtaining the decree of divorce and as a result, since the appellant did not wish to affect the respondent's second marriage, she had chosen to confine her challenge to the judgments of the Courts below to the findings on issue No.2 alone framed by the Family Court, namely, as to whether she is suffering from any mental illness? After referring to the findings of the Judge, Family Court on the aforesaid issue, wherein the case of the respondent-husband had been accepted and the issue was affirmed in the affirmative, Ms. Rao then referred to the judgment passed by the same learned Judge of the Family Court at Aurangabad on 28th December, 2002, on the question of custody of the minor daughter, Naveli, born of the marriage between the parties, being Petition A-60 of 2001 filed by the respondent-husband. Ms. Rao pointed out from the judgment that the stand of the respondent-husband that he had better credentials to be granted custody of the minor daughter than the appellant, was negated by the same learned Judge after taking into consideration the same evidence alleging that the appellant suffered from schizophrenia. Ms. Rao pointed out that the same learned Judge realized that the earlier order passed by her in the divorce proceedings had been obtained on a mis-representation of facts which amounted to fraudulent behaviour on the part of the respondent-husband. Ms. Rao pointed out that the learned Judge of the Family Court observed that after seeing the appellant in Court at the time of trial and at the time when she gave evidence, it was difficult for her to come to the conclusion that the appellant was schizophrenic. Another circumstance mentioned in the judgment of the Family Court in the custody matter relating to the insertion of Copper-T by Dr. Sakulkar, a Gynaecologist, fully negated the respondent's claim that during the period in question the appellant had refused to cohabit with the respondent which amounted to cruelty on her part towards the respondent. Ms. Rao submitted that since the respondent had remarried, the appellant-wife did not wish to go into the details and was, therefore, confining her

submissions in the appeal to the quantum of payment of a lump sum amount by way of permanent alimony.

6. Ms. Rao submitted that the respondent was leading a luxurious life and it was only incumbent for the respondent to provide a residence to the appellant and their minor daughter, and to pay a sum of Rs.75 lakhs by way of permanent alimony. She prayed for an order accordingly.

7. Appearing for the respondent-husband, Mr. Ananthbhushan Kanade, learned Advocate, attempted to emphasize the findings of the Courts below regarding the alleged mental disorder of the appellant, but focused more on the amount claimed by the appellant towards permanent alimony. He submitted that the claims made by the appellant were not only without any foundation, but exorbitant and that the fact that respondent had purchased an Innova car did not justify the claim of the appellant.

8. Mr. Kanade also submitted that the claim of the appellant regarding payment of a lump sum amount by way of permanent alimony under Section 25 of the Hindu Marriage Act, 1955, was not maintainable in view of the pendency of four matters relating to grant of maintenance under Section 125 of the Criminal Procedure Code and under Section 18 of the Hindu Adoption and Maintenance Act, 1956, for the minor daughter. Since on 14th May, 2007, notice was issued on the application for condonation of delay and also on the Special Leave Petition on the question of the findings relating to mental disorder and payment of lump sum amount to the appellant and since it was also recorded that the petitioner did not wish to challenge the final decree of divorce granted in favour of the husband, we shall confine our judgment and order to the said aspects only.

9. As far as the prayer for condonation of delay in filing the Special Leave Petition is concerned, we are of the view that sufficient grounds have been made out to condone such delay, particularly because a large portion of the delay was on

account of the pendency of the Review Petition which had been filed against the judgment and order of the High Court dismissing her appeal. The delay in filing the Special Leave Petition is, accordingly, condoned.

10. As far as the question of findings relating to the mental disorder of the appellant is concerned, we are inclined to accept the subsequent finding arrived at by the same learned Judge of the Family Court, who had decreed the suit of the Respondent No.1 for divorce, in the custody proceedings. Having regard to the observations made by the learned Judge while passing orders on the custody petition of the minor, in our view, we should desist from making any further observation in the matter, as we are concerned with the effect such findings may have on the minor child. Suffice to say that we are unable to accept and agree with the findings regarding the appellant's alleged mental disorder/schizophrenia and have little or no hesitation in holding that such findings cannot be sustained and have been rightly rejected by the learned Judge of the Family Court.

11. This brings us to the last question involving the quantum of permanent alimony under Section 25 of the Hindu Marriage Act. As we have already pointed out hereinbefore, the said prayer is not only maintainable but also justified in the facts and circumstances of the instant case. The statements made in paragraphs 7 to 12 of the Rejoinder Affidavit filed by the appellant to the Counter Affidavit filed on behalf of the respondent Nos. 1 and 2, have not been denied by the respondents, except to the extent that the vehicle indicated had been purchased by the respondents after obtaining a loan. The list of assets owned by the respondent No. 1, set out as Annexure-1 to the rejoinder affidavit, indicates that the respondent No.1 is sufficiently well-off to provide for a suitable lump sum amount towards permanent alimony as maintenance to the appellant and her daughter, Naveli, though may not be to the extent as claimed by the appellant. Since it is not possible

for us on the general information supplied, to arrive at the estimated income of respondent No.1, we are of the view that while retaining the matter in this Court, the Family Court may be directed to take additional evidence to ascertain the estimated income of the respondent No.1 from the list of assets indicated by the appellant, and, thereafter, to send the same to this Court for passing final orders in this appeal.

12. It is, therefore, ordered that the appeal be kept pending for a period of three months and the records be remitted to the learned Judge, Family Court at Aurangabad, to take additional evidence relating to the estimated income of the Respondent No.1, keeping in mind the list of assets annexed by the appellant to her Rejoinder Affidavit and to send back the same to this Court for final disposal of the instant appeal. Such additional evidence is to be taken within two months from the date of receipt of a copy of this order by the learned Family Judge, Aurangabad, and the same is to be sent to this Court within a fortnight thereafter.

13. Let a copy of this order be sent to the Judge, Family Court at Aurangabad, Maharashtra, forthwith and the parties are directed to appear before the said Court on 26th April, 2010 for the aforesaid purpose.

K.K.T. Matter adjourned.

M/S. JAYABHERI PROPERTIES PVT. LTD. AND ORS.
v.
STATE OF ANDHRA PRADESH AND ORS.
(Civil Appeal No. 52 of 2008)

APRIL 05, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Land Acquisition Act, 1894: s.5A – Land required for construction of Outer Ring Road (ORR) for the twin cities of Hyderabad and Secunderabad – ORR alignment finalised – Acquisition notification – Representations for change of ORR alignment on the ground that land situated in the said alignment comprised of water bodies – Alternative alignment suggested – Accordingly notification issued for acquiring land in Narsingi Village and Poppalguda Village – Challenged by appellants-land-owners – Held: The reports of local authorities stated that the first alignment involved considerable amount of rock cutting which was not so, as far as the second alignment was concerned – That apart, major stretch of the Outer Ring Road had already been completed – Only a small stretch involving plots of appellants, was yet to be completed – In such situation, public interest would out-weigh the interest of the individual plot holders – However, concerned authorities directed to take maximum care to preserve as far as possible the water bodies over which the road is to be constructed – Environmental law – Urban development.

The State required land for the purpose of Outer Ring Road (ORR) project for the twin cities of Hyderabad and Secunderabad. The ORR alignment was finalised in April 2005 providing for 159 Km. road around the twin cities and Ranga Reddy district. Notification was issued for acquisition of various lands. Since the alignment of Western sector was through Poppalguda and other villages which comprised of water bodies,

representations were made for change of said alignment. On inspection, the technical wing of ORR project felt that the alignment involved rock cutting, which was highly uneconomical and also affecting a water body and school building. An alternative alignment was suggested by the Committee. The Alignment Committee recommended that the notified Western Alignment joining Phase I at Poppalguda Village was not advisable and an alignment passing through Narsingi Village would lessen the expenses for cutting through rock forming part of proposed alignment. The Alignment Committee also observed that the new alignment avoided all water bodies in the area which was an ecologically sensitive area with a need to protect all water bodies. The new alignment was finalised. On 13.12.2002, a Notification was issued under Section 4 of the Land Acquisition Act, 1894 for acquiring the land belonging to the appellants situated at Narsingi Village and at Poppalguda Village. Objections were filed under Section 5-A of the Land Acquisition Act, 1894 that there was a water body in the impugned alignment. The objections were rejected and on 29.7.2006, a draft declaration was published under Section 6 of the Act. The writ petitions challenging the acquisition proceedings were dismissed. Hence these appeals. The Director of the Centre for Environmental studies filed an interlocutory application for intervention challenging the alignment on account of the fact that the hydrological system in the area would be destroyed if Western Sector of the project was allowed.

Disposing of the appeals and interlocutory application, the Court

HELD: 1. From the site plans of the area submitted by the parties, it is clear that both the two alignments touch and disturb existing water bodies, which was the main ground for the change of alignment in the first

place. The reports submitted by the various local authorities stated, that in order to proceed according to the first alignment, the respondents had to cut through a great deal of rock, which was not so as far as the second alignment was concerned. In terms of the environmental policies of the State Government, the Western Sector of the project is shown to be a highly ecologically sensitive zone, but there was no choice but to consider the viability of either of the two alignments for the purpose of the connectivity of the Outer Ring Road and while doing so the said factor and also the interest of the private land owners as against the interest of the public has to be balanced. Apart from that, the major stretch of the Outer Ring Road is said to had been completed, even in the Western Sector, and only a small stretch involving the plots of the appellants, was yet to be completed. [Para 30][89-F-H; 90-A-C]

2. There is no doubt that in the facts of this case, the public interest will out-weigh the interest of the individual plot holders. The only consideration is with regard to the preservation of the water bodies which are yet untouched, such as, plot No. 300 of Poppalguda Village mentioned in the report of the Central Water Commission and also in the letter written by the Executive Engineer on 23rd December, 2006. Looking at the problem holistically, the objections raised by the appellants as to the use of the lands for the purpose of the Outer Ring Road have to give way to the construction of the said road. However, while constructing the portion of the road affecting the plots in question, maximum care has to be taken by the concerned authorities to preserve as far as possible the water bodies over which the road is to be constructed. The authorities are directed to take all possible steps to ensure that the water bodies in the area are not unduly affected and are preserved to the maximum extent possible during the construction of the

remaining portion of the Outer Ring Road on the Western Sector. [Paras 31, 33][90-C-F; 91-A-B]

Intellectuals Forum, Tirupathi v. State of A.P. & Ors. **(2006) 3 SCC 549;** *Hinch Lal Tiwari v. Kamala Devi & Ors.* **(2001) 6 SCC 496;** *PUBLIC v. State of West Bengal* **AIR 1993 Cal. 215;** *Munshi Singh & Ors. v. Union of India* **(1973) 2 SCC 337;** *Union of India & Ors. v. Mukesh Hans* **(2004) 8 SCC 14;** *Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai & Ors.* **(2005) 7 SCC 627;** *Ram Krishan Mahajan v. Union Territory of Chandigarh & Ors.* **(2007) 6 SCC 634;** *Delhi Admn. v. Gurdip Singh Uban* **(2000) 7 SCC 296, referred to.**

Case Law Reference:

AIR 1993 Cal. 215	**referred to**	**Para 14**
(2001) 6 SCC 496	**referred to**	**Para 14**
(2006) 3 SCC 549	**referred to**	**Para 14**
(1973) 2 SCC 337	**referred to**	**Para 15**
(2004) 8 SCC 14	**referred to**	**Para 15**
(2005) 7 SCC 627	**referred to**	**Para 15**
(2007) 6 SCC 634	**referred to**	**Para 15**
(2000) 7 SCC 296	**referred to**	**Para 25**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 52 of 2008.

From the Judgment & Order dated 1.10.2007 of the High Court of Judicature of Andhra Pradesh at Hyderbad in Writ Petition No. 22809 of 2006.

WITH

C.A. Nos. 74 & 215 of 2008.

GopalSubramaniam,ASG.,BhaskarGupta,A.K.Ganguly, AltafAhmad,K.K.Venugopal,AnoopG.Chaudhri,K. Parmeshwar,SamiranSharma,AribamGuneshwarSharma, E.AjayReddy,GunturPrabhakar,G.V.R.Choudary,K.Shivraj Choudhuri,S.UdayaKumarSagar,BinaMadhavan,Ankul Talwar,(forLawyer'sKnit&Co.),ManojSaxena,RajneeshKr. Singh,T.V.Georgefortheappearingparties.

TheJudgmentoftheCourtwasdeliveredby

ALTAMASKABIR,J. 1.CivilAppealNo.52of2008 arisingoutofSLP(C)No.19592of2007filedbyM/s.Jayabheri PropertiesPvt.Ltd.andothers,wastakenupforhearingand finaldisposalalongwithCivilAppealNos.74and215of2008 arisingoutofSLP(C)No.19633/07andSLP(C)D.No.29751/ 07respectively.Sinceallthethreeappealsariseoutofthe samesetoffactsandgiverisetothesamesetofissues,they havebeentakenuptogetherforhearingandfinaldisposal.

2.Twowritpetitionsbeing WritPetitionNos.22809and 22810of2006,werefiledbytheappellantsherein,whereas WritPetitionNo.26996of2006wasfiledbyT.Chittaiahand threeothersagainsttheStateofAndhraPradeshand,in particular,againsttheHyderabadUrbanDevelopmentAuthority (hereinafterreferredtoasthe'HUDA').Thethreewritpetitions relatetothechallengethrowntotheacquisitionofland comprisedinSurveyNos.176,189,190,191,197,198,199, 200,201and202ofNarsingiVillageandSurveyNos.292,293 and294ofPoppalgudaVillageofRajendranagarMandal, RangaReddyDistrictfortheOuterRingRoad(ORR)Project forthetwincitiesofHyderabadandSecunderabad.

3.Thesaidprojectwasforthepurposeofprovidingan InnerandIntermediateRingRoadandanOuterRingRoadas partofthemaincirculationsystemfortraffic.In1984,HUDA undertookadetailedstudyforthedevelopmentoftheIntermediateRingRoad,buttherewaslittleornoprogressin viewofthegrowthofthecityandadventoftheInformation

Technologyindustryandvariousothereducationalandindustrial projects.In2001,theGovernmentofAndhraPradeshinitiated aprojectknownasthe"ORRProject"andHUDAengagedM/ s.MECONforfeasibilitystudy.

4.ThereportsubmittedbyM/s.MECONcontemplatedthe layingofa109km.4-laneconnectivityaroundthecity.InJuly, 2004,theprojectwasre-examinedandonthe recommendationsmadebyseniorofficersoftheGovernment andHUDA,theprojectwasrevisedsothatORRcouldpass throughopenareasavoidingmajorsettlementsandhabitations. Therevisedprojectwasnotifiedvide G.O.Ms.No.442dated 19thOctober,2004.TheORRalignmentwasfinalisedinApril, 2005,providingfora159km.roadaroundthetwincitiesand RangaReddyDistrict.

5.Thefinalalignmentcomprisedof Western,Northern, EasternandSouthernsectors.Thereafter,notificationsdated 13thApril,2005and21stApril,2005,wereissuedunder Section4(1)oftheLandAcquisitionAct,1894,foracquisition ofvariouslandsindifferentsectors.Sincethealignmentofthe WesternSectorwasthroughPoppalgudaandothervillages whichcomprisedhillocks,tanksandlakes,representations weremadeforchangeofthesaidalignmentwhichledtothe inspectionofthesamebyofficersofthetechnicalwingofthe ORRProject.Itwasfoundthatthealignmentinvolvinghuge rock-cutting,wouldbehighlyuneconomical.Theproposed TrumpetInterchangeattheT-Junctionpointwhichwas incorporatedatPoppalgudaJunction,wasfoundtobeaffecting awaterbodyandschoolbuilding.Accordingly,analternative alignmentwasconsideredbyaCommitteecomprisingsenior officialsoftheGovernmentandHUDAwhichinspectedthe alternativealignmentsandmadecertainobservations.Among theobservationswhichaffectedthepartiestothepresent proceedings,wasobservation(e),which,onthebasisofaquick survey,*interalia*,providedasfollows:

(i) Thealignmentshouldnotaffectanywaterbody,as

it was environmentally sensitive zone.

(ii) The alignment should involve minimal rock cutting and filling, as the terrain was uneven.

(iii) The alignment should involve minimal bends and curves keeping the design standards of the Outer Ring Road in mind.

6. On the basis of the aforesaid suggestions, the matter was assigned to NSS Associates, which submitted its report on 15th November, 2005, with the recommendation that the notified Western Alignment joining Phase I at Poppalguda Village was not advisable and an alignment passing through Narsingi village should be worked out to lessen the expenses for cutting through rock forming part of the proposed alignment. After considering the report submitted by NSS Associates, the Alignment Committee, once again studied the entire matter and recommended that the alignment suggested by NSS Associates be accepted. One of the observations made by the Alignment Committee with regard to the Western Sector alignment, as suggested by NSS Associates, is that the new alignment avoids all water bodies in the area, which was an environmentally sensitive area with a need to protect all water bodies. Upon approval of the State Government of the Report of the Alignment Committee, a G.O.M. No. 8 dated 12.12.2005 was issued, whereby the Project Director and the Special Collector, Land Acquisition, Outer Ring Road Project, were permitted to notify the final alignment of the ORR.

7. Subsequent thereto, on 13th December, 2005, a notification was issued under Section 4(1) of the Land Acquisition Act for the purpose of acquiring the land belonging to the appellants situated at Narsingi Village. Another notice of even date was also issued seeking to acquire the lands belonging to the appellants situated at Poppalguda Village. On 12th January, 2006, objections were filed by the appellants under Section 5-A of the Land Acquisition Act, *inter alia*,

contending as follows:

(a) there is a water body in the impugned alignment in Survey No. 291 of Poppalguda Village.

(b) the change of alignment is illegal, since the earlier alignment was straight in shape and the impugned alignment is taking several twists and turns.

(c) earlier alignment was finalized upon scientific survey and consequently notifications were earlier issued on 21-4-2005, which was a straight alignment.

(d) impugned alignment was finalized without any proper survey and verification.

Reference was also made to a Land Use Certificate issued by HUDA on 16th January, 2006, indicating that as per the approved Zonal Development Plan, there was a notified water body in the land comprising Survey No. 291 of Poppalguda. The objections filed under Section 5-A were fixed for consideration on 17th July, 2006, before the Special Deputy Collector and on 21st July, 2006, the same were rejected and on 29th July, 2006, a Draft Declaration was published under Section 6 of the Land Acquisition Act, 1894.

8. In the meantime, on the complaints made on behalf of the appellants, a CBI inquiry was directed by the Central Government in respect of 5 projects undertaken by the Government, including the ORR Project and the HUDA Township at Kokapet.

9. After considering the objections filed on behalf of some of the land owners, a draft declaration dated 29.7.2006 was issued under Section 6 of the aforesaid Act and the same was published in the Andhra Pradesh Gazette Extra-ordinary of the same date. By virtue of the said draft declaration under Section 6 of the Land Acquisition Act, the Government of Andhra

Pradesh declared that the land specified in the schedule to the draft declaration situated at Narsingi village of Rajendranagar Mandal, Ranga Reddy District, measuring 23 acres and 23 guntas was needed for a public purpose, namely, for formation of the Outer Ring Road. The same was challenged by the Appellants herein by way of a Writ Petition on 24th October, 2006, on several grounds. One of the grounds taken was that the earlier notifications under Sections 4 and 6 of the Land Acquisition Act had been issued keeping in view the scientific alignment of the road and suitability of the land proposed to be acquired and more importantly that the proposed acquisition did not cover the land of Narsingi village. Perhaps, the most important ground was that the land covered by Survey No. 291 was shown to be a water body and Survey No. 292 was a green belt touching a water body.

10. It was also urged on behalf of the Appellants that the alignment of the road had been altered with mala fide intent to benefit certain people belonging to the ruling party in power. It was also claimed that the revised alignment would convert the straight road into a serpentine road with the sole object of ensuring that the Outer Ring Road passed in a manner which boosted the value of the land held by ruling party leaders, their well-wishers and kith and kin.

11. Appearing for the appellants, Mr. Bhaskar Gupta, learned Senior Advocate, submitted that although one of the reasons given for alteration of the alignment was that water bodies on the said alignment would be disturbed, in fact, the alternative alignment would affect a larger number of existing water bodies and destroy particularly Survey Nos. 291, 298, 299 and 300. It was urged that the objections filed by the appellants under Section 5-A of the Land Acquisition Act, 1894, which gives a very valuable right to the appellants and had been given almost the same status as a fundamental right by this Court, had been dealt with perfunctorily revealing non-application of mind as the above-mentioned survey numbers had, in fact,

been identified by the local authorities, including HUDA, to be water bodies. Mr. Gupta pointed out from the Land Use Information given by HUDA on 16th January, 2006, that Survey No. 291 was a water body, Survey No. 292 was used for wet and dry agriculture and was touching a water body and Survey Nos. 293 and 294 were also used for wet and dry agriculture.

12. He contended that apart from the above, even in GOM No. 647 dated 3rd October, 2001, prescribing registration of water bodies, Survey No. 291 under the entries relating to Poppalguda Village was shown to be "Kunta", meaning a tank.

13. Mr. Gupta submitted that in a letter dated 23rd December, 2006, the Executive Engineer, Irrigation Department, informed the appellants herein regarding the existence of water bodies in Survey Nos. 291, 298, 299 and 300 of Poppalguda Village. Mr. Gupta submitted that the concerned Executive Engineer was suspended from service for giving a true picture of the terrain to the appellants. It was submitted that the report of the Central Water Commission dated 27th November, 2007, which had been submitted to this Court after inspection of Survey Nos. 291, 298, 299 and 300 on 24th November, 2007, did not give a correct picture of the plots in question, since the inspection was conducted during the month of November which is a dry season in the area when most of the tanks and water bodies tend to dry up. Mr. Gupta submitted that although a great deal of reliance has been placed by the respondents on a letter written by another Executive Engineer also dated 23rd December, 2006, saying that there were no water bodies at all, such a statement had to be incorrect in view of the report of the Central Water Commission which also indicated that there were water bodies, of which some were dry. Mr. Gupta submitted that, in any event, water bodies were required to be preserved and could not be converted to other use, even if it was for the public good.

14. In support of his aforesaid submissions, Mr. Gupta referred to and relied upon the decision of this Court in

Intellectuals Forum, Tirupathi vs. State of A.P. & Ors. [(2006) 3 SCC 549], wherein the need for balancing water and land resources for urban developmental needs was considered and it was observed that the responsibility of the State to protect the environment is now a well accepted notion in all countries. Reference was also made to a decision of this Court in *Hinch Lal Tiwari vs. Kamala Devi & Ors.* [(2001) 6 SCC 496] and on a decision of the Calcutta High Court in *PUBLIC vs. State of West Bengal* [AIR 1993 Cal. 215], wherein similar views have been expressed. Various other decisions were also cited in this regard, which will only have a multiplying effect to the views already expressed in the earlier judgments.

15. On the question of the importance of Section 5-A, Mr. Gupta referred to several decisions of this Court, such as: (i) *Munshi Singh & Ors. vs. Union of India* [(1973) 2 SCC 337]; (ii) *Union of India & Ors. vs. Mukesh Hans* [(2004) 8 SCC 14]; (iii) *Hindustan Petroleum Corpn. Ltd. vs. Darius Shapur Chenai & Ors.* [(2005) 7 SCC 627]; and (iv) *Ram Krishan Mahajan vs. Union Territory of Chandigarh & Ors.* [(2007) 6 SCC 634], wherein the importance of Section 5-A and the very valuable right given to an individual, whose land is being sought to be taken away, to raise an objection, has been emphatically demonstrated.

16. Mr. Gupta submitted that since a very valuable right to object to the acquisition of land has been given to a person whose land was being sought to be taken away, it was the statutory duty of the Collector to consider the suitability of the land, hear objections, if any, filed by any of the persons affected, and, thereafter, to make his recommendations on the objections so raised and forward the same to the Government for further action. Instead, the Collector appeared to be helpless since a decision had already been taken by the Government even before the publication of the Section 4 notification. The report of the Collector dated 23rd December, 1996, was nothing but an empty formality.

17. Mr. Gupta also urged that the High Court, while considering the two contradictory letters dated 23rd December, 2006, written by two Executive Engineers, erroneously chose to reject the letter which had been relied upon by the Appellants merely on the ground that according to the Gazette Notification Survey No. 291 falls in Narsingi Village, although, the letters say that the same falls in Poppalguda Village. Mr. Gupta submitted that the error committed by the High Court would be evident from the project description submitted by M/s NSS Associates along with its communication dated 15th November, 2005.

18. Mr. Gupta urged that the entire approach of the High Court was erroneous and failed to take into consideration the facts relating to the topography of the land involving the changed alignment of the ring road.

19. Mr. Altaf Ahmed, Senior Advocate, who appeared for the Appellants in Civil Appeal Nos. 74 of 2008 and 215 of 2008, reiterated Mr. Gupta's submissions relating to denial of a proper opportunity to the Appellants (landowners) under Section 5-A of the Land Acquisition Act, 1894. Mr. Ahmed submitted that while the public purpose of the project could not be denied, what we are called upon to consider is regarding the viability of the land included in the second alignment since it passed through and affected some of the water bodies in the area. Mr. Ahmed referred to the report submitted by the Committee comprised of the Principal Secretary, Infrastructure and Investment Department (IIT), Managing Director, INCAP and Vice-Chairman, Hyderabad Urban Development Authority (HUDA) and other officers of HUDA, the Chief Engineer and Special Collector, ORR, wherein in paragraph (e) the Committee was of the view that the data available was insufficient and a quick survey should be made, inter alia, to ascertain that the alignment did not affect any water body since the area was an environmentally sensitive zone.

20. Reference was also made to the final decision of the Committee which was based on the recommendations of the

Pollution Control Board in which it was stated that the alignment avoids all water bodies in the area, which statement was incorrect. Having regard to the admission subsequently made by HUDA in the Land Use Certificate issued on 16.1.2006 indicating that plot No.300, which falls squarely on the new alignment, was a water body together with plot No.291.

21. Mr. Ahmed urged that based on an incorrect appreciation of the topography relating to the second alignment, a decision had been taken to act on the basis of the new alignment, which, in fact, could not have been proceeded with for the same reason as was given for abandoning the first alignment. Mr. Ahmed repeated Mr. Gupta's submission regarding the two certificates dated 12th August, 2009, which showed the existence of water bodies in plot Nos. 298, 299 and 300. He contended that the creation of the second alignment was made only to suit certain individuals who had an interest in the lands which fell within the first alignment.

22. Mr. Ahmed submitted that the decision taken to approve the second alignment was motivated and was contrary to the stand taken while disapproving the first alignment.

23. Appearing for the Hyderabad Urban Development Authority (HUDA), Mr. K.K. Venugopal, Senior Advocate, referred to the report of the Alignment Committee, on which strong reliance was placed by him. Mr. Venugopal submitted that only after examining the reports submitted by M/s NSS Associates and M/s. Aarvee Associates that the Alignment Committee set up by the Government recommended change in the alignment of the Outer Ring Road in the Poppalguda and Narsingi villages in the Western Sector. Mr. Venugopal submitted that proper care had been taken to avoid all major structures, water bodies and habitations. Learned counsel submitted that the change from the first alignment to the second alignment was necessitated by the fact that a large portion of the alignment was comprised of hilly terrain which would involve a considerable amount of rock cutting and that in order to avoid

the said hillocks at Poppalguda the second alignment was proposed through Narsingi village.

24. Mr. Venugopal submitted that a major portion of the construction work in respect of the Western Sector of the Outer Ring Road had been completed and only the portion comprising about a two- kilometer stretch, which is the subject matter of the present appeals, was yet to be completed.

25. In this connection, Mr. Venugopal also referred to the report of the visit of the Expert Central Team of the Central Water Commission for an on the spot study and to verify as to whether Survey Nos.291, 298, 299 and 300 of Poppalguda Village were, in fact, water bodies. The report of the Central Water Commission indicated that none of the three survey numbers, apart from Survey No.300, disclosed the existence of a water body. On the other hand, it was categorically indicated that there was no water body existing as on the date of inspection in plot Nos.291, 298 and 299.

26. Apart from the above, Mr. Venugopal submitted that the possession of the land had already been taken under Section 16 of the Land Acquisition Act, 1894, and as indicated hereinbefore, the major portion of the construction work of the Outer Ring Road had been completed and only the two ends of the construction work had to be brought together in order to complete the project. Mr. Venugopal submitted that in respect of projects of national importance, the balance of convenience and inconvenience of the majority of the citizens would have to be considered as opposed to private interests. He referred to the decision of this Court in *Delhi Admn. vs. Gurdip Singh Uban* [(2000) 7 SCC 296], wherein it was held that when several plots of land are involved in an acquisition, the objection of several individual plot owners could not be entertained even under Section 5-A of the 1894 Act, particularly, because when several LA Collectors were dealing with different segments of the acquired lands, it would not be possible for one of such

Collectors to take a decision with regard to the operation of the integrated project.

27. Mr. Venugopal ended on the note that since the inconvenience that may be caused to a few individual plot owners could not outweigh the interest of the public, the appeal filed by M/s Jayabheri Properties Pvt. Ltd. & others was liable to be dismissed.

28. Mr. Anoop G. Chaudhari, Senior Advocate, who appeared for the State of Andhra Pradesh, endorsed the submissions made by Mr. Venugopal and added that the Appellants could not be considered to be "a person interested" within the meaning of Section 3(b) of the 1894 Act. He urged that the Collector had duly applied his mind to the fact situation and the decision ultimately taken did not merit any interference.

29. Mr. A.K. Ganguli, Senior Advocate, appeared on behalf of Mr. Purshottam Reddy, who had made an application for intervention in the proceedings and submitted that the intervenor who was the Director of the Centre for Environmental Studies, Osmania University, had challenged the change of alignment on account of the fact that the integrated hydrological system which was prevailing in the area would be destroyed if the Western Sector of the project was allowed to be completed.

30. We have taken pains to set out the fact situation in some detail since a decision in this matter depends on the fact situation leading to the change of alignment of the Western Sector of the Outer Ring Road Project in the twin cities of Hyderabad and Secunderabad in Andhra Pradesh. From the site plans of the area submitted by the parties, it is clear that both the two alignments touch and disturb existing water bodies, which was the main ground for the change of alignment in the first place. From the reports submitted by the various local authorities, it is, however, clear that in order to proceed according to the first alignment, the respondents would have to cut through a great deal of rock, which is not so as far as

the second alignment is concerned. It is no doubt true that in terms of the environmental policies of the State Government, the Western Sector of the project has been shown to be a highly ecologically sensitive zone, but we have no choice but to consider the viability of either of the two alignments for the purpose of the connectivity of the Outer Ring Road and while doing so we have to balance the aforesaid factor and also the interest of the private land owners as against the interest of the public. Apart from the above, we have also to take into consideration the factors that the major stretch of the Outer Ring Road is said to have been completed, even in the Western Sector, and only a small stretch involving the plots of the appellants, is yet to be completed.

31. There is no doubt that in the facts of this case the public interest will out-weigh the interest of the individual plot holders. The only consideration is with regard to the preservation of the water bodies which are yet untouched, such as, plot No. 300 mentioned in the report of the Central Water Commission and also in the letter written by the Executive Engineer on 23rd December, 2006. The arguments advanced on behalf of the appellants have their positive value but looking at the problem holistically, we are of the view that their objections to the use of the lands for the purpose of the Outer Ring Road have to give way to the construction of the said road. However, while constructing the portion of the road affecting the plots in question, maximum care has to be taken by the concerned authorities to preserve as far as possible the water bodies over which the road is to be constructed.

32. The submissions advanced on behalf of the appellants alleging that adequate opportunity had not been given to them under Section 5A of the Land Acquisition Act, 1894, to voice their objections, is without substance as the objections filed were duly considered by the Special Deputy Collector and rejected by his order dated 21st July, 2006.

33. Although, we are not inclined to interfere with the orders

impugned in the three appeals or to entertain the two writ petitions, we dispose of the same with a direction to the authorities to take all possible steps to ensure that the water bodies in the area are not unduly affected and are preserved to the maximum extent possible during the construction of the remaining portion of the Outer Ring Road on the Western Sector.

34. The Interlocutory Applications filed for intervention are also disposed of by this order.

D.G. Appeals & Interlocutory application disposed of.

STATE OF PUNJAB
v.
LAKHWINDER SINGH & ANR.
(Criminal Appeal No. 32 of 2009)

APRIL 5, 2010

[DR. MUKUNDAKAM SHARMA AND A.K. PATNAIK, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – s. 15 – Punishment for contravention in relation to poppy straw – Respondents found in possession of 35 bags of poppy husk – Conviction u/s. 15 by trial court – Set aside by High Court – On appeal, held: Evidence clearly established that respondents were in conscious possession of contraband goods – Failure of defence to prove that seizure and seal put in the samples were ever tampered with before it was examined by Chemical Examiner – Delay of seven days in sending samples to the examiner not fatal since the seal was found intact at the time of examination – Thus, order of trial court restored.

The question which arose for consideration in this appeal was whether the High Court was justified in acquitting the respondents of the charge u/s. 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 by setting aside the order of conviction and sentence passed by the trial court.

Disposing of the appeal, the Court

HELD: 1. Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 makes possession of contraband articles an offence. Section 15 in Chapter IV of the Act relates to the offence of possession of poppy straw. [Para 11] [100-A-B]

2.1. Evidence was led by the prosecution to establish that the respondents were found sitting on the said bags of poppy husk. It was also stated by the Sub-Inspector as also the Assistant Sub-Inspector that the presence of the accused respondents at such an early hour, i.e., 8.00 a.m. near a religious place with such large number of bags and their sitting on them and on seeing the police party their conduct of trying to hide themselves behind the bags prove and establish that they were in possession of the said bags. The very fact that they tried to hide themselves behind the bags made the police party suspicious about the contents of the bags which led to a search of the said bags and on search being carried out in accordance with law, the said suspicion that the bags contained contraband was confirmed. [Para 14] [100-F-H; 101-A]

2.2. The respondents, during the trial, could not give any satisfactory reply as to how and why they came from place H and were found sitting on bags of poppy husk. Their subsequent conduct of hiding behind the bags also shows their guilty mind. [Para 15] [101-B]

2.3. In the memos prepared by the Investigating Officer, it was clearly stated that the contraband was contained in the bags which were kept in the possession of the respondents. There were separate memos prepared and each one of them is signed by the two respondents respectively and separately. The said documents, therefore, clearly establish that the respondents were in possession of the said contraband. The evidence adduced by both the Sub-Inspectors as also by the Assistant Sub-Inspector examined as PW-3 and PW-4 also prove and establish that both the respondents were in conscious possession of the contraband goods. [Para 16] [101-C-E]

Inder Sain v. State of Punjab **(1973) 2 SCC 372;** *Madan*

Lal and Anr. v. State of H.P. **(2003) 7 SCC 465;** *Gunwantlal v. State of M.P.* **(1972) 2 SCC 194, relied on.**

3. Regarding the seizure of the contraband goods, the discrepancies pointed out by the High Court are very minor and they are not very material. The prosecution has been able to establish and prove that the said bags which were 35 in number contained poppy husk and accordingly the same were seized after taking samples therefrom which were properly sealed. The defence has not been able to prove that the said seizure and seal put in the samples were in any manner tampered with before it was examined by the Chemical Examiner. There was merely a delay of about seven days in sending the samples to the Forensic Examiner and it is not proved as to how the said delay of seven days has affected the said examination when it could not be proved that the seal of the sample was in any manner tampered with. The seal having been found intact at the time of the examination by the Chemical Examiner and the said fact having been recorded in his report, a mere observation by the High Court that the case property might have been tampered with, is based on surmises and conjectures and cannot take the place of proof. The case property was produced in the Court and there is no evidence to show that the same was ever tampered with. [Paras 16 and 18] [101-E-H; 102-A-B-E]

Hardip Singh v. State of Punjab **(2008) 8 SCC 557, relied on.**

4.1. The discrepancies referred to by the High Court as glaring discrepancies appear to be very minor discrepancies which do not in any manner affect the sub-stratum of the case and the offence alleged against the respondents. [Para 9] [98-F]

4.2. Considering the facts and circumstances of the case, the view taken by the High Court is palpably wrong

and the findings recorded are also perverse. The reasons stated are sufficient and cogent grounds to disturb the acquittal. The judgment and order passed by the High Court is set aside and the order of the trial court is restored. [Para 19] [102-E-F]

Case Law Reference:

(1973) 2 SCC 372	**Relied on.**	**Para 10**
(2003) 7 SCC 465	**Relied on.**	**Para12**
(1972) 2 SCC 194	**Relied on.**	**Para 13**
(2008) 8 SCC 557	**Relied on.**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 32 of 2009.

From the Judgment & Order dated 20.8.2007 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 607-DB of 2005.

Kuldip Singh for the Appellant.

Manoj Mittal, Dr. Kailash Chand for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA 1. The present appeal is an appeal filed by the State of Punjab challenging the judgment and order dated 20.08.2007 passed by the High Court of Punjab & Haryana whereby the High Court acquitted the respondents herein of the charge under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 [for short "NDPS Act"], thereby reversing the judgment and order of conviction and sentence passed by the trial Court, i.e., the Special Court, Patiala. The trial Court convicted the respondents herein under the aforesaid section and sentenced each of them to suffer rigorous imprisonment for a period of 12 years and to pay a fine of Rs. 1 lakh each, and in default of

payment of fine, to further undergo rigorous imprisonment for two years.

2. The prosecution case, in brief, is that on 23.04.2002 Sub-Inspector, Tejinder Singh [PW-4], who was the then Station House Officer [for short "SHO"] of the Police Station, Ghagga accompanied by Sub-Inspector Ajaib Singh, Assistant Sub-Inspector Surinderpaljit Singh [PW-3] and constables, viz., Faqir Chand, Kulwant Singh and other police officials were present at village Shahpur and were going around in the course of their routine duty of checking of the religious places in the said village. It was during the course of patrolling that they also visited a temple of Udasi Community on Shahpur Tilla and saw that on the nearby passage a man and woman were sitting on some plastic bags. As soon as the respondents saw the police party, they tried to hide themselves behind the said bags. On seeing the aforesaid conduct of the respondents, the police party became suspicious and therefore approached them to enquire from them their identity. Respondent no. 1 gave his name as Lakhwinder Singh @ Lakha whereas the woman [respondent no. 2] disclosed her name as Balwinder Kaur.

3. The SHO [PW-4] then informed the respondents about his suspicion of the said bags containing contraband and also of his intention to conduct a search of the bags. Accordingly, PW-4 offered them as to whether they wanted to be searched by him or by a Gazetted Officer or a Magistrate. At this, respondents refused to be searched by PW-4 and consequently, the Sub-Inspector sent a wireless message to send a Gazetted Officer or a Magistrate. Upon this Jaspreet Singh Sindhu, DSP, Samana arrived at the said place and disclosed his identity to the accused persons and separately asked the respondents as to whether they wanted their search to be conducted by a Gazetted Officer or a Magistrate. Lady Constable Harjit Kaur was also called at the spot. On being so asked, both the respondents gave their consent to be searched before the DSP. In the meantime, Gurnam Singh, Lamberdar

of village Kakrala also joined the police party and he also thumb marked the consent memo. Thereafter, a search of the bags on which the respondents were sitting, numbering 35, was conducted and poppy husk was found in all the 35 bags.

4. On recovery of the aforesaid poppy husk from the said bags, two samples of 250 grams each were separated from each bag and separate parcels were prepared. The bags were numbered from Nos. 1 to 35. The bags as well as the sample parcels were separately sealed by PW-4 with his seal TS, and the sample seal was separately prepared. The seal after use was handed over to Gurnam Singh, Lamberdar of village Kakrala. The case property was taken into possession through recovery memo. Intimation for grounds of arrest was given to the respondents and they were accordingly arrested and on return to the police station, case property was deposited with the MHC. The case property and the sample parcels were produced before the learned Sub-Divisional Judicial Magistrate, Samana on 24.04.2002. On the analysis of the samples, the Chemical Examiner submitted a report whereby he confirmed the contents of the samples seized and sealed to be poppy husk. Ruqa was prepared and sent to the Police Station Ghagga, on the basis of which a formal First Information Report was drawn and registered. After completing the investigation, the challan was presented in the Court.

5. The trial Court after receipt of the chargesheet filed under Section 15 of the NDPS Act charged the respondents under the said Section. The respondents herein pleaded not guilty to the charge and claimed trial. Consequently, a trial was conducted, during the course of which, the prosecution examined four witnesses whereas the defence examined none. The respondents were examined under Section 313 CrPC.

6. Upon completion of the trial, the learned Judge, Special Court, Patiala passed a judgment and order dated 07.07.2005 whereby the trial Court convicted the respondents herein under Section 15 of the NDPS Act and sentenced them as aforesaid.

7. Being aggrieved by the aforesaid judgment and order of conviction and sentence, the respondents herein filed an appeal before the High Court of Punjab and Haryana. The High Court after hearing the parties passed a judgment and order dated 20.08.2007 allowing the appeal filed by the respondents herein. The Division Bench of the High Court set aside the order of conviction and sentence passed by the trial Court and acquitted the respondents of all the charges. Being aggrieved by the aforesaid order of acquittal, the present appeal was filed by the State of Punjab on which we have heard the learned counsel appearing for the parties.

8. The counsel appearing for the State submitted before us that the order of acquittal is palpably wrong and perverse. It was also submitted that the findings recorded by the High Court that there were glaring discrepancies in the prosecution case is based on irrelevant materials and that the order of acquittal was passed on frivolous grounds. It was also submitted by the counsel appearing for the appellant that conscious possession of the illegal substance by the respondents was established and the said finding having not been discredited, the High Court was not justified in interfering with the order of conviction recorded by the trial Court.

9. In order to appreciate the aforesaid contention, we have gone through the records. The discrepancies which are referred to by the High Court as glaring discrepancies appear to us to be very minor discrepancies which do not in any manner affect the sub-stratum of the case and the offence alleged against the respondents. The High Court has held that both the respondents were required to be acquitted because Surinderpaljit Singh [PW-3] had stated that the seal was handed over to Gurnam Singh, Lamberdar of village Kakrala whereas the Investigating Officer had stated that the seal was handed over to Sub-Inspector Ajaib Singh. The other ground which was considered and relied upon by the High Court for acquitting the respondents was that the DSP, who had been

called at the option of the respondents who wanted to be searched in front of the gazetted officer was not brought into the witness box and was given up by the prosecution as being unnecessary. Other grounds which have been recorded by the High Court for acquitting the respondents were that the police officials were travelling in a private jeep but the number of that jeep was not given by the prosecution and that the Sub-Inspector Tejinder Singh [PW-4], the Investigation Officer did not categorically say as to who was driving the jeep and who was the owner of the jeep. The High Court has also held that the delay of about seven days in sending the samples of the case property to the Forensic Science Laboratory was fatal, inasmuch as in the intervening period tampering of the case property could have been easily done. For the aforesaid reasons, the High Court passed the order of acquittal.

10. Counsel appearing for the respondents disputed the fact of conscious possession by the respondents and submitted that merely because the respondents were sitting on the bags it could not be said that they were in conscious possession of the bags. The expression "possession" came to be analysed by this Court in several decisions. The first case in point of time to which our attention was drawn is the decision in the case of *Inder Sain v. State of Punjab* reported in (1973) 2 SCC 372. In the said decision also this Court was called upon to answer the question as to whether the appellant was in possession of opium. In the said decision, this Court held that the word "possess" connotes some sort of knowledge about the thing possessed. It was also held that the prosecution must prove that accused was in control of something in the circumstances which showed that he was assenting to being in control of it. This Court further held that once it is proved by the prosecution that the accused was in physical custody of opium, it is for the accused to prove statutorily that he has not committed an offence by showing that he was not knowingly in possession of opium. Thus, the burden of proving the fact that the accused was not knowingly in possession of the contraband

would lie on the shoulders of the accused person.

11. Section 15 of the NDPS Act makes possession of contraband articles an offence. Section 15 appears in Chapter IV of the Act which relates to the offence of possession of poppy straw.

12. In *Madan Lal and another v. State of H.P.* reported in (2003) 7 SCC 465 this Court held that once possession is established, the person who claims that it was not a conscious possession has to establish it because how he came to be in possession of the same is within his special knowledge. It was also held in that case that Section 35 of the Act gives a statutory recognition to this position by making it a statutory presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

13. In *Gunwantlal v. State of M.P.* reported in (1972) 2 SCC 194 it was held by this Court that possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given also is subject to such power or control.

14. In the backdrop of the aforesaid settled position of law we have to examine the facts of the present case in order to hold as to whether or not the respondents could be said to have been in conscious possession of the contraband goods. Evidence was led by the prosecution to establish that the respondents were found sitting on the aforesaid bags of poppy husk. It was also stated by the Sub-Inspector as also the Assistant Sub-Inspector that the presence of the accused respondents at such an early hour, i.e., 8.00 a.m. near a religious place with such large number of bags and their sitting on them and on seeing the police party their conduct of trying to hide themselves behind the bags prove and establish that they were in possession of the aforesaid bags. The very fact

that they tried to hide themselves behind the bags made the police party suspicious about the contents of the bags which led to a search of the said bags and on search being carried out in accordance with law, the aforesaid suspicion that the bags contained contraband was confirmed.

15. The respondents, during the trial, could not give any satisfactory reply as to how and why they came from Haryana and were found sitting on bags of poppy husk. Their subsequent conduct of hiding behind the bags also shows their guilty mind.

16. Reference could also be made to Exhibits PC and PD which are memos prepared by the Investigating Officer. In the said memos, it was clearly stated that the contraband was contained in the bags which were kept in the possession of the respondents. There were separate memos prepared and each one of them is signed by the two respondents respectively and separately. The aforesaid documents, therefore, clearly establish that the respondents were in possession of the said contraband. The evidence adduced by both the Sub-Inspectors as also by the Assistant Sub-Inspector examined as PW-3 and PW-4 also prove and establish that both the respondents were in conscious possession of the contraband goods. So far as the seizure of the contraband goods is concerned, the discrepancies pointed out by the High Court in our opinion are very minor and they are not very material. The prosecution has been able to establish and prove that the aforesaid bags which were 35 in number contained poppy husk and accordingly the same were seized after taking samples therefrom which were properly sealed. The defence has not been able to prove that the aforesaid seizure and seal put in the samples were in any manner tampered with before it was examined by the Chemical Examiner. There was merely a delay of about seven days in sending the samples to the Forensic Examiner and it is not proved as to how the aforesaid delay of seven days has affected the said examination when it could not be proved that the seal of the sample was in any manner tampered with. The

seal having been found intact at the time of the examination by the Chemical Examiner and the said fact having been recorded in his report, a mere observation by the High Court that the case property might have been tampered with, in our opinion is based on surmises and conjectures and cannot take the place of proof.

17. We may at this stage refer to a decision of this Court in *Hardip Singh v. State of Punjab* reported in (2008) 8 SCC 557 in which there was a delay of about 40 days in sending the sample to laboratory after the same was seized. In the said decision, it was held that in view of cogent and reliable evidence that the opium was seized and sealed and that the samples were intact till they were handed over to the Chemical Examiner, the delay itself was held to be not fatal to the prosecution case. In our considered opinion, the ratio of the aforesaid decision squarely applies to the facts of the present case in this regard.

18. The case property was produced in the Court and there is no evidence to show that the same was ever tampered with.

19. Considering the facts and circumstances of the case, we are of the considered opinion that the view taken by the High Court is palpably wrong and the findings recorded are also perverse. In our considered opinion, the aforesaid reasons which are stated hereinabove are sufficient and cogent grounds to disturb the acquittal. Accordingly, the judgment and order passed by the High Court is set aside and the order of the trial Court is restored.

20. The respondents, if at liberty, are hereby directed to surrender forthwith and undergo the remaining term of imprisonment as directed by the trial Court. The appeal stands disposed of in terms of the aforesaid order.

N.J. Appeal disposed of.

SIDHARTHA VASHISHT @ MANU SHARMA
v.
STATE (NCT OF DELHI)
(Criminal Appeal No. 179 of 2007)

APRIL 19, 2010

[P. SATHASIVAM AND SWATANTER KUMAR, JJ.]

Penal Code, 1860/Arms Act, 1950:

Sections 302, 201/120B/Section 27 – Murder – Trial against nine accused – Acquittal by trial court – Conviction by High Court against three accused – A-1 sentenced to life for murder and fine of Rs.50,000/-, 4 years of sentence under the Arms Act with default stipulation – A-2 and A-3 sentenced to four years imprisonment and fine of Rs.2000/- each with default stipulation – On appeal, ***Held:*** *Prosecution has established its case beyond doubt – Appellate court has all the necessary powers to evaluate the evidence let in before the trial court and the conclusions reached by it – High Court has given cogent and adequate reasons for reversing the order of acquittal – Presence of accused at the scene of crime proved by ocular testimonies and corroborated by Exhibits – Conclusions arrived at by the High Court upheld.*

Code of Criminal Procedure, 1973:

Section 24 – Public prosecutor – Duties and responsibilities – Duty of Court to ensure that Public Prosecutor does his duties to the utmost level of efficiency and fair play – Interference by Courts – Limitations – Discussed.

Section 154 – First Information Report – Cryptic telephone message of a cognizable offence not to be treated as FIR.

Sections 170, 172 – Conduct of investigation – Duties of investigation officer vis-à-vis rights of accused – Discussed – Constitution of India, Articles 14, 19.

Sections 293, 294 – Proof of documents – Documents sought to be relied on must be originals – Photocopy of the original documents – Acceptance of, procedure to be followed.

Section 313 – questions put to the accused – If accused furnishes false answers as regards proved facts, court can draw an adverse inference qua him – Such inference would become an additional circumstance to prove the guilt of the accused.

Evidence Act, 1872:

Sections 8, 27 – Evidence of telephone calls – Admissibility of.

Section 9 – Test identification parade – Practice not borne out of procedure, but out of prudence – Investigating officer conducts a TIP to ensure that he has got the right person as an accused.

Section 165 – Expert witness – When the expert opinion is vague, no credence could be lent to it – Court's power under the Section – Discussed.

Judicial propriety – Judicial propriety and discipline demand that strictures or lacerating language should not be used by higher courts in exercise of their appellate or supervisory jurisdiction – Errors of judgments to be corrected by reasons of law – Practice of passing comments against lower courts deprecated.

Judicial discipline/restraint – A judgment could be set aside preferably without offering undesirable comments, disparaging remarks or indications which would impinge upon the dignity and respect of the judicial system – Despite such restraint, if there are compelling reasons for making

comments, rule of law and principles to be adhered – View point of judge concerned should also be invited – In the facts of the case, all the remarks made by the trial judge against the prosecution and by the Division Bench against the trial judge directed to be expunged – Strictures by court – Expunging of.

Media Trial:

Despite significance of the print and electronic media, it is desirable to ensure that trial by media does not hamper fair investigation – More importantly not to prejudice the right of defence of accused in any manner whatsoever – Freedom of expression to be carefully and cautiously used, to avoid interference in the administration of justice and leading to undesirable results in the matters sub-judice before courts – Caution to all modes of media to extend full cooperation to ensure fair investigation, trial, defence of accused and non-interference in the administration of justice in matters subjudice – However, in the instant case, the media trial did affect the accused to a very limited extent but not tantamount to prejudice which would weigh with the Court in taking any different view – Constitution of India, 1950 – Article 19(1)(a).

Doctrines:

Doctrine of 'contra veritatem lex nunquam aliquid permittit' – Meaning of.

Doctrine of disclosure – Discussed.

According to the prosecution, on the night intervening 29-30.04.1999, a 'Thursday Party' was going on at Qutub Colonnade once called "Tamarind Cafe". Liquor was being served by the bartenders, namely, 'J' (since deceased) and PW-2. At about 2.00 a.m., appellant in the main appeal (A-1) along with his friends came there and asked for two drinks. The waiter did not serve him liquor as the party was over. Deceased and PW-6, who

were also present there, tried to make him understand that the party was over and there was no liquor available with them. On refusal to serve liquor, the appellant took out a pistol and fired one shot at the roof and another at the deceased which hit near her left eye as a result of which she fell down. PW-20 who was present there, stopped the appellant and questioned him as to why he had shot the deceased and demanded the weapon from him but he did not hand over the pistol and fled away. Deceased was rushed to Ashlok Hospital from where she was shifted to Apollo Hospital. On 30.04.1999, in the early morning hours, she was declared brought dead at Apollo Hospital.

FIR was lodged and after police investigation, charges were framed against nine accused under Sections 302/202/120B/212 IPC and under Section 27 of the Arms Act against the appellants. Trial began in May, 2001 against nine accused. In all, 101 witnesses were examined by the prosecution and two court witnesses were also examined. On 21.02.2006, after trial, the Additional Sessions Judge acquitted all the nine accused including the appellant.

Challenging the acquittal, the prosecution filed an appeal before the High Court. On 20.12.2006, the High Court convicted and sentenced the appellants. A-1 was given life sentence for murder and a fine of Rs.50,000/- and four years sentence under Section 27 of the Arms Act with default stipulation. The other two appellants (A-2 and A-3) were convicted and sentenced to four years imprisonment and fine of Rs.2000/- each with default stipulation.

Challenging the said order of the High Court, all the three appellants filed separate appeals before this Court.

On behalf of the appellants, it was contended that A-

1 has been denied his fundamental right to free and fair trial which is guaranteed under Article 21 of the Constitution of India; that on the very first day of investigation i.e. on 30.04.1999, an FIR was filed against PW-6, PW-20 and PW-24 under the Punjab Excise Act in order to control these witnesses and to pressurise them to support the prosecution case. After their deposition, the Excise case was pre-poned and disposed of by imposing a fine of paltry amount; that PW-6, PW-20 and PW-24 were frequently shown the photograph of the appellant and he was paraded before them; that the finding of the High Court that the appellant took out his pistol and first fired at the ceiling and then at the deceased is based on no evidence; that three Ballistic Experts have concurred that empty cartridges have been fired from two different weapons; their Report support the statement-in-chief of PW-2; there was no evidence on record that both the shots were fired from one weapon; and that the High Court has wrongly placed reliance upon the testimony of PW-1, even though, he was not present in the party and he was planted by the prosecution; the evidence of three family members PW-6, PW-20 and PW-24 was inadmissible in law; that the prosecution never claimed PW-20 as an eye-witness, however, the High Court erroneously held her as eye-witness to the occurrence; that the High Court failed to consider the evidence of PW-46 and PW-47; that the High Court committed an error in relying upon the testimony of PW-24 to corroborate the evidence of PW-20; that the First Information Report recorded on the statement of PW-2 was not an FIR but a signed statement; that the High Court wrongly discarded his ocular version; that the Trial Court assigned good reasons for accepting his evidence; that the High Court's observation on Ballistic Experts from CFSL was erroneous; that the High Court committed an error in disbelieving PW-95; that there is no acceptable evidence/material to connect Tata Safari to the

alleged occurrence; that PW-30 was a planted witness, and there was no need for him to accompany PW-1 to the spot when he was assigned other official work; that a rough site plan which was prepared in the early hours of 30.04.1999 (Ex. PW 100/2) clearly showed the absence of PW-20 at the alleged place of occurrence, if she was an eye-witness, this would have been done; that the Public Prosecutor failed to adhere the basic principles in conducting criminal case; that the High Court committed a grave error by reversing the well considered order of acquittal by the Trial Court and on conjunctures the High Court interfered with the acquittal and imposed sentence which is not permissible under law; and that the prosecution failed to establish the charge in respect of the other two accused-appellants (A-2 and A-3) under Section 201 read with 120B of the IPC.

On behalf of the State, it was contended that the Trial Judge has committed an error in acquitting all the accused and the High Court being an Appellate Court is fully justified in re-analysing the evidence and convicting all the three accused-appellants and awarding appropriate sentence; and that the conviction and sentence awarded by the High Court were acceptable and no interference is called for by this Court.

The following points arose for consideration in these appeals:

(a) Whether the prosecution has established its case beyond reasonable doubt against all the three accused?

(b) Whether the trial court is justified in acquitting all the accused in respect of charges leveled against them?

(c) Whether the impugned order of the High Court imposing punishment when the trial court

acquitted all the accused in respect of the charges leveled against them is sustainable?

Dismissing the appeals, the Court

HELD:

1.The following principles have to be kept in mind by the Appellate Court while dealing with appeals, particularly, against the order of acquittal:

(i) There is no limitation on the part of the Appellate Court to review the evidence upon which the order of acquittal is found.

(ii) The Appellate Court in an appeal against acquittal can review the entire evidence and come to its own conclusions.

(iii) The Appellate Court can also review the Trial Court's conclusion with respect to both facts and law.

(iv) While dealing with the appeal preferred by the State, it is the duty of the Appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.

(v) An order of acquittal is to be interfered only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(vi) While sitting in judgment over an acquittal the Appellate Court is first required to seek an answer to the question whether finding of the Trial Court are palpably wrong, manifestly, erroneous or demonstrably unsustainable. If the Appellate Court answers the above question in the negative the

order of acquittal is not to be disturbed. Conversely, if the Appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion.

(vii) When the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of Ballistic Experts etc., the Appellate Court is competent to reverse the decision of the Trial Court depending on the materials placed. [Para 13] [168-D-H; 169-A-E]

Madan Lal vs. State of J&K, **(1997) 7 SCC 677;** *Ghurey Lal vs. State of Uttar Pradesh* **(2008) 10 SCC 450;** *Chandra Mohan Tiwari vs. State of M.P.,* **(1992) 2 SCC 105 and** *Jaswant Singh vs. State of Haryana,* **(2000) 4 SCC 484, referred to.**

2. There is no dispute that the incidence occurred in a place known as "Qutub Colonnade". The open area of "Qutub Colonnade" is known as "Tamarind Court" whereas the closed area is called "Tamarind Cafe". In order to establish the presence of A-1 and others, prosecution has examined PW-1, PW-2, PW-6, PW-20, PW-24, PW-23 and PW-70. Apart from these ocular witnesses, prosecution pressed into service Ex. PW12/D-1 which is a wireless message received at Police Station, Mehrauli. [Para 15] [170-B-C]

3. A close scrutiny of PW-1's evidence clearly shows that the deceased was friendly with him having known him for 5-6 years. He also went to the house of her parents twice i.e. on 30th April and 1st May 1999 to pay condolence. Further, in categorical terms, he asserted and identified the presence of A-1 at the scene of offence.

Since he had contact with a person having fair complexion with smiling face, in the Court he correctly identified both A-1 and A-2. He also identified other persons who accompanied these two accused. It is also clear from his evidence that at around 1.45 a.m., he heard a noise emerging from Tamarind Cafe to the effect that the deceased had been shot. It is also clear that on hearing, he ran towards Tamarind Cafe though according to him he could not go inside yet peeped and saw the deceased lying on the floor. Since the High Court has accepted his evidence which was not acceptable by the Trial Court, this Court analyzed his entire statement with great care. On seeing his entire evidence, there is no reason to either suspect his evidence or reject the same as unacceptable. On the other hand, his evidence supported by other witnesses clearly proves the presence of accused Nos. 1-4 at the place of occurrence. He asserted the presence of the deceased and PW-2 and the claim of whisky by a fair complexion man who exchanged niceties with him and introduced himself (A-1). There is no valid reason to hold that he is a planted witness, though he was not an eye-witness to the actual shooting incident but his own statement proves that immediately on hearing the noise he peeped and noticed the deceased lying on the floor of Tamarind Cafe. To this extent, the evidence of PW-1 is acceptable and the High Court has rightly believed and relied on his version. [Para 15] [172-G-H; 173-A-H]

4. The analysis of the evidence of PW-2 shows that though he turned hostile but his evidence shows that he had visited Tamarind Cafe on the night of 29.04.1999. He also mentioned the presence of A-1. His evidence further shows that immediately after the shot PW-20 and others were carrying the deceased to Ashlok Hospital. In other words, his evidence proves the presence of A-1 at the scene of offence. To this extent, the prosecution relied

upon his evidence and this was rightly accepted by the High Court. Though, the defence submitted that High Court ought to have accepted his entire evidence in toto, considering his earlier statement to the police and his evidence before the Court, this Court is satisfied that the High Court is justified in holding that even if his testimony is discarded, the case of the prosecution hardly gets affected. His evidence amply proves the presence of accused at the scene of occurrence at the time and date as pleaded by the prosecution. [Para 15] [175-E-H; 176-A]

5. It is relevant to note that PW-6 (daughter of PW-20) is not an ordinary person and it is not the case of the defence that she is an illiterate, unable to understand what she said to the earlier questions. She is a fashion designer by profession. In other words, she is highly qualified and it is not her grievance that she was unable to understand her earlier answers. It is clear from the evidence of PW-6 that A-1 was very well present at the scene of offence and she correctly identified him. Further, as rightly observed by the High court, though she was not an eye-witness, she is certainly a witness identifying A-1 along with 4 or 5 persons present at the Tamarind Court who asked her for whisky and later misbehaved with her. This Court agrees with the observation and the ultimate conclusion about PW-6 reached by the High Court. [Para 15] [179-H; 180-A-D]

6. If the evidence of PW-20 is analyzed along with the sketch/map of the occurrence, when she mounted steps of the restaurant, she heard a shot, a moment later, she heard another shot. It is also relevant to note that she mentioned that the deceased was standing with the people at the far end and she saw her falling down. She also informed that PW-2 said that the deceased had been shot. It is relevant to point out that she was shouting to the guests to call the Doctor or to take the deceased for

treatment, she reached the gate where her husband was standing and she told him that *"this was the man who had shot the deceased and to see in which car he gets into".* **If her entire evidence is read she refers only to A-1. She also correctly identified the presence of other accused persons. Her evidence remained unchallenged, though the Trial Court discarded her evidence as she was not an eye-witness to the occurrence but accepted that she is a witness to the presence of the accused at the Qutub Colonnade. Her statement clearly proves the prosecution case that she had herself seen A-1 shooting the deceased. As rightly observed by the High Court, if the evidence of PW-20 is analyzed in depth, it is clear that she not only asserted the presence of A-1 at the scene of occurrence and heard two shots one by one but also asked a pertinent question to PW-2 that why he (A-1) had shot the deceased. For the limited purpose of proving the presence of accused at the scene of offence, her evidence fully supports the case of the prosecution. [Para 15] [180-F-H; 181-A-E]**

7. PW-24 is a Canadian citizen and according to him, he has been residing in India since February, 1992. PW-20 is his wife. His evidence makes it clear that at the relevant time on hearing the shot, PW-2 came running shouting that someone shot the deceased. He reached the door of the restaurant. It is also clear that PW- 20 was moving at a place ahead of him towards the left side. This witness subsequently stated that PW-20 was addressing a young man who was moving with someone. He also identified the person who had come out first followed by PW-20 and he touched A-1 as the person who was being followed by PW-20. His evidence also proves the presence of A-1 at the scene of offence. [Para 15] [181-F-H; 183-D-E]

8.1. PW-23 in his evidence, admitted that he had told

the police that he saw PW-20 going after a boy. [Para 15] [183-F-G]

8.2. The statement of PW-70 also makes it clear that after the shooting incident PW-20 was running behind a man shouting *"catch that man".* **[Para 15] [184-C-D]**

9. The evidence of PWs 1, 2, 6, 20, 23, 24 and 70 which are all admissible in evidence clearly show the presence of A-1 at the scene of offence. This evidence of the ocular witnesses is duly corroborated by Ex PW 12/D-I, the wireless message received at PS Mehrauli. In addition to the evidence of the above mentioned witnesses, who were present at the party, the presence of appellants is also proved by other evidence, namely, 3 PCR calls Ex PW 11/A, B and C which were received. The evidence of PWs 11, 12 and 13 clearly proves that immediate and prompt action was taken. [Para 15] [184-D-F]

10. PW-83 reached the scene of occurrence within two minutes at around 02.17 a.m. and reported back at 02.35 a.m. Ex. PW 12/D-1, a contemporaneous document, clearly corroborates the testimony of ocular witnesses. From the evidence adduced, it is clear that the appellants-accused Nos. 1-3 were present at the scene of occurrence. Admittedly without setting up a plea of alibi to show their presence elsewhere, they have flatly denied their presence. It is relevant that the said witness reached around 02.17 a.m., on a message from PCR to PS Mehrauli takes around 10 minutes as from local PCR it goes to headquarter from where it is transmitted to concerned district net which further transmits it to the local police station. In this way, around 02.25 a.m., even before the local police had arrived at the spot PW-83 had sent the version available at the spot. The prosecution placed specific reliance on the same. In the absence of rebuttal evidence, there is no reason to reject the

evidence of PW-83 as well as Ex. PW-12/D-1. In those circumstances, the entire premise of the defence argument that it was not a person in white T-shirt, stocky and fair, who shot at the deceased over a row over the drink and fled away from the spot and this was a planted and concocted story of the prosecution to rope in A-1 and make escape good of the tall Sikh gentleman, is wholly erroneous and without any basis. [Para 15] [184-G-H; 185-D, G-H; 186-A-C]

11.1. The analysis of evidence of PWs 46 and 47 shows that when PW-47 heard the noise of the shots he was in the office counting cash and after hearing the noise of firing he opened the gate of his office which he had closed at the time of counting the cash. He saw from the gate of his office that people were coming in and going out. At that time, he saw PW-20 on the steps of the cafe, he rushed towards her and they both went inside the cafe. It is clear from the testimony of this witness that he was inside his office counting the cash when he heard the shots, thus after taking care of the cash when he opened the gate he saw people coming in and going out, which means that his act of coming out from the office is considerably after and not immediately after the shots were fired and, therefore, he saw people running back and forth whereas PW-20 has stated that when she mounted the steps of the restaurant she saw a few people standing next to the counter and heard a shot. A moment later she heard another shot. Deceased was standing with people at the far end and she saw her falling. It is pertinent to note that as per the scaled site plan, the point at which PW-20 was standing was only four feet from the point at which the shot was fired at the deceased. Therefore, it can never be alleged that there was no way in which the said witness could have had any doubt as to the identity of A-1. Thereafter, she accosted him till the gate of Qutub Colonnade where she told PW-24 that this was the man who had shot the deceased and that he should see in which car he i.e. A-1 gets into and after that PW-20 came back to the spot. It is when she came back to the cafe this witness PW-47 joined PW-20 entering the cafe, thus the testimony of this witness does not negate the fact that PW-20 witnessed the incident. It is relevant to mention the very fact that PW-20 followed the appellant is a clear indication of the fact that she was more than certain that he was the culprit responsible for the crime, and, therefore, she did not chase anybody else as the person who was having the gun. It has to be borne in mind that PW-20 had no enmity with the appellant-main accused and also the whole theory of planting of witnesses at the instance of the police is false since the accused has not led any defence evidence or brought on record any evidence to suggest that the investigation was motivated by mala fide. [Para 18] [188-C-H; 189-A-D]

11.2. The defence that since PW-47 in his cross examination has stated that PW-20 stated to him as to what had happened and who had done it, an inference has to be drawn that she did not witness the incident, does not lead to the inference that PW-20 did not witness the incident rather it could further reinforce what she had witnessed. Even otherwise, admittedly, thus, PW-20 was available she was not recalled to confront her with the testimony of PW-47. In those circumstances, the defence cannot take advantage out of a portion of statement of PW-47. [Para 19] [189-D-F]

11.3. A perusal of the testimony of PW-46 reveals that when he came down, PW-20 was already there. Thus PW-46 is not in a position to say as to what PW-20 witnessed. It may be further pointed out that the stairs leading to the terrace are not on the cafe but on the main building of Qutub Colonnade which houses the shops beyond the verandah and Tamarind Court. Hence, the testimony of PW-46 cannot negate the evidence of PW-20 that she

witnessed the incident. The mere absence of PW-20 in the site plan also does not negate her presence or her having not witnessed the incident, specifically when she had given her statement to the police under Section 161 CrPC on 30.04.1999, itself. [Para 20] [190-A-C]

11.4. This Court meticulously verified the site plan as well as the evidence of PWs 20, 46 and 47. The absence of PW-20 in the site plan does not belie her presence and her having witnessed the incident especially when her statement under Section 161 Cr.P.C. was recorded on 30.04.1999 in the morning itself. [Para 21] [190-E-F]

12.1. It has been vehemently argued that PW-20 is not an eye witness since both Investigating Officers i.e. PWs-100 and 101 admitted the same. It was submitted by the State that this argument runs counter to the well settled proposition of law that a witness cannot be discredited without the said piece of the testimony having been put to her. The accused had a statutory option available by way of Section 311 of the Code to call PW-20 for the purposes of further examination. This argument of the defence also runs counter to their own argument used to discredit the investigation that PW-6 was placed in the 'rukka' by the Police for the purposes of being shown as an eye-witness. The said part of the testimony of PWs-100 and 101 are at best in the nature of opinion evidence which are inadmissible pieces of evidence and for the aforesaid reasons cannot wipe out the unchallenged testimony of PW-20, which is the case of the prosecution. Further, the appellant-main accused has also been clearly identified by PW-6 as the person in the White T Shirt who had asked for whisky and thereafter on her refusal to oblige, he misbehaved with her in the most vulgar fashion. [Para 23, 24] [192-F-H; 193-A-C]

12.2. It is pertinent to note that FIR No. 288 of 1999 at PS Mehrauli under Excise Act was registered on

30.04.99 itself and thus the question of making PW-6 an accused on 08.05.99 does not arise. Moreover, the excise offence is a bailable offence. Further, the statement of PW-6 was recorded under Section 161 Cr.P.C. on 03.05.99 itself vide Ex PW 6/DA and thus the contention of making her an accused on 08.05.99 on this count is also fallacious. [Para 25] [193-G-H; 194-A]

12.3. As regards the argument that PW-6 was shown as an eye-witness to the incident of shooting in the 'rukka', a perusal of the same reveals that at no point of time PW-2, stated either in the positive or the negative that PW-6 was or was not there when the shots were fired. In any case, as rightly pointed out on the side of the State that the alleged prosecution planted PW-6 as an eye-witness goes contrary to all reasoning, since on 30.04.1999 at the time of recording the 'rukka', none of the witnesses had disclosed the identity of A-1, therefore, to allege that the Police had planted the witness is wholly incorrect. [Para 26] [194-B-D]

12.4. As regards the argument that PW-6 was under the influence of alcohol, therefore, could not have identified A-1, is also wrong since she clearly stated in her testimony, particularly, in cross-examination, that she had consumed only one drink. [Para 27] [194-D-E]

12.5. The argument that deposition of PW-6 as regards the presence of other accused, does not find corroboration from the testimony of PW-1 is incorrect since the said witness categorically mentioned the presence of other accused. The grievance that the identification of A-1 was based on a leading question is also wrong since even before the alleged leading question was put to the witness, the witness, PW-6 had positively identified A-1 by specifically pointing out and stating that he just looks like him. It was explained by the State that the appellant (A-1) was not personally known

to the said witness or her family and, therefore, the manner of identification in the present case wherein the present witness by pointing out towards him stated that he just looks like the man she saw at the party is most conclusive and reliable. Further the argument of her having been shown the photo, her identification is of little value since her statement that she saw the photographs prior to 05.05.1999 is most wavering and unclear. In the same manner, she has deposed that photos were also shown to PW-20 and PW-24 is of little value since neither PW-20 nor PW-24 stated that they had been shown the photos of the accused inspite of having all the opportunities failed to confront the said witnesses with the said part of PW-6's testimony. Based on the statement of PW-70, that he saw her screaming out, the defence has sought to discredit PW-6's, statement. It is relevant to note that it is the case of PW-6 that she came to know when she was in the courtyard, PW-2 came running towards her screaming that the deceased had been shot. Thereafter, PW-6 fainted, thus, in the process, if PW-70 saw her screaming in the courtyard, it cannot be said that there is any contradiction in the statement of PW-6 and PW-70. [Para 28] [194-F-H; 195-A-D]

12.6. After perusing the evidence of PW-6, it is clear that after refusal of the drink, A-1 misbehaved in the most vulgar fashion. The testimony of PW-23 further corroborates the testimony of PW-6. As rightly pointed out by the State that it was a case where the deceased was murdered for a row over the drink. [Para 29] [195-E]

12.7. The evidence of these three witnesses, viz. PWs 6, 20 and 24, if read in whole in conjunction and in harmony with each other, would show the chain of circumstances of evidence leading to only one inference. It is relevant to mention that PW-24's statement was recorded on the same day i.e. 30.04.99. The presence of PW-24 at the time of incident is also supported by the

testimony of PW-13, who deposed that a person bearing the description of PW-24 came to the Police Station to report about the firing incident, which fact corroborates the testimony of PW-24 that he went to the Police Station. PW-100 reached Ashlok Hospital and made enquiries from PW-20 who directed him to take the statement of PW-2 as he was present at the bar counter and conversant with every thing. The prosecution has explained that in view of the statements of the eye-witnesses having been taken immediately at 03.40 a.m. on 30.04.99 itself on the basis of which FIR was registered and number of other investigation processes like post-mortem, site plan etc. and immediately thereafter search for Tata Safari, ownership of the alleged vehicle, search for A-1 in the case being made, as such even if there is delay in recording of statements of other witnesses, it cannot be fatal to the prosecution case. The said claim of the prosecution cannot be rejected as unreasonable. [Para 30] [195-G-H; 196-A-G]

12.8. PW-6 in categorical terms informed the Court about A-1 asking about the whisky, his misbehaviour immediately before the shooting and also identified the same person in white T-shirt asking for the whisky and misbehaving with her. PW-6 further corroborates the testimony of PW-20 and part testimony of PW-2 with regard to the presence of A-1. The scrutiny of the entire evidence of PW-6 clearly shows that her evidence is not only relevant but also admissible. [Para 31]

13.1. PW-9, who conducted post-mortem on the body of deceased has stated that on 30.04.1999 at about 11:20 a.m. 7 sheets of papers i.e. inquest papers, request of post-mortem, inquest report, copy of FIR, brief facts of the case, were submitted to him along with the dead body. He informed that the cause of death to the best of his knowledge and belief was head injury due to firearm, injury was ante-mortem in nature. He also deposed that

Injury no. 3 was sufficient to cause death in the ordinary course of nature. [Para 32] [197-C-E]

13.2. Coming to the evidentiary value of PW-2, on behalf of the defence, it was stated that PW-2 is not a reliable witness in view of the fact that according to him he made his statement in English, however, PW-100 recorded it in Hindi. In the absence of any suggestion to the contrary, that it must be presumed that PW-100 recorded the statement correctly. It is also relevant to mention that in his statement as a witness he said he can understand spoken Hindi. Even if a prosecution witness is challenged in cross-examination, that part of his testimony which is corroborated by other witnesses or from other evidence can clearly be relied upon to base conviction. [Para 33] [197-E-H; 198-A-B]

13.3. With regard to the allegation that statements of PW-6, PW-20 and PW-24 were taken under pressure as a case under Excise Act was lodged against them. In fact, PW-20 has denied the suggestion that she is deposing falsely at the instance of Police. In the same way, PW-24 has also denied the suggestion that a deal was struck between him and the investigation agency to make a false statement, thereafter, the Excise case could be hatched up. It is relevant to point out that the case under Punjab Excise Act which was registered as FIR No. 288/99 on 30.04.1999 has not been withdrawn by the prosecution against the accused. On the other hand, the fact remained that the accused had pleaded guilty. The maximum penalty/fine under Section 68 is Rs.200/-, therefore, the maximum fine which could have been imposed on the accused is Rs.200/-. In those circumstances, the allegation that these three witnesses were kept under pressure is not acceptable. [Para 34] [198-C-H; 199-A]

14.1. The information about the commission of a cognizable offence given "in person at the Police Station"

and the information about a cognizable offence given "on telephone" have forever been treated by this Court on different pedestals. The rationale for the said differential treatment to the two situations is, that the information given by any individual on telephone to the police is not for the purpose of lodging a First Information Report, but rather to request the police to reach the place of occurrence; whereas the information about the commission of an offence given in person by a witness or anybody else to the police is for the purpose of lodging a First Information Report. Identifying the said objective difference between the two situations, this Court has categorically held in a plethora of judgments that a cryptic telephonic message of a cognizable offence cannot be treated as a First Information Report under the Code. It has also been held in a number of judgments by this Court that merely because the information given on phone was prior in time would not mean that the same would be treated as the First Information Report, as understood under the Code. [Para 41] [208-B-F]

14.2. In the instant case, the three telephonic messages received by the police around 2.25 a.m. on 30.04.1999 did not constitute the FIR under Section 154 of the Code and the statement of PW-2 was rightly registered as the FIR.[Para 42] [208-G]

State of U.P. vs. P.A. Madhu, **(1984) 4 SCC 83;** *Tapinder Singh vs. State of Punjab* **(1970) 2 SCC 113;** *Ranbir Yadav vs. State of Bihar,* **(1995) 4 SCC 392 and** *Ramesh Baburao Devaskar and Others vs. State of Maharashtra* **(2007) 13 SCC 501, relied on.**

Mehr Vajsi Deva vs. State of Gujarat, **AIR 1965 Guj 143, held per incuriam.**

Superintendent of Police, CBI and Others vs. Tapan Kumar Singh, **(2003) 6 SCC 175, held inapplicable.**

State of U.P. vs. Bhagwant Kishore Joshi **AIR 1964 SC 221 and** *Emperor vs. Khwaja Nazir Ahmad* **AIR 1945 PC 18, distinguished.**

H.N. Rishbud & Inder Singh vs. The State of Delhi **(1955) SCR 1150;** *Damoder vs. Rajasthan* **(2004) 12 SCC 336;** *Ramsinh Bavaji Jadeja vs. State of Gujarat* **(1994) 2 SCC 685;** *Zahidurddin vs. Emperor,* **AIR 1947 PC 75;** *Superintendent and Remembrancer of Legal Affairs to the State of W.B. vs. Ram Ajudhya Singh & Anr.* **AIR 1965 Cal. 348 (Para 9) and** *Mer Vas Deva vs. State of Gujarat,* ***AIR 1965*** **Guj. 143 (Para 9 & 10), referred to.**

15.1. PW-30 has categorically stated that while he was on duty he saw a vehicle Tata Sierra White Colour coming slowly from the side of Qutub at about 03.40 am or 03.45 am. There were two persons in the said vehicle on the front seat. They stopped the vehicle near Tata Safari of black colour. One boy came down from the said vehicle and opened Tata Safari with a key. PW-30 told him not to do so but the said boy forcibly entered the Tata Safari and took it away. PW-30 gave a lathi blow on the glass of window pane and it broke due to danda blow. He noted down the number of the black Tata Safari as CH-01-W-6535. The witness also identified Tata Safari which was hit by him on that night, which is exhibit PW 30/X. PW 30 also identified that Tata Sierra was driven by A-2 whereas A-3 drove away black Tata Safari. PW-101 also stated that when he came back, he was told that two boys had come and had forcibly taken away the Tata Safari. Out of the two boys one was Sikh, PW-30 also informed that he had broken the right backside window panel of Safari with his Danda. He also gave the number of the Tata Safari as CH-01-W-6535. PW-100 has also stated that two persons had got into the Tata Safari and had driven away. The testimony of the above witnesses is duly corroborated by document Ex PW 101/DK-1. Thus it is clearly established by cogent evidence that on

30.04.1999 at about 03.40 or 03.45 am A-2 and A-3 came in a white colour Tata Sierra Car and A-3 got down and drove away black Tata Safari No. CH-01-6535. [Paras 43 and 44] [212-D-H; 213-A-C]

15.2. From the statements of PW-100, PW-101, PW-87, PW-80 and PW-85, it is clear that Tata Safari vehicle was being searched by Inspector (PW-87) and SI (PW-85) and other police officers at various places in Delhi, Haryana and Chandigarh. The said vehicle was found on 02.05.1999 at Noida and the same was taken into possession through a seizure memo prepared by Noida Police. The same was taken into possession by Delhi Police on 03.05.1999 after taking appropriate orders from the Magistrate, Ghaziabad. [Para 46] [215-B-D]

15.3. Ex PW 74/A Seizure Memo of Tata Safari and live cartridge with 'C' mark etc. clearly establish the recovery of the same at Noida, beyond any shadow of doubt vide Ex PW 74/C Seizure of Live cartridge by Insp. (PW-74) dated 26.06.1999. PW-91 and PW-74 of PS Sec.24, Noida have deposed that they found black Tata Safari No. CH-01-W-6535 abandoned at the NTPC Township pursuant to which FIR No. 115/99 u/s 25 of the Arms Act was registered vide Ex. PW 74/B. The said Tata Safari was seized under seizure memo Ex PW 74/A. PW 101 has clearly deposed that about 10.00 p.m. on 02.05.1999 he got the information with regard to the Tata Safari having been found at Noida. On 03.05.1999, he moved an application before the ACJM, Noida for the superdari of the Tata Safari vide Ex. PW 101/1 and in pursuance of the orders of ACJM Ex. PW 101/2 and he seized the same vide seizure memo dated 03.05.1999 vide Ex. PW 100/DB along with other articles including broken glass pieces which were duly sealed with the seal of BD. The seizure memo Ex. PW 100/DB is duly signed by SI BD Dubey. The said Tata Safari and the broken glass pieces duly sealed with the seal of BD have been deposited in the Malkhana

of PS Mehrauli on 03.05.1999. PW-101 has also stated that SI Vijay Kumar accompanied him to Noida and that seizure memo Ex. PW 101/DB was in the handwriting of SI Vijay Kumar of PS Mehrauli. Ex PW 18/DA at item no. 7 & 9 in the letter sent to CFSL mentioned about the seal of BD on the sealed parcel containing broken glass pieces. The report of CFSL vide Ex PW 90/A proved that on comparison of S1 and S2 the two window panes of the left and the right rear side of the said Tata Safari are different. Thus this convincing testimony of PW 101 duly corroborated by documents cannot be discarded simply because SI Sudesh Gupta (Noida Police) failed to mention the seizure of broken glass pieces on 02.05.1999. [Paras 47, 49] [215-G-H; 216-D-H; 217-A-B]

15.4. From the evidence on record it has been proved by the prosecution that A-I and co-accused were present in the said party at Tamarind Cafe on the night of occurrence. The presence of Tata Safari CH-01-W-6535 at the place of occurrence and its being forcibly taken at around 3.45 am after the incident has also been proved beyond reasonable doubt. PW-18 has proved that the said Tata Safari CH-01-W-6535 is registered in the name of Piccadilly Agro Industries Ltd., Chandigarh. It has also been proved from the testimony of PW-25, PW-26, PW-48 and the annual report of Piccadilly that A-1 was the director in Piccadilly Agro Industries which finding has also been arrived at by the Trial Court in favour of the prosecution. Thus a reasonable inference has to be drawn from the above mentioned evidence that A-1 used the said Tata Safari for coming to Qutub Colonnade on the fateful night of 29/30.04.1999. [Para 50] [217-C-F]

16.1. The prosecution has established that the appellant/accused was the holder of a .22" bore Pistol; he was witnessed by PW-20 as the perpetrator of the crime; a mutilated .22" lead was recovered from the skull of the deceased; two empties of .22" make with mark 'C'

were found at the spot; a .22" live cartridge with mark 'C' was found in the Tata Safari of the appellant/accused which was found abandoned at Noida and for which no theft report was lodged; that his prior and subsequent conduct of having got the Tata Safari removed from the spot, of absconding; refusal to TIP without having any basis; that he even denied his presence at the spot, clearly prove beyond reasonable doubt leaving no manner of doubt that he is guilty of the offence of murdering the deceased by using firearm and destroying evidence thereafter. [Para 55] [221-D-F]

16.2. A-1 despite forever maintaining that the police had illegally taken away the pistol from his farmhouse on 30.04.1999/01.05.1999, did not take this ground in the reply to remand application and argument to the said effect was recorded in the remand order by the Magistrate. The only inevitable conclusion that could be reached from the said turn of events is that the pistol was still in custody of the accused and had never been recovered by the police from his farmhouse. In the reply dated 07.05.1999 filed by the accused to the remand application, there are interpolations in the reply in black ink in two handwritings to the effect that the pistol had already been recovered from the person of the accused. The assertion that the words in two handwritings in black ink are interpolations gain strength from the fact that nowhere in the remand order dated 07.05.1999 has it come that the accused has taken the plea that the pistol had already been recovered. Thus this evidence coupled with the testimony of PW-2, that the person in white T-shirt who was asking for whisky took out a pistol from dub of his pant and fired a shot in the air and the other witnesses PWs 1,6, 20 and 24 that the person in white T-shirt was A-1, a positive inference beyond reasonable doubt has to be drawn that A-1 fired from his .22" bore pistol which resulted in the death of the deceased on the

fateful night of 29/30.04.1999. [Para 56] [222-A-F]

16.3. A perusal of the questions posed and answers given by A-1 were either evasive or incorrect and an adverse inference deserves to be drawn for such acts of the A-1. [Para 57] [223-H; 224-A]

Sucha Singh vs. State of Punjab **(2001) 4 SCC 375, relied on.**

17.1. Had the witnesses been planted, the witnesses would have rendered a parrot like testimony. PW-1 has explicitly stated that on 30.04.1999 he had told the police at the Apollo Hospital all that he knew. This being the case, it cannot be said that the testimony of the witness should be thrown out for the delay in recording the statement by the Police. Clearly, PW-1 was not an eye witness, this fact must have been realized by PW-100 and 101, therefore, they felt no urgency in addressing this aspect of the investigation i.e., recording of the statement of PW-1. On behalf of the State, it was submitted that as there were number of witnesses to be examined the said examination continued for days. Witnesses 'PS' and 'AS' were also examined on 14.05.1999. Further the presence of PW-1 can also not be belied in view of the testimony of PW-29 and PW-73. In any case, any defect by delay in examination of witnesses in the manner of investigation cannot be a ground to condemn the witness. Further Section 162 Cr.P.C. is very clear that it is not mandatory for the police to record every statement. In other words, law contemplates a situation where there might be witnesses who depose in Court but whose previous statements have not been recorded. [Para 61] [225-E-H; 226-A-C]

17.2. The statements of witnesses were recorded not only by the I.O. himself but by other officials as well who were helping him in investigation. The delay in recording

the statement of PW-1 occurred due to natural flow of statements of various witnesses. The statement of PW-1, was recorded by ACP (PW-92), who stated the name of PW-1 occurred during the course of interrogation of other guests/witnesses. The evidence of PW-1 is relevant for a limited purpose i.e., proving the presence/identity of A-1 and his desire for liquor in the party which part of evidence has also been given by other witnesses in so many words, prior to PW-1 as well. [Para 62] [226-D-G]

Mohd. Khalid Vs. State of W.B., **(2002) 7 SCC 334;** *Prithvi vs. Mam Raj ,* **(2004) 13 SCC 279 and** *Ganeshlal vs. State of Mahrashtra* **(1992) 3 SCC 106, relied on.**

Maruti Rama Naik vs. State of Mahrashtra, **(2003) 10 SCC 670 and** *Jagjit Singh vs. State of Punjab* **(2005) 3 SCC 689, distinguished.**

Ganesh Bhavan Patel vs. State of Maharashtra, **(1978) 4 SCC 371, referred to.**

18.1. The opinion of Ballistic expert finally exhibited as Ex. PW 89/DB only says that *"it appears that the two cartridge cases are from two different pistols."* **Such a vague opinion of the expert can neither be relied upon nor can be any basis to come to a conclusion that there were two persons who had fired two different shots. [Para 64] [229-B-C]**

18.2. PW-95, Ballistic expert at FSL, Jaipur, was asked a specific query being query No.3 whether both the empty cartridge cases have been fired from the same firearm or otherwise. In the reply to the said query, the expert opined that no definite opinion could be given on the two .22" bore cartridge cases C-1 and C-2 in order to link with the firearm unless the suspected firearm is available for examination. It was pointed out that the trial Court puts a question to the witness and while putting the question first gives a specific fact finding that for reply

to Query No. 3, the presence of the firearm was not necessary. This incorrect finding of fact given by the trial Court was based on no expertise and had resulted in grave miscarriage of justice. It is well settled that while giving reports after Ballistic examination, the bullets, cartridge case and the cartridges recovered and weapon of offence recovered are carefully examined and test firing is done at the FSL by the said weapon of offence and then only a specific opinion is given. [Para 65] [229-D-G]

18.3. In any case, both Section 293 and Section 294 of the Code of Criminal Procedure which dispense with formal proof of documents under certain circumstances make it abundantly clear that the documents sought to be relied upon must be the originals. Assuming for the sake of the argument, though not admitting, that the said report, i.e. Ex. PW-89/DB is admissible even though a photocopy has been placed on record and even though nowhere it has come in evidence that the same i.e. the photocopy has been compared and scrutinized with the original by the Court and then placed on record, the same still loses all credence in the light of the fact that a perusal of the forwarding letter and report would show that there seems to have been some tampering with the said documents since the sequence of numbering of the parcels as between the forwarding letter and the report has been changed by somebody which fact remains unexplained as, therefore, casts a further doubt on the genuineness of the said report. The report itself with regard to query No.3 shows that "it appears that the two cartridge cases C-1 and C-2 have been fired by two different weapons". This opinion of the expert was vague and on the basis of the said opinion no credence can be lent to the fact adverted to by the defence that there were two persons who fired two different shots from two different weapons. Moreover the said report is oddly

silent on query No.7 of the forwarding letter wherein it was specifically asked about the various markings on the live cartridge and the bullet empties. The stand of the defence that to opine the two cartridge cases are from the same weapon or not the pistol is not required and the pistol is only required when the opinion is sought whether they are from that particular weapon or not cannot be accepted. It is well settled that when pressure is built inside the cartridge case, which results in the pushing out of the bullet from the barrel, there is difference in the marks to the extent that it may be either clear or unclear and flattened or deepened thus no opinion can be rendered on account of this dissimilarity in the absence of the weapon of offence and test firing. Further once the report is rendered inadmissible the two gun theory of the defence becomes wholly inadmissible and what remains is that the two empties found at the spot are .22" bore cartridges, that the live bullet found in the Tata Safari is a .22" cartridge and that the gun belonging to the appellant is a .22" bore pistol which was used for the commission of the crime of murder of the deceased. [Para 67] [231-F-H; 232-A-G]

18.4. The argument that the judge knew that the issue in question was whether the two empties found on the spot were fired from the same gun is wrong and misleading. The judge knew that as per the charge framed against A-1 it was he alone who was charged with the possession and use of a gun. The judge also knew that the first expert opinion was brought on record at the instance of the accused; the judge further knew that PW-95 had stated in no uncertain terms that no opinion can be given as regards the two empties without receipt of the weapon of offence. Inspite of knowing all this, the judge first put a finding of its own to the witness that he did not need the firearm in question in order to reply as to whether the two empties were fired from the same gun

i.e., a gun and not the gun. The Court exceeded its power under Section 165 of the Evidence Act by putting the question after giving its own finding. [Para 70] [235-C-F]

18.5. The discretion on the part of the I.O. and the superior officers was rightly exercised when they decided not to file the expert report since they realized that the expert report is ambiguous as it uses the term "appear" when it suggests that the two empties appear to have been fired from different weapons. Clearly the said opinion was far from conclusive and would have only created confusion in the case of the prosecution. Thereafter a second opinion was sought wherein the expert i.e. PW-95 opined that a conclusive opinion can only be given after the receipt of the weapon of offence. The argument that the weapon of offence is not required to determine whether the two bullets have been fired from the same gun is based on the wrong premise that the two empties would necessarily consist of features which would enable an expert in determining the said fact. [Para 71] [236-A-D]

18.6. In the present case, the moment the Ballistic Expert uses the word "appear" his opinion unsupported by reasons becomes inconclusive and stands discredited for the purpose of placing reliance on. Though he has given opinion qua query No.5 that the two .22" cartridge cases appears to have been fired from two different .22" caliber standard firearms but his opinion is completely silent on the marks i.e. ejector, trigger, chamber, magazine or other tool marks on the bullet empties (Ex. PW 89/DB). Clearly an option was available to the accused under Section 293 Cr.P.C. to call for the witness and ascertain from his for sure that the two empties were in fact fire from two different weapons, however, the accused did not choose to do so in terms of Section 293 Cr.P.C. In any case, the said opinion as of

today is of little use to the accused for the reasons stated above and since it is both inconclusive and unsupported by any reasoning whatsoever and, therefore, cannot appeal to the judicial mind of this Court. Similar is the case with the expert opinion of PW-95 which is again inconclusive. There is no evidence on record to suggest that PW-95 gave an opinion to oblige the prosecution. On the contrary, his response to the Court question reveals that he was extremely confused as to the issue which had to be addressed by him in the capacity of an expert. In the concluding part of his testimony he reaffirms the opinion given by him which is that without test firing the empties from the weapon of offence no conclusive opinion can be given. [Para 71] [236-G-H; 237-A-E]

18.7. It is pertinent to note that the testimony of the experts i.e., exhibited as Ex.PW-89/DB and PW-95 exhibited as Wx PW-95/C-1 in inconclusive. The expert PW-95 has stated in his report that it is only on receiving the weapon of offence that a conclusive opinion as to whether the two empties (cartridge cases) found at the spot were fired from the same weapon or from two different weapons could be given. [Para 72] [237-F-G]

18.8. The law is very clear that where a witness for the prosecution turns hostile, the Court may rely upon so much of the testimony, which supports the case of the prosecution and is corroborated by other evidence. PW-2's testimony as regards the identity of the person shooting, is certainly not corroborated by the testimony of the experts since both the experts have given opinions which cannot qualify as conclusive opinion of experts. [Para 73] [238-A-C]

A.E.G. Carapiet vs. A.Y. Derderian, **AIR 1961 Calcutta 359 and** *Ram Chander vs. State of Haryana,* **AIR 1981 SC 1036, referred to.**

19.1. A public prosecutor is appointed under Section 24 of the Code of Criminal Procedure. Thus, Public Prosecutor is a statutory office of high regard. He has wider set of duties than to merely ensure that the accused is punished, the duties of ensuring fair play in the proceedings, all relevant facts are brought before the court in order for the determination of truth and justice for all the parties including the victims. It must be noted that these duties do not allow the prosecutor to be lax in any of his duties as against the accused. It is also important to note the active role which is to be played by a court in a criminal trial. The court must ensure that the prosecutor is doing his duties to the utmost level of efficiency and fair play. [Paras 76, 77] [238-F-G; 240-B-D]

19.2. In the Indian Criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. An accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India. A person is entitled to be tried according to the law in force at the time of commission of offence. A person could not be punished for the same offence twice and most significantly cannot be compelled to be a witness against himself and he cannot be deprived of his personal liberty except according to the procedure established by law. The law in relation to

investigation of offences and rights of an accused, in our country, has developed with the passage of time. On the one hand, power is vested in the investigating officer to conduct the investigation freely and transparently. Even the Courts do not normally have the right to interfere in the investigation. It exclusively falls in the domain of the investigating agency. In exceptional cases the High Courts have monitored the investigation but again within a very limited scope. There, on the other a duty is cast upon the prosecutor to ensure that rights of an accused are not infringed and he gets a fair chance to put forward his defence so as to ensure that a guilty does not go scot free while an innocent is not punished. Even in the might of the State the rights of an accused cannot be undermined, he must be tried in consonance with the provisions of the constitutional mandate. The cumulative effect of this constitutional philosophy is that both the Courts and the investigating agency should operate in their own independent fields while ensuring adherence to basic rule of law. It is not only the responsibility of the investigating agency but as well that of the Courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of bias mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society. [Para 82] [248-E-H; 249-A-F]

19.3. The aim of criminal justice is two-fold. Severely punishing and really or sufficiently preventing the crime. Both these objects can be achieved only by fair investigation into the commission of crime, sincerely proving the case of the prosecution before the Court and

the guilty is punished in accordance with law. [Para 82] [250-B-C]

19.4. Historically but consistently the view of this Court has been that an investigation must be fair and effective, must proceed in proper direction in consonance with the ingredients of the offence and not in haphazard manner. In some cases besides investigation being effective the accused may have to prove miscarriage of justice but once it is shown the accused would be entitled to definite benefit in accordance with law. The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and 21 and expensive power of the police to make investigation. [Para 83] [250-D-E]

19.5. The power of the police to investigate freely and fairly is well recognized and codified in law. In terms of Section 170, the investigating officer when satisfied that sufficient evidence or reasonable grounds exist he shall forward accused under custody to a Magistrate along with such weapons or articles which may be necessary to be produced before the Court. Section 172 of the Code has a meaningful bearing on the entire investigation by a police officer. [Para 84] [251-C-D]

19.6. Under Section 170, the documents during investigation are required to be forwarded to the Magistrate, while in terms of Section 173 (5) all documents or relevant extracts and the statement recorded under Section 161 have to be forwarded to the Magistrate. The investigating officer is entitled to collect all the material, what in his wisdom is required for proving the guilt of the offender. He can record statement in terms of Section 161 and his power to investigate the matter is a very wide one, which is regulated by the provisions of the Code. The statement recorded under Section 161 is not evidence per se under Section 162 of the Code. The

right of the accused to receive the documents/statements submitted before the Court is absolute and it must be adhered to by the prosecution and the Court must ensure supply of documents/statements to the accused in accordance with law. Under proviso to Section 162 (1) the accused has a statutory right of confronting the witnesses with the statements recorded under Section 161 of the Code thus indivisible. Further, Section 91 empowers the Court to summon production of any document or thing which the Court considers necessary or desirable for the purposes of any investigation, inquiry, trial or another proceeding under the provisions of the Code. Where Section 91 read with Section 243 says that if the accused is called upon to enter his defence and produce his evidence there he has also been given the right to apply to the Court for issuance of process for compelling the attendance of any witness for the purpose of examination, cross-examination or the production of any document or other thing for which the Court has to pass a reasoned order. [Para 91] [255-F-H; 256-A-D]

19.7. The liberty of an accused cannot be interfered with except under due process of law. The expression 'due process of law' shall deem to include fairness in trial. The Court gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused places an implied obligation upon the prosecution (prosecution and the prosecutor) to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in Court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by

the investigating agency and in the opinion of the prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused. The role and obligation of the prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English System. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. [Para 91] [256-D-H; 257-A-C]

19.8. Section 207 Cr.P.C. not only require or mandate that the Court without delay and free of cost should furnish to the accused copies of the police report, first information report, statement, confessional statement of the persons recorded under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173 (6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under Sub Section 5 of Section 173. In contradistinction to the provisions of Section 173, where the Legislature has used the expression 'documents on which the prosecution relies' are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173 (5) would deem to include the documents which have to be sent to the Magistrate during the course

of investigation as per the requirement of Section 170 (2) of the Code. [Para 91] [257-B-F]

19.9. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the Court. But certain rights of the accused flow both from the codified law as well as from equitable concepts of constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the Court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bonafidely and has bearing on the case of the prosecution and in the opinion of the public prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially. The concept of disclosure and

duties of the prosecutor under the English System cannot, be made applicable to Indian Criminal Jurisprudence *stricto senso* **at this stage. However, the doctrine of disclosure would have to be given somewhat expanded application. As far as the present case is concerned, no prejudice had been caused to the right of the accused to fair trial and non-furnishing of the copy of one of the ballistic reports had not hampered the ends of justice. Some shadow of doubt upon veracity of the document had also been created by the prosecution and the prosecution opted not to rely upon this document. In these circumstances, the right of the accused to disclosure has not received any set back in the facts and circumstances of the case. The accused even did not raise this issue seriously before the Trial Court. [Para 92] [257-G-H; 258-A-H; 259-A]**

Shiv Kumar v. Hukam Chand and Anr. **(1999) 7 SCC 467;** *Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others,* **(1994) 4 SCC 602;** *Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat and Ors.,* **(2004) 4 SCC 158;** *Kashmeri Dev v. Delhi Administration and Anrs.* **JT 1988 (2) SC 293;** *Sasi Thomas vs. State & Ors.* **(2007) 2 SCC (Criminal) 72;** *State Inspector of Police vs. Surya Sankaram Karri* **(2006) 3 SCC (Criminal) 225;** *T.T. Antony vs. State of Kerala* **(2001) 6 SCC 181;** *Nirmal Singh Kahlon vs. State of Punjab* **AIR 2009 SC 984;** *Habeeb Mohammad v. State of Hyderabad,* **A.I.R. 1954 S.C. 51;** *Khatri v. State of Bihar* **A.I.R. 1981 SC 1068;** *Malkiat Singh and Ors. v. State of Punjab* **(1991) 4 SCC 341;** *Mukund Lal v. Union of India* **A.I.R. 1989 SC 144;** *Shamshul Kanwar v. State of U.P.* **A.I.R. 1995 SC 1748;** *State of Kerala v. Babu* **(1999) 4 SCC 621 and** *State of Karnataka vs. K. Yarappa Reddy* **(1999) 8 SCC 715, relied on.**

R. v Ward (Judith Theresa) **(1993) 2 All E.R. 577 and** *R v. Preston & Ors.* **(1993) 4 All ER 638, referred to.**

20.1. The evidence of the telephone calls in the present case is admissible under Sections 8 and 27 of the Indian Evidence Act. [Para 93] [259-B]

20.2. The details of the phone call show that the accused were in touch with each other which resulted in destruction of evidence and harboring. Thus the finding of the trial Court that in the absence of what they stated to each other is of no help to the prosecution is an incorrect appreciation of evidence on record. A close association is a very important piece of evidence in the case of circumstantial evidence. The evidence of phone calls is a very relevant and admissible piece of evidence. The details of the calls made by the various accused to one another are available in Ex. PW-66/B, PW-66/D and PW-66/C. [Para 96] [260-F-G]

21. The petitioner had adequate and competent legal representation before the trial Court and leading questions, if any, put by the prosecutor were objected to by the defence and several questions were disallowed by the trial court. Furthermore, the finding of guilt of the appellant by the High Court has not been on account of any of the answers elicited to any such questions. It is not as if every single leading question would invalidate the trial. The impact of the leading questions, if any, has to be assessed on the facts of each case. [Para 97] [261-E-F]

Varkey Joseph vs. State of Kerala, **1993 Supp (3) SCC 745, distinguished.**

22. The Police while filing the charge-sheet before the Magistrate had enlisted Sanjay Mehtani's name in the list of witnesses. This fact clearly shows that the prosecution had the intention to examine Sanjay Mehtani as their witness. Further, the said witness was summoned by the Court for examination vide orders dated 28.11.2001,

08.02.2002, 27.11.2003 and 11.12.2003. The said sequence of events clearly show that the prosecution not only wanted to examine him as a witness, but tried serving him with the summons many times, but the same could not be achieved as Sanjay Mehtani had by then shifted to Hong Kong and was not staying in India. Therefore to contend that Sanjay Mehtani was deliberately not examined by the Prosecution is absolutely baseless and not founded on the basis of the record. [Para 98] [262-B-E]

23.1A criminal trial is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material. [Para 100] [263-D]

23.2. From the testimony of PW-20 and PW-24, it is proved beyond reasonable doubt that A-1 after committing the murder of the deceased fled away from the scene of occurrence. It is further proved from the testimony of PW-100, PW-101, PW-87, PW-85 and PW-80 that from afternoon of 30.04.1999 search was made for the black Tata Safari bearing Regn. No. CH-01-W-6535 and for A-1 in Bhadson, Kurukshetra, Chandigarh, his farmhouse at Samalkha and Okhla, Delhi. It is also proved that even after the seizure of vehicle on 02.05.1999 the search for A-1 continued and search was made at Piccadilly Cinema, Piccadilly Hotel, his residence at Chandigarh, PGI Hospital where his father was subsequently admitted. However, he was not found nor anybody informed his whereabouts and it is only on 06.05.1999 that he had surrendered at Patiala Guest House, Chandigarh in the presence of an advocate. The

above evidence of the witnesses clearly establishes beyond reasonable doubt that A-1 absconded after committing the crime and surrendered on 06.05.1999 after extensive searches were made. [Para 99] [262-G-H; 263-A-C]

23.3. Thus, it has been proved beyond reasonable doubt that A-1 absconded after the incident which is a very relevant conduct u/s 8 of Evidence Act. [Para 100] [263-G-H]

Anant Chaintaman Lagu vs. State of Bombay **AIR 1960 SC 500, relied on.**

24.1. PW-100 and PW-101 deposed that on the early morning of 05.05.1999 A-2 was arrested and he made a voluntary disclosure vide Ex.PW 100/7 that on 29.04.1999 he had a talk with Alok Khanna over telephone and thereafter a telephone call was received at about 8.30 p.m. from A-1. He has further disclosed that Alok Khanna came to his house in Tata Sierra car no. MP 04V 2634. He has further disclosed that he and Alok Khanna went to Qutub Colonnade in Alok Khanna's Tata Sierra bearing No. MP-04-V-2634. A-1 surrendered on 06.05.1999 at 2.30 p.m. at Patiala Guest House, Chandigarh before Inspr. (PW-87) and ASI (PW-80). After his arrest A-1 had made four disclosure statements. The first was an oral disclosure made to Inspr. (PW 87) wherein he said that he could recover the pistol from Ravinder Sudan at Mani Majra. However, it was pointed out that the search of the house at Chandigarh was taken and since the diary containing the address of Ravinder Sudan could not be found, no recovery could be effected. On 07.05.1999, he made a disclosure to Inspr. (PW-101) which was recorded as Ex. PW 100/12. In the said disclosure, he disclosed that he was using his younger brother Kartik's Cellphone No. 9811096893 in making calls to his friends A-2, Alok Khanna, Amit Jhingan and others. He also

disclosed the phone Nos. of some of the co-accused and that he handed over his cell bearing No. 9811096893 to Yograj Singh in Panchkula and can recover the same. Pursuant to this disclosure of A-1 the mobile phone used by him was recovered from accused Yograj Singh (Ex.PW 100/23). [Paras 101, 102] [264-A-G]

24.2. The third disclosure is Ex. PW 100/Article-1 which was video recorded on 07.05.1999 itself after A-1 was produced before the Metropolitan Magistrate and copies of which were duly supplied to the accused during trial. From the disclosure Ex PW 100/Article-1 there were further discovery of facts admissible under Section 27 of the Evidence Act. Pursuant to the disclosures of A-1 investigations were carried out and it was that the accused were in close contact with each other over phone and A-1 had made number of calls from the house of A-3 to his house in Chandigarh and to Harvinder Chopra at Piccadilly. [Para 103] [264-H; 265-A-C]

24.3. The fourth disclosure of A-1 was recorded by PW-101 wherein he had disclosed that Ravinder Sudan @ Titu having concealed the pistol, had gone to Manali (HP) where he met his uncle Shyam Sunder and he very well knew the place where they concealed the pistol and that he could lead to Manali to recover the pistol used in the incident. It further came on record that calls were made to USA to Ravinder Sudan. It may not be out of place to mention that calls were exchanged between the accused and made to USA were discovered pursuant to disclosures made by the accused persons. [Para 104] [265-C-E]

25.1. The witnesses PWs 1, 6, 20 and 24 have clearly proved beyond reasonable doubt the identification of the accused persons. PW-1 had met A-1 on the night of 29.04.1999 at Qutub Colonnade when he introduced himself to PW-1 and they were about to exchange visiting

cards when A-2 took him away towards the cafe. Both A-2 and A-1 refused their TIP on 06.05.1999 and 07.05.1999 respectively before the Metropolitan Magistrate without citing any credible reason. Thereafter, photo identification was conducted in which they were duly identified by PW-1. The said witness has also clearly identified the two of them in the Court. [Para 105] [265-F-H; 266-A-B]

25.2. PW-6, has categorically stated that she identified A-1 as the accused in the Police Station. She had seen accused in the police station on 08.05.1999 and thus the same was after 07.05.1999 when he refused his TIP. [Para 106] [266-B-C]

25.3. Further, PW-20 has categorically identified all the four accused in the witness box and there is no cross examination of PW-20 to the effect that the photographs of the accused were shown only in the police station. Even, PW-24 has identified A-1 in the court and his testimony also remains unshaken on this aspect. PW-30 has also clearly identified the other accused in the court and the photo identification with regard to them was resorted after A-2 had refused TIP on 06.05.1999. [Para 106] [266-F-H; 267-A-B]

25.4. PW-2 had left for Kolkata and thereafter, photo identification was got done when PW 76 went to Kolkata to get the identification done by picking up from the photographs wherein he identified A-1 though he refused to sign the same. However, in the court PW-2 refused to recognize him. In any case, the factum of photo-identification by PW-2 as witnessed by the concerned Officer is a relevant and an admissible piece of evidence. [Para 107] [267-B-C]

25.5. As far as refusal of TIP by A-1 is concerned, there is no justification in the stand of the defence that TIP was not held due to his photo or he himself being

shown to the witness. In this regard, it would be relevant to note that he had surrendered on 06.05.99 and on 07.05.99 he was produced in muffled face before the Metropolitan Megistrate and the proceedings thereof are recorded vide Ex PW-79/G wherein A-1's contention for refusal of TIP is that his photograph has appeared in newspapers and his photograph has been shown to the witnesses and that he has been shown physically to the witnesses. All the three contentions of A-1 are incorrect and misconceived with regard to the appearance of the photos in the newspapers. It was pointed out that in none of the newspapers is the photograph of A-1 shown. As a matter of fact vide Ex. No. PW 101/15 photograph dated 06.05.1999 clearly shows that he is in muffled face. In the absence of any defence refusal of TIP on this ground is totally unjustified and an adverse inference ought to be drawn in this regard. [Para 110] [268-E-H; 269-A-B]

25.6. It is not disputed that the photograph of A-1 was obtained from his farmhouse located in Samalkha on the intervening night 30.04.1999 & 01.05.1999. However, it is further in evidence of PW-87 that he went to Chandigarh and he took the photograph of A-1 for the purposes of identification and it was with him till 06.05.1999. Thus the photo of A-1 could not have been shown to any of the witnesses because the witnesses were either in Delhi or Kolkata not in Chandigarh. [Para 111] [269-D-E]

25.7. In the light of A-1's refusal, the police had little choice but to formally show the photo to the witnesses and record their statement in that regard. Thus, firstly his refusal is not justified on the ground that he has been shown to the witnesses, moreover, he was shown to the witness only after his refusal of TIP so that it is verified that he is the same person who is involved in the incident and no adverse inference on this count can be taken against the prosecution. [Para 111] [270-C-E]

25.8. Resort to photo identification was properly taken by mixing the photograph of A-1 with number of other photographs and asking the witnesses to pick up the photograph of the person they had witnessed on the fateful night and the morning thereafter i.e. 29/30.04.99. This mode of photo identification was resorted to vis-'-vis PW-1 on 24.05.1999 at Delhi, PW-3 and PW-4 on 29.05.99 and PW-2 on 19.05.99 at Calcutta. Thus there is no merit in the contention of the defense that the dock identification was a farce as it was done for the first time in the Court. [Para 112] [270-F-H]

25.9. Even a TIP before a Magistrate is otherwise hit by Section 162 of the Code. Therefore to say that a photo identification is hit by section 162 is wrong. It is not a substantive piece of evidence. It is only by virtue of section 9 of the Evidence Act that the same i.e. the act of identification becomes admissible in Court. The logic behind TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not born out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation. [Para 113] [272-G-H; 273-A-B]

25.10. It cannot be urged by the defence merely in order to suit his convenience that his statement may be treated as evidence and that all facts stated therein be treated as true unless contradicted by the prosecution. While answer given by the accused to question put under Section 313 of the Code are not per se evidence because, firstly, it is not on oath and, secondly, the other party i.e., the prosecution does not get an opportunity to cross-

examine the accused, it is nevertheless subject to consideration by the Court to the limited extent of drawing an adverse inference against such accused for any false answers voluntarily offered by him and to provide an additional/missing link in the chain of circumstances. [Para 125] [280-F-H; 281-A-B]

25.11. Regarding the contention that evidence of each witness must be put to the accused, it must be clarified that only the circumstances need to be put and not the entire testimony. [Para 126] [281-B-C]

25.12. It is not necessary that the entire prosecution evidence need to be put to the accused and answers elicited from him/even if an omission to bring to the attention of the accused an inculpatory material has occurred that ipso facto does not vitiate the proceedings, the accused has to show failure of justice. [Para 127] [283-H; 284-A-B]

Umar Abdul Sakoor Sorathia vs. Intelligence Officer, Narcotic Control Bureau, **(2000) 1 SCC 138;** *Munshi Singh Gautam vs. State of M.P.* **(2005) 9 SCC 631 and** *State of Punjab vs. Swaran Singh,* **(2005) 6 SCC 101, relied on.**

George & Ors. vs. State of Kerala & Anr. **(1998) 4 SCC 605, held inapplicable.**

N.J. Suraj vs. State **(2004) 11 SCC 346;** *Laxmipat Chararia vs. State of Maharashtra* **AIR 1968 SC 938;** *Hari Nath & Anr vs. State of U.P.* **(1988) 1 SCC 14;** *Kanan & Ors vs. State of Kerala* **(1979) 3 SCC 319;** *Dana Yadav vs. State of Bihar* **(2002) 7 SCC 295;** *Hate Singh Bhagar Singh vs. State of Madhya Bharat*, **AIR 1953 SC 468 and** *Ranvir Yadav vs. State of Bihar,* **(2009) 6 SCC 595, distinguished.**

Kartar Singh vs. Union of India **(1994) 3 SCC 569;** *Hari Nath & Ors vs. State of U.P.* **(1988) 1 SCC 14;** *Budhsen & Others vs. State of U.P.* **(1970) 2 SCC 128;** *Malkhansing vs.*

State of M.P., **(2003) 5 SCC 746;** *Shivaji Sahabrao Bobade vs. State of Maharashtra,* **(1973) 2 SCC 793;** *Mullagiri Vajram vs. State of A.P.* **1993 Supp. (2) SCC 198;** *Vijayan vs. State of Kerala* **(1999) 3 SCC 54 and** *Harender Nath Chakraborty vs. State of West Bengal,* **(2009) 2 SCC 758, referred to.**

R vs. McCay **(1991) 1 All ER 232, referred to.**

''Proof of Guilt by Glanville Williams,' **3rd Edition and** *'Eye Witness Identification in Criminal Cases'* **by Patrick M. Wall, referred to.**

26. This Court has time and again held that where an accused furnishes false answers as regards proved facts, the Court ought to draw an adverse inference qua him and such an inference shall become an additional circumstance to prove the guilt of the accused. In the present case, the appellant-A-1 has, inter, has taken false pleas in reply to question nos. 50, 54, 55, 56, 57, 64, 65, 67, 72, 75 and 210 put to him under Section 313 of the Code. [Para 130(i)] [284-G-H; 285-A-B]

Peresadi vs. State of U.P., **(1957) Crl.L.J. 328;** *State of M.P. vs. Ratan Lal,* **AIR 1994 SC 458 and** *Anthony D'Souza vs. State of Karnataka* **(2003) 1 SCC 259, referred to.**

27. A-1 was holder of a pistol .22" bore P Berretta, made in Italy duly endorsed on his arms licence. It was his duty to have kept the same in safe custody and to explain its whereabouts. It is proved beyond reasonable doubt on record that extensive efforts were made to trace the pistol and the same could not be recovered. Moreover as per the testimony of PW-43, DSP/NCRB, RK Puram there is no complaint or report of the said pistol. Thus an adverse inference has to be drawn against A-1 for non-explanation of the whereabouts of the said pistol. Similarly another plea not supported by any positive evidence led by A-1 is that his pistol i.e. the weapon of

offence and the arms licence were recovered from his farm house on 30.04.1999, when in fact it is an established fact that the pistol could not be recovered and that the licence was surrendered on 06.05.1999 at the time of his arrest. It defies all logic and ordinary course of conduct to allege that the prosecution has withheld the pistol after seizing the same from his farmhouse. The fact that he has failed to produce the pistol, a presumption shall arise that if he has produced it, the testing of the same would have been to his prejudice. The burden thus shifts on him. [Para 130(ii)] [285-C-G]

28. It is the defence of A-1 that the Tata Safari was taken away on 30.04.1999 from Karnal. No report or complaint of the taking away of the vehicle or the theft of the vehicle was ever lodged by the appellant/accused and hence an adverse inference has to be drawn against the accused on this count as well. Further the conduct of the appellant/accused in not taking any steps despite opportunity in reporting the alleged taking away of Tata Safari on 30.04.1999 and his licensed pistol on 01.05.1999 in itself is enough material to draw serious adverse inference against the accused. [Para 130(iii)] [285-H; 286-A-B]

29.1. On 03.05.2001, PW-2, was duly accompanied by the proxy counsel, Ashok Bansal who had appeared for A-1 before the trial court wherein he clearly says that he has come with a lawyer for his personal security. On behalf of the State, it was contended that an adverse inference against accused-A-1 has to be drawn for influencing the witness. It may not be out of place to mention here that PW-2, who is the maker of the FIR and complainant of the case, did not fully support the prosecution case though he admitted having made statement to the police and having signed the same. The stand of the State cannot be ignored, on the other hand,

it is acceptable. [Para 130(iv)] [286-D-F]

29.2. It is pointed out by the State that calls were made from PCO, Ambala and PCO Hazrat Nizamuddin which have been duly proved by the testimony of PW-36, PW-16, PW-17. This conduct of accused-A-1 which is relevant and admissible under Section 8 of the Indian Evidence Act an adverse inference has to be drawn against A-1 for this conduct. [Para 131] [286-G-H; 287-A-B]

30. The specific evidence, especially of presence at the time of incident, removal of Tata Safari, call details etc. as well as the evidence of PWs 30 and 101, for conviction under Section 201 read with Section 120-B IPC against the other two appellants, namely, A-2 and A-3 have already been discussed. This court is satisfied that the High Court, on appreciation of the relevant materials, found against them and convicted accordingly. On analysis of all the materials, this Court agrees with their conviction and sentence. [Para 132] [287-B-C]

31.1. The higher Courts in exercise of their appellate or original jurisdiction may find patent errors of law or fact or appreciation of evidence in the judgment which has been challenged before them. Despite this, what is of significance is that, the Courts should correct the error in judgment and not normally comment upon the judge. The possibility of taking a contrary view is part of the system. The judicial propriety and discipline demand that strictures or lacerating language should not be used by the higher Courts in exercise of their appellate or supervisory jurisdiction. Judicial discipline requires that errors of judgments should be corrected by reasons of law and practice of passing comments against the lower courts needs to be deprecated in no uncertain terms. Individuals come and go but what actually stands forever is the institution. [Para 133] [287-D-G]

31.2. In the present case the High Court in its judgment, on the one hand, explicitly referred to certain criticism/comments/remarks made by the trial Judge against the investigating agency, and observed that they were uncalled for and that they should have been avoided. But, on the other hand, the Division Bench itself while criticizing the reasoning in the judgment under appeal made certain sweeping remarks against the trial Judge. These are criticism of the Judge per se and could have been avoided easily by the Division Bench of the High Court. It is also desirable, that the language which may imply an allegation of suspicion in the performance of function of the Court should be carefully examined and unless it is absolutely established on record, comments should be avoided. [Paras 134, 135] [287-G-H; 288-A-C]

31.3. In the instant case, the Division Bench could have avoided making such observations which directly or impliedly indicates towards impropriety in the functioning of the Court, appreciation of evidence by the Judge and/or any other ancillary matter. The content and merit of the judgment would have remained unaffected even if such language or comments were not made against the learned trial Judge. The respect of judiciary and for the judiciary, is of paramount consideration. Every possible effort should be made and precaution taken which will help in preservation of public faith and individual dignity. A judicial consensus would require that the judgment should be set aside or affirmed as the case may be but preferably without offering any undesirable comments, disparaging remarks or indications which would impinge upon the dignity and respect of judicial system, *actus curiae neminem gravabit.* **Despite exercise of such restraint, if, in a given case, the Court finds compelling reasons for making any comments in that event it will be in consonance with the basic rule of law and adherence to the principles of natural justice that**

view point of the concerned Judge should also be invited. [Para 143] [293-F-H; 294-A-B]

31.4. In view of the above, this Court directs expunction of all remarks made by the Trial Judge against the prosecution and by the Division Bench against the Trial Judge. [Para 144] [294-C]

A.M. Mathur vs. Pramod Kumar Gupta & Ors. **(1990) 2 SCC 533;** *'K' A Judicial Officer* **(2001) 3 SCC 54;** *Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors.* **(2004) 4 SCC 158;** *Samya Sett vs. Shambhu Sarkar & Anr.* **(2005) 6 SCC 767;** *Parkash Singh Teji vs. Northern India Goods Transport Company Private Limited and Another*, **(2009) 12 SCC 577;** *Alok Kumar Roy vs. Dr. S.N. Sharma* **(1968) 1 SCR 813 and** *State of M.P. vs. Nandlal Jaiswal* **(1986) 4 SCC 566, relied on.**

Cardozo: *"Nature of the Judicial Process",* **referred to.**

32.1. There is danger, of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom such that it publishes photographs of the suspects or the accused before the identification parades are constituted or if the media publishes statements which outrightly hold the suspect or the accused guilty even before such an order has been passed by the Court. Despite the significance of the print and electronic media in the present day, it is not only desirable but least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused in any manner whatsoever. It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial. [Paras 147, 148] [294-G-H; 295-A-B]

32.2. In the instant case, certain articles and news items appearing in the newspapers immediately after the date of occurrence, did cause certain confusion in the mind of public as to the description and number of the actual assailants/suspects. It is unfortunate that trial by media did, though to a very limited extent, affect the accused, but not tantamount to a prejudice which should weigh with the Court in taking any different view. The freedom of speech protected under Article 19 (1) (a) of the Constitution has to be carefully and cautiously used, so as to avoid interference in the administration of justice and leading to undesirable results in the matters sub judice before the Courts. [Para 149] [295-C-E]

32.3. In the present case, various articles in the print media had appeared even during the pendency of the matter before the High Court which again gave rise to unnecessary controversies and apparently, had an effect of interfering with the administration of criminal justice. This Court would certainly caution all modes of media to extend their cooperation to ensure fair investigation, trial, defence of accused and non interference in the administration of justice in matters sub judice. [Para 152] [296-D-E]

R.K. Anand v. Delhi High Court **(2009) 8 SCC 106;** *M.P. Lohia v. State of W.B. & Anr.* **(2005) 2 SCC 686 and** *Anukul Chandra Pradhan v. Union of India & Ors.* **(1996) 6 SCC 354, relied on.**

P.C. Sen In Re: **AIR 1970 SC 1821 and** *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express* **1988 (4) SCC 592, referred to.**

33. The prosecution has established its case beyond doubt against the appellants and this Court is in agreement with the conclusion arrived at by the High Court, consequently, all the appeals are devoid of any

merit. [Para 154] [298-F-G]

Case Law Reference:

(1997) 7 SCC 677	referred to	Para 11
(2008) 10 SCC 450	referred to	Para 11
(1992) 2 SCC 105	referred to	Para 12
(2000) 4 SCC 484	referred to	Para 12
AIR 1964 SC 221	distinguished	Para 36
AIR 1945 PC 18	distinguished	Para 36
(1955) SCR 1150	referred to	Para 37
AIR 1965 Guj 143	held per incuriam	Para 38
(2003) 6 SCC 175	held inapplicable	Para 39
(1984) 4 SCC 83	relied on	Para 40
(1970) 2 SCC 113	relied on	Para 40
(1995) 4 SCC 392	relied on	Para 40
(2004) 12 SCC 336	referred to	Para 40
(1994) 2 SCC 685	referred to	Para 40
AIR 1947 PC 75	referred to	Para 40
AIR 1965 Cal. 348	referred to	Para 40
AIR 1965 Guj. 143	referred to	Para 40
(2007) 13 SCC 501	relied on	Para 41
(2001) 4 SCC 375	relied on	Para 54
(1978) 4 SCC 371	referred to	Para 58

(2003) 10 SCC 670	**distinguished**	**Para 59**
(2005) 3 SCC 689	**distinguished**	**Para 60**
(2002) 7 SCC 334	**relied on**	**Para 63**
(2004) 13 SCC 279	**relied on**	**Para 63**
(1992) 3 SCC 106	**relied on**	**Para 63**
AIR 1961 Calcutta 359	**referred to**	**Para 66**
AIR 1981 SC 1036	**referred to**	**Para 69**
(1999) 7 SCC 467	**relied on**	**Para 76**
(1994) 4 SCC 602	**relied on**	**Para 76**
(2004) 4 SCC 158	**relied on**	**Para 77**
(1993) 2 All E.R. 577	**referred to**	**Para 80**
(1993) 4 All ER 638	**referred to**	**Para 81**
JT 1988 (2) SC 293	**relied on**	**Para 82**
(2007) 2 SCC(Criminal) 72	**relied on**	**Para 83**
(2006) 3 SCC (Criminal) 225	**relied on**	**Para 83**
(2001) 6 SCC 181	**relied on**	**Para 83**
AIR 2009 SC 984	**relied on**	**Para 83**
A.I.R. 1954 S.C. 51	**relied on**	**Para 86**
A.I.R. 1981 SC 1068	**relied on**	**Para 86**
(1991) 4 SCC 341	**relied on**	**Para 88**
A.I.R. 1989 SC 144	**relied on**	**Para 89**

A.I.R. 1995 SC 1748	**relied on**	**Para 90**
(1999) 4 SCC 621	**relied on**	**Para 90**
(1999) 8 SCC 715	**relied on**	**Para 90**
1993 Supp (3) SCC 745	**distinguished**	**Para 97**
AIR 1960 SC 500	**relied on**	**Para 100**
(1991) 1 All ER 232	**referred to**	**Para 107**
(2000) 1 SCC 138	**relied on**	**Para 113**
(1994) 3 SCC 569	**referred to**	**Para 113**
(1988) 1 SCC 14	**referred to**	**Para 114**
(1970) 2 SCC 128	**referred to**	**Para 114**
(2003) 5 SCC 746	**referred to**	**Para 115**
(2005) 9 SCC 631	**relied on**	**Para 115**
(1973) 2 SCC 793	**referred to**	**Para 116**
1993 Supp. (2) SCC 198	**referred to**	**Para 117**
(2004) 11 SCC 346	**distinguished**	**Para 118**
AIR 1968 SC 938	**distinguished**	**Para 119**
(1988) 1 SCC 14	**distinguished**	**Para 120**
(1979) 3 SCC 319	**distinguished**	**Para 121**
(2002) 7 SCC 295	**distinguished**	**Para 122**
(1999) 3 SCC 54	**referred to**	**Para 123**
(1998) 4 SCC 605	**held inapplicable**	**Para 124**
AIR 1953 SC 468	**distinguished**	**Para 125**

(2005) 6 SCC 101	**relied on**	**Para 126**
(2009) 2 SCC 758	**referred to**	**Para 127**
(2009) 6 SCC 595	**distinguished**	**Para 129**
(1957) Crl.L.J. 328	**referred to**	**Para 130**
AIR 1994 SC 458	**referred to**	**Para 130**
(2003) 1 SCC 259	**referred to**	**Para 130**
(1990) 2 SCC 533	**relied on**	**Para 136**
(2001) 3 SCC 54	**relied on**	**Para 137**
(2004) 4 SCC 158	**relied on**	**Para 138**
(2005) 6 SCC 767	**relied on**	**Para 139**
(2009) 12 SCC 577	**relied on**	**Para 140**
(1968) 1 SCR 813	**relied on**	**Para 141**
(1986) 4 SCC 566	**relied on**	**Para 142**
AIR 1970 SC 1821	**referred to**	**Para 146**
1988 (4) SCC 592	**referred to**	**Para 146**
(2009) 8 SCC 106	**relied on**	**Para 150**
(2005) 2 SCC 686	**relied on**	**Para 150**
(1996) 6 SCC 354	**relied on**	**Para 151**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 179 of 2007.

From the Judgment & Order dated 18.12.2006 & 20.12.2006 of the High Court of Delhi at New Delhi in Criminal Appeal No. 193 of 2006.

WITH

Criminal Appeal Nos.157 & 224 of 2007.

Gopal Subramaniam, SG, Ram Jethmalani, Pravin, H. Parekh, Harish Ghai, Lata Krishnamurti, P.R. Mala, Saurabh Ajay Gupta, Bansuri Swaraj, Pranav Diesh, T. Cheema, Mazag Andrabi, Somanadri Goud, Bhupinder Ghai, Nitin T., E.R. Kumar, Lalit Chauhan, Andrabi, Rukhmini Bobde, Rajat N., Sameer Parekh, Parekh & Co., Nitin Sangra, Gaurav Agarwal, Sachin Dev Sharma, Sanjeev Manan, Dinesh Sharma, Hakikat Yadav, Ranbir Yadav, Jay Kishore Singh, Swetha, Majumdar, Shyam B. Namdar, Subramanium Prasad, B.D. Vivek, Balji Srinivasan, P. Kakra, Madhusmita Bora, Charudatta Mahindrakar, T.V.S. Raghavendra Sreyas, Mukul Gupta, Satyaram, Ambuj Agrawal, Nikhil Nayyar, Rajat Katyal, Tanmay Mehta, Vibhore Garg, Sangram Singh, Anand Verma, Anagha Narayan, Mamta Dhody Kalra, Intervenor-in-person for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These statutory appeals are filed under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 and under Section 379 of the Criminal Procedure Code against the final judgment and order dated 18/20.12.2006 passed by the High Court of Delhi in Criminal Appeal No. 193 of 2006 whereby the High Court reversed the order of acquittal dated 21.02.2006 passed by the Additional Sessions Judge, Delhi, in Sessions Case No. 105 of 2001 and convicted Sidhartha Vashisht @ Manu Sharma (appellant in Crl. A. No. 179 of 2007) under Section 302, 201/120B IPC and Section 27 of the Arms Act and sentenced him to undergo imprisonment for life for the offence under Section 302 IPC together with a fine of Rs.50,000/- to be paid to the family of the victim and in default of payment of fine, to undergo further imprisonment for three years and also sentenced him to undergo imprisonment for four years for the

offence under Section 27 of the Arms Act with a fine of Rs.2000/- and in default to further undergo imprisonment for three months. He was further sentenced to undergo imprisonment for four years for the offence under Section 201/120B IPC together with a fine of Rs. 2,000 and, in default, to further undergo imprisonment for three months. The High Court also sentenced Amardeep Singh Gill @ Tony Gill (appellant in Crl.A. No. 157/2007) and Vikas Yadav (appellant in Crl. A.No.224/2007) to undergo rigorous imprisonment for four years and a fine of Rs.2000/- each and, in default of payment of fine, to further undergo imprisonment for three months under Section 201/120B IPC.

2. *The case of the prosecution:*

(a) On night intervening 29-30.04.1999, a 'Thursday Party' was going on at Qutub Colonnade at ''Once upon a time'' restaurant also called ''Tamarind Cafe''. The liquor was being served by the bartenders, namely, Jessica Lal (since deceased) and one Shyan Munshi (PW-2). At about 2.00 a.m., Sidhartha Vashisht @ Manu Sharma (appellant in Crl. A. No. 179 of 2007) along with his friends came there and asked for two drinks. The waiter did not serve him liquor as the party was over. Jessica Lal and Malini Ramani (PW-6), who were also present there, tried to make him understand that the party was over and there was no liquor available with them. On refusal to serve liquor, the appellant took out a pistol and fired one shot at the roof and another at Jessica Lal which hit near her left eye as a result of which she fell down. Beena Ramani (PW-20), who was present there, stopped the appellant and questioned him as to why he had shot Jessica Lal and demanded the weapon from him but he did not hand over the pistol and fled away. Jessica Lal was rushed to Ashlok Hospital from where she was shifted to Apollo Hospital. On 30.04.1999, in the early morning hours, Jessica Lal was declared brought dead at Apollo Hospital.

(b) On the night intervening 29/30.04.1999 at 2.20 a.m., DD Entry No. 41 A (Ex. PW-13/A) was recorded at Police

Station Mehrauli which disclosed a shooting incident at H-5/6 Qutub Colonnade. A copy of the said DD entry was handed over to SI Sharad Kumar (PW-78) who along with Ct. Meenu Mathew left for the spot. Near about the same time, copy of the said DD entry was also given to SI Sunil Kumar (PW-100) who along with Ct. Subhash also left for the spot. On reaching the spot, PW-78 found that the injured had been removed to Ashlok Hospital and the floor of the Restaurant was found to be wet. SI Sunil Kumar (PW-100) then left SI Sharad Kumar (PW-78) at the spot to guard the same and proceeded to Ashlok Hospital along with Ct. Subhash. The SHO Police Station Mehrauli, Inspector S.K. Sharma (PW-101) along with his team also left the Police Station vide DD Entry No. 43 A and reached the spot and deputed one Home Guard Shravan Kumar (PW 30) at the entrance of 'Qutub Colonnade' to guard the vehicles. On reaching Ashlok Hospital, PW-100 met Beena Ramani (PW-20), who is the owner of the Restaurant, and enquired about the incident but she asked him to talk to Shyan Munshi (PW-2) saying that he was inside and he knew everything. PW-100 then recorded the statement of PW-2 and made an endorsement on the same for the registration of the case under Section 307 IPC and handed over it to Ct. Subhash to be carried to the police station, Mehrauli. At about 4.00 a.m., FIR No. 287/99 was registered at the police station, Mehrauli. In the meantime, Jessica Lal had been shifted to Apollo Hospital. When SI Sunil Kumar came back to the spot along with PW-2, PW 30 informed them about the lifting of one black Tata Safari from the spot. On inspection of the site, two empty cartridges were seized and, in the meantime, a supplementary statement of PW-2 was also recorded by PW-100. At about 5.45 a.m., PW-100 received an information by Ct. Satyavan intimating him about the death of Jessica Lal at Apollo Hospital. Charge under Section 302 IPC/201/120 B IPC and under Section 27 of the Arms Act has been framed against the accused Sidhartha Vashisht @ Manu Sharma, charge under Section 201/120B IPC has been framed against accused Vikas Yadav, Amardeep Singh Gill @ Tony Gill and Alok Khanna, charge under Section

212 IPC has been framed against Harvinder Chopra, Raja Chopra, Vikas Gill @ Ruby Gill and Yograj Singh and charge under Section 201/212 IPC against Shyam Sunder Sharma. At about 7.00 a.m. PW 100 recorded the statement of the Manager (PW-47), Waiter (PW-46) and Beena Ramani (PW-20) – the owner of the Restaurant.

(c) The post mortem was conducted at about 11.30 a.m. at the All India Institute of Medical Sciences on the same day i.e. 30.04.1999. In the meantime, at about 11.00 a.m., SI Pankaj Malik (PW-85) had been sent to Chandigarh to secure the black Tata Safari and to arrest the appellant. PW-100 recorded the statements of the witnesses. On 30.04.1999 at about 4.15 p.m., an FIR was registered against Malini Ramani (PW-6), Beena Ramani (PW-20) and George Mailhot (PW-24) under Sections 61/68/1/14 of the Punjab Excise Act. At about 8.30 p.m., PW-100 handed over the investigation to SHO S.K. Sharma (PW-101). On the night intervening 30.04.1999/ 01.05.1999, at about 2 a.m., the police raided the farm house of the appellant and on search being conducted seized a photograph of the appellant. On 02.05.1999, a list of invited guests was prepared by PW-24. On the same day, around 10.00 p.m., PW-101, got an information that a black Tata Safari has been found by the U.P. Police (Sector 24, Noida Police Station) and on the next day PW-101 went to Noida Police Station and seized the said black Tata Safari. On 05.05.1999 at about 2.30 a.m., Amardeep Singh Gill @ Tony Gill and Alok Khanna were arrested and from their alleged disclosure statements, the involvement of Sidhartha Vashisht @ Manu Sharma was confirmed. On the same day, Inspector Raman Lamba (PW 87) who was in Chandigarh with his team intimated the lawyer of the accused- appellant that Manu Sharma is required in the case. On receipt of the information, on 06.05.1999, the appellant surrendered before PW-87 and was later arrested at about 2.20 p.m. and brought to Delhi. On 07.05.1999, the police produced the appellant before the Metropolitan Magistrate and sought police remand for effecting

recovery of the alleged weapon of offence. An application for conducting Test Identification Parade (TIP) of the appellant was also moved. Thereafter, the appellant was remanded to five days police custody till 12.05.1999 and thereafter on 12.05.1999 extended till 17.05.1999 on the application of the I.O., but on 15.05.1999, the appellant's remand was preponed from 17.05.1999 to 15.05.1999. On 16.05.99, the appellant was sent to judicial custody. On 30.05.1999, the accused-Vikas Yadav was also arrested. After the completion of investigation, the other accused persons were also arrested.

(d) On 03.08.1999, charge sheet was filed against ten accused persons. On 23.11.2000, the Additional Sessions Judge framed charges against the appellant/Manu Sharma under Sections 302, 201 read with 120 B IPC and Section 27 of the Arms Act, accused Amardeep Singh Gill was charged under Section 120 read with Section 201 IPC, accused Vikas Yadav was charged under Section 120 read with 201 IPC as also Section 201 read with 34 IPC, accused Harvinder Chopra, Vikas Gill, Yograj Singh and Raja Chopra under Section 212 IPC and accused Alok Khanna, Shyam Sunder Sharma and Amit Jhingan were discharged of all the offences. In 2000/2001, Revision Petition No. 596 of 2000 was preferred by the prosecution before the High Court of Delhi praying for the framing of charge against the accused persons and setting aside the discharge of Alok Khanna, Shyam Sunder Sharma and Amit Jhingan. Revision Petitions were also preferred by the accused persons against the framing of the charges against them. The High Court disposed of all the revision petitions filed by the accused persons by a common order dated 13.03.2001. On 12.04.2001, charges as per the orders of the High Court were framed and some of the charges as framed earlier were maintained. Charges under Section 120B/201 IPC were framed against accused Vikas Yadav, Amardeep Singh Gill @ Tony Gill and Alok Khanna and charges under Sections 201 and 212 IPC were framed against accused Shyam Sunder Sharma. Against the rest of the accused, the charges as framed on

23.11.2000 by the trial Court were maintained. Trial began in May, 2001 against nine accused. In all, 101 witnesses were examined by the prosecution and two court witnesses were also examined.

(e) On 12.12.2001, the case registered against Malini Ramani, Beena Ramani and George Mailhot under the Punjab Excise Act was disposed of with a direction to pay a fine of Rs.200/- each. On 28.01.2002, the appellant was released on interim bail for a period of six weeks by the order of the High Court dated 25.01.2002 with a direction to surrender after the expiry of the same. In compliance with the conditions of interim bail, the appellant surrendered on 11.3.2002 but again sought for and granted interim bail for a period of ten weeks starting from 20.03.2002. During the period from March 2002 to February 2006, the appellant was enlarged on bail on different occasions by various orders of the High Court. On one occasion, against the dismissal of the bail application by the High Court on 11.11.2003, the appellant filed a special leave petition before this Court which was dismissed by this Court on 02.12.2003. On 21.02.2006, after trial, the Additional Sessions Judge acquitted all the nine accused including the appellant-Manu Sharma.

(f) Challenging the acquittal, the prosecution filed an appeal before the High Court being Crl. Appeal No. 193 of 2006. On 20.12.2006, the High Court vide the impugned order, convicted and sentenced the appellants, as mentioned in paragraphs above. Challenging the said order of the High Court, all the three appellants filed above mentioned separate appeals before this Court. All the appeals were heard together and are being disposed of by this common judgment.

3. Heard Mr. Ram Jethmalani, learned senior counsel for Sidhartha Vashisht @ Manu Sharma, appellant in Crl. A. No. 179 of 2007, Mr. Nitin Sangra, learned counsel for Amardeep Singh Gill @ Tony Gill, appellant in Crl.A. No. 157/2007, Mr. Ranbir Yadav, learned counsel for Vikas Yadav, appellant in Crl.

A.No.224/2007, Mr. Gopal Subramanium, learned Solicitor General of India for Respondent-State in all the three appeals and Mrs. Mamta Dhody Kalra, intervenor, who appeared in person and pleaded for acquittal of the appellant-Manu Sharma.

Contentions of the appellants/accused:

4. Mr. Ram Jethmalani, after taking us through all the oral and documentary evidence relied on by the prosecution as well as the defence, the order of the Trial Judge acquitting all the appellants from the charges leveled against them and the impugned order of the High Court reversing the order of acquittal raised the following contentions:-

(a) The appellant (Sidhartha Vashisht @ Manu Sharma) has been denied his fundamental right to free and fair trial which is guaranteed under Article 21 of the Constitution of India.

(b) On the very first day of investigation i.e. on 30.04.1999, an FIR was filed against Malini Ramani PW-6, Beena Ramani PW-20 and George Mailhot PW-24 under the Punjab Excise Act in order to control these witnesses and to pressurise them to support the prosecution case. After their deposition, the Excise case was pre-poned and disposed of by imposing a fine of paltry amount.

(c) Malini Ramani PW-6, Beena Ramani PW-20 and George Mailhot PW-24 were frequently shown the photograph of the appellant and he was paraded before them.

(d) The finding of the High Court that Sidhartha Vashisht @ Manu Sharma took out his pistol and first fired at the ceiling and then at Jessica Lal is based on no evidence.

(e) Three Ballistic Experts have concurred that empty cartridges have been fired from two different weapons. Their Report support the statement-in-chief of Shyan Munshi PW-2. There is no evidence on record that both the shots were fired

from one weapon.

(f) The High Court has wrongly placed reliance upon the testimony of Deepak Bhojwani PW-1, even though, he was not present in the party and he was planted by the prosecution. The evidence of three family members Malini Ramani PW-6, Beena Ramani PW-20 and George Mailhot PW-24 is inadmissible in law.

(g) The prosecution never claimed Beena Ramani PW-20 as an eye-witness, however, the High Court erroneously held her as eye-witness to the occurrence.

(h) High Court failed to consider the evidence of Madan Kumar (Waiter) PW-46 and Jatinder Raj (Manager) PW-47.

(i) The High Court committed an error in relying upon the testimony of George Mailhot PW-24 to corroborate the evidence of Beena Ramani PW-20.

(j) The First Information Report recorded on the statement of Shyan Munshi PW-2 is not an FIR but a signed statement. The High Court wrongly discarded his (PW-2) ocular version. However, the Trial Court assigned good reasons for accepting his evidence.

(k) The High Court's observation on Ballistic Experts from CFSL is erroneous.

(l) The High Court committed an error in disbelieving P.S. Manocha PW-95.

(m) There is no acceptable evidence/material to connect Tata Safari to the alleged occurrence.

(n) Shravan Kumar PW-30 is a planted witness, and there is no need for him to accompany PW-1 to the spot when he was assigned other official work.

(o) A rough site plan which was prepared in the early hours of 30.04.1999 (Ex. PW 100/2) clearly shows the absence of Beena Ramani PW-20 at the alleged place of occurrence, if she was an eye-witness, this would have been done.

(p) The Public Prosecutor failed to adhere the basic principles in conducting criminal case.

(q) The High Court committed a grave error by reversing the well considered order of acquittal by the Trial Court and on conjunctures the High Court interfered with the acquittal and imposed sentence which is not permissible under law.

5. The other two learned counsel submitted that the prosecution failed to establish the charge in respect of Amardeep Singh Gill and Vikas Yadav under Section 201 read with 120B of the IPC.

6. The intervenor supported the case of the appellant-Manu Sharma and prayed for his acquittal.

Submissions on behalf of the State:

7. On the other hand, Mr. Gopal Subramanium, learned Solicitor General, after taking us through the entire materials, submitted that the Trial Judge has committed an error in acquitting all the accused and the High Court being an Appellate Court is fully justified in re-analysing the evidence and convicting all the three accused-appellants and awarding appropriate sentence. After pointing out oral, documentary evidence and other legal principles, he submitted that the conviction and sentence awarded by the High Court are acceptable and no interference is called for by this Court, and prayed for dismissal of all the three appeals.

8. We have carefully considered all the materials placed and the rival contentions.

9. *Points for consideration in these appeals are:-*

(a) Whether the prosecution has established its case beyond reasonable doubt against all the three accused?

(b) Whether the trial Court is justified in acquitting all the accused in respect of charges leveled against them?

(c) Whether the impugned order of the High Court imposing punishment when the trial Court acquitted all the accused in respect of the charges leveled against them is sustainable?

10. It is not in dispute that the following charges were framed against the appellants:-

S.No.	Name of Accused	Accused	Charges Framed
1.	Sidhartha Vashist @ Manu Sharma	1	302 IPC, 27 Arms Act, 201 r/w 120B IPC
2.	Vikas Yadav	2	201 r/w 120B IPC
3.	Amardeep Singh Gill	3	201 r/w 120B IPC

Powers and Duties of the Appellate Court while dealing with the order of acquittal:

11. Before analyzing the prosecution case, the defence plea and the arguments of the respective counsel, let us find out the scope of the Appellate Court in reversing the order of acquittal by the Trial Court. Mr. Ram Jethmalani, learned senior counsel for the appellant-Manu Sharma, by drawing our attention to the principles laid down by this Court in *Madan Lal vs. State of J&K,* (1997) 7 SCC 677 submitted that in an appeal against acquittal, it is incumbent on the Appellate Court to give adequate reasons for reversal. By citing *Ghurey Lal vs. State of Uttar Pradesh* (2008) 10 SCC 450, he further contended that the High Court could not have reversed the

judgment of the Trial Court inasmuch as the view taken by the Trial Court was plausible view based on the evidence on record, hence the finding of the Trial Court could not have been overturned.

12. Mr. Gopal Subramanium, learned Solicitor General, by relying on the decision of this Court in *Chandra Mohan Tiwari vs. State of M.P.,* (1992) 2 SCC 105 submitted that where the High Court's conclusion was based on evaluation of evidence which was not erroneous or perverse and was based on an independent analysis of evidence which fully establishes the case of the prosecution as against the trial Court's conclusion, there is no reason much less the compelling reason to disagree with the finding of guilt by the High Court. He also pressed into service another decision of this Court in *Jaswant Singh vs. State of Haryana,* (2000) 4 SCC 484.

13. The following principles have to be kept in mind by the Appellate Court while dealing with appeals, particularly, against the order of acquittal:

(i) There is no limitation on the part of the Appellate Court to review the evidence upon which the order of acquittal is found.

(ii) The Appellate Court in an appeal against acquittal can review the entire evidence and come to its own conclusions.

(iii) The Appellate Court can also review the Trial Court's conclusion with respect to both facts and law.

(iv) While dealing with the appeal preferred by the State, it is the duty of the Appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.

(v) An order of acquittal is to be interfered only when there are ''compelling and substantial reasons'' for doing so. If the order is ''clearly unreasonable'', it is a compelling reason for interference.

(vi) While sitting in judgment over an acquittal the Appellate Court is first required to seek an answer to the question whether finding of the Trial Court are palpably wrong, manifestly, erroneous or demonstrably unsustainable. If the Appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the Appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion.

(vii) When the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of Ballistic Experts etc., the Appellate Court is competent to reverse the decision of the Trial Court depending on the materials placed.

In the light of the above principles, let us examine the impugned judgment of the High Court with reference to the materials placed by the prosecution and the defence.

14. At the outset, Mr. Ram Jethmalani, learned senior counsel highlighted the role of public prosecutor in conducting prosecution for which he relied on the procedures being followed in United Kingdom and also cited certain passages from the books of foreign authors. In addition to the same, he highlighted how the appellant-Manu Sharma was prejudiced by the wild allegations that were carried by Media, both print and electronic. Since we intend to concentrate on the merits of the case, we discuss and give our reasoning at the appropriate

place or at the end of our order.

15. *Presence of accused Manu Sharma & others at the scene of offence.*

There is no dispute that the incidence occurred in a place known as ''Qutub Colonnade''. The open area of ''Qutub Colonnade'' is known as ''Tamarind Court'' whereas the closed area is called ''Tamarind Cafe''. In order to establish the presence of the accused Sidhartha Vashisht @ Manu Sharma and others, prosecution has examined Deepak Bhojwani PW-1, Shyan Munshi PW-2, Malini Ramani PW-6, Beena Ramani PW-20, George Mailhot PW-24, Rouble Dungley PW-23 and Rohit Bal PW-70. Apart from these ocular witnesses, prosecution pressed into service Ex. PW12/D-1 which is a wireless message received at Police Station, Mehrauli.

(a) *Deepak Bhojwani PW-1*

He is a resident of K-5/B, Ground Floor, Lajpat Nagar, New Delhi. According to him, in the year 1999, he had attended the place known as ''Qutub Colonnade'' as Thursday Party four times on each Thursday and the last occasion when he attended this Thursday Party was on 29.04.1999. There used to be a gathering of friends at this Party and all varieties of liquor used to be served in this Party besides snacks etc. He explained that coupons used to be issued for purchase of any kind of liquor. Such coupons were used to be purchased in advance from the cash counter. On 29.04.1999, he attended the Thursday Party alone at about 11 o'clock in the night.

In chief examination, in categorical terms, he deposed:

"I had purchased four coupons of Rs. 100/- each on that day. Jessica Lal (since deceased) and Shyan Munshi (complainant) were serving liquor on that night at the bar counter. I had known Jessica lal for about five or six years whereas Shyan was introduced to me by Jessica Lal about a week before 29.04.1999 i.e. on the previous Thursday

Party".

Apart from the above assertion, he also informed the Court that Jessica Lal (since deceased) was working with Oberoi Hotel and was also a model by profession. He described the location of ''Tamarind Court'' and ''Tamarind Cafe''. The bar counter was located in ''Tamarind Court'' open area between the two doors of the ''Tamarind Cafe'', but since it was summer nobody was using the bar counter giving preference to the bar counter located outside. He also stated that Jessica Lal was wearing blue denim shorts and white half sleeved shirt on that night. On the same night, at about 1 o'clock (midnight), he went to the bar counter to have his third drink. He informed the Court that on the suggestion of Jessica Lal that the liquor was getting over he handed over all the remaining coupons and purchased two pegs of whisky. While holding both the glasses of whisky, he came in the company of his friends.

The following statement of PW-1 proves the presence of accused Manu Sharma and his friends –

> "I was moving around in the party with two glasses of whisky, when I came across a person having fair complexion who was giving smile to me. I also reciprocated. Then he came to me. We both introduced each other. He gave me his name as Manu Sharma. He said as to how I was holding two glasses of whisky in my hands whereas he was unable to get even one. Manu Sharma came into my contact after about 10-15 minutes of my purchasing two pegs of whisky. He requested me to arrange liquor for him on which I told him that liquor was over and the bar was closed and therefore, I would not be able to arrange liquor for him. We were already introduced to each other and were about to exchange visiting cards, when one tall sikh gentleman came from behind of Manu Sharma and told him something and took him away towards Tamarind Cafe. Before leaving, Manu Sharma told me that he would come back and meet me again".

PW-1 correctly identified the photographs of both the accused persons one Manu Sharma and the other Tony Gill. He also informed that the accused Tony Gill came along with Manu Sharma and 2/3 of his friends. In respect of the question whether it would be possible for him to identify those 2/3 persons who were accompanying accused Tony Gill, PW-1 has pointed out Alok Khanna, accused-Manu Sharma and Tony Gill. We shall separately discuss about the Test Identification Parade and the validity of desk identification during time in the latter paragraphs.

About the incident, he narrated that

> "After about 15/20 minutes i.e. about 1:45 a.m., I heard noise from Tamarind Cafe and I heard somebody saying Jessica was shot. At that time I was present in Tamarind Court and I was talking to my friend Arash Aggarwal. After hearing the shouts about Jessica having been shot, I rushed towards Tamarind Cafe. I could not go inside where the incident had taken place but I peeped and saw Jessica lying on the floor. At that time, there were about 70/80 persons gathered all around i.e. near the gate of Tamarind Cafe i.e. the gate of Tamarind Cafe."

He further informed the Court –

> ".....discussion was going on as to who had done this and it was also being discussed that the culprit was wearing blue denim jeans and white shirt and was fair and was little short in height then I assessed that he was the same person who had come to me to arrange drinks for him. I had told the police in Apollo Hospital that it was Manu Sharma who was with the similar description as was discussed amongst friends on which police had told me that they would call me."

A close scrutiny of PW-1's evidence clearly shows that Jessica Lal was friendly with him having known him for 5-6 years. He

also went to the house of parents of Jessica Lal twice i.e. on 30th April and 1st May 1999 to pay condolence. Further, in categorical terms, he asserted and identified the presence of Manu Sharma at the scene of offence. Since he had contact with a person having fair complexion with smiling face/Manu Sharma, in the Court he correctly identified both Manu Sharma and the tall Sikh gentleman as Tony Gill. He also identified other persons who accompanied Manu Sharma and Tony Gill. It is also clear from his evidence that at around 1.45 a.m., he heard a noise emerging from Tamarind Cafe to the effect that Jessica Lal had been shot. It is also clear that on hearing that Jessica Lal had been shot, he ran towards Tamarind Cafe though according to him he could not go inside yet peeped and saw Jessica Lal lying on the floor. Since the High Court has accepted his evidence which was not acceptable by the Trial Court, we analyzed his entire statement with great care. Mr. Ram Jethmalani, learned senior counsel has pointed out that since PW-1's name does not figure in the list of invitees prepared by George Mailhot PW-23 and Sabrina Lal PW-73 did not mention the name of Deepak Bhojwani PW-1 at Ashlok Hospital and of the fact that the statement of PW-1 was recorded on 14.05.1999 submitted that, first of all, he is an interested witness and his testimony is not acceptable. On seeing his entire evidence, there is no reason to either suspect his evidence or reject the same as unacceptable. On the other hand, his evidence supported by other witnesses clearly proves the presence of accused Nos. 1-4 at the place of occurrence. He asserted the presence of Jessica Lal, Shyan Munshi and the claim of whisky by a fair complexion man who exchanged niceties with him and introduced him as Manu Sharma. We do not find any valid reason to hold that he is a planted witness, though he was not an eye-witness to the actual shooting incident but his own statement proves that immediately on hearing the noise he peeped and noticed Jessica Lal lying on the floor of Tamarind Cafe. To this extent, the evidence of PW-1 is acceptable and the High Court has rightly believed and relied on his version.

(b) *Shyan Munshi PW-2*

In the year 1999, he was studying in Indian Institute of Planning and Management at New Delhi doing his MBA Course. At that time, he was residing at 15/16 H. Hauz Khas, New Delhi. He informed the Court that he was acquainted to Malini Ramani through which he started knowing about Beena Ramani who is the mother of Malini Ramani. He had visited Tamarind Cafe on the night of 29th April, 1999. It was Thursday Night. He was attending the Party at that night. Alcohol and food were being served there on paying for coupons. In categorical terms he informed the Court that –

> "I was attending the party there on that night. Alcohol and food was being sold there on coupons. I had met Jessica Lal on that night in the party. I had acquaintance with her from before. The place where the party was going on was known as Qutub Colonnade Tamarind Court. There was miniature bar counter outside in the open space where liquor was being served. Besides Jessica Lal and Malini there were other few persons who were helping in serving liquor. On that night, I did go inside the Tamarind Cafe. It might be 2 o'clock at that time, I mean 2 a.m. There were about 6-7 persons inside the cafe at that time."

> "I went inside the cafe primarily with a view to eat something as I was feeling hungry and also nothing was being served outside. I found that Jessica was inside. At that time, no other lady was there. I went behind the counter to get something to eat. I managed to get pastry lying in the freeze and when I was taking it, a gentleman with white tea-shirt came there. He asked the waiter to serve him two drinks. The waiter did not pay attention to that gentleman and became busy in cleaning up. Jessica was also there on the other side of the counter and she told the gentleman that the party was over and there was no alcohol to be served. At that time, that gentleman took out a pistol from

the dub of the pant and fired a shot in the air. There was another gentleman on the other side of the counter, who fired a shot at Jessica Lal and she fell down. That gentleman was also wearing light colored clothes."

Since the present statement about ''another gentleman'' who fired a shot at Jessica Lal and she fell down was not the one earlier made to the Police, after getting permission from the Court, the public prosecutor cross-examined him. He stated—

"It is correct that Beena Ramani and other lifted Jessica from the spot and carried her to the Hospital Ashlok. I went there later. In the Ashlok Hospital, police came there and contacted me and recorded my statement.'' ''...I reached the Hospital at about 3:30 a.m. and my statement was taken at about 3:45 a.m. or 4 a.m."

He also admitted that he was in Delhi for about a year or so and able to understand spoken Hindi. He is aware of Beena Ramani as the proprietor of Qutub Colonnade.

The analysis of the evidence of PW-2 shows that though he turned hostile but his evidence shows that he had visited Tamarind Cafe on the night of 29.04.1999. He also mentioned the presence of Manu Sharma. His evidence further shows that immediately after the shot Beena Ramani and others were carrying Jessica Lal to the Ashlok Hospital. In other words, his evidence proves the presence of accused-Manu Sharma at the scene of offence. To this extent, the prosecution relied upon his evidence and this was rightly accepted by the High Court. Though, Mr. Ram Jethmalani submitted that High Court ought to have accepted his entire evidence in toto, considering his earlier statement to the police and his evidence before the Court, we are satisfied that the High Court is justified in holding that even if his testimony is discarded, the case of the prosecution hardly gets affected. As observed earlier his evidence amply proves the presence of accused at the scene

of occurrence at the time and date as pleaded by the prosecution.

(c) *Malini Ramani PW-6*

She is the daughter of Beena Ramani PW-20. She is a fashion designer by profession. Her mother Beena Ramani owns a property near Qutub Minar known as Qutub Colonnade. She explained to the Court that in the year 1999 they used to have parties in Qutub Colonnade and liquor used to be consumed in these parties. On 29.04.1999, there was a party at Qutub Colonnade. It was Thursday. It was a farewell party for her stepfather namely, George Mailhot PW-24, who was going abroad for five months. She was at the Qutub Colonnade on that evening. Jessica Lal was also there. Beena Ramani PW-20 and Shyan Munshi PW-2, were also there. According to her, the party on that night was over by midnight. Approximately at about 1.45 a.m., she went with her friend Sanjay Mehtani to the restaurant to look for something to eat. At that time, she had a drink in her hand. She found that Jessica Lal, Shyan Munshi, her electrician and couple of waiters were there in the restaurant. She further deposed –

"We were standing there when couple of guys went in. They were about numbering four, may be five. I am not very sure about it. One of them asked me could I have two whiskys. He was wearing jean and white t-shirt. He was in his mid twenties. He was having fair complexion. His built was on the plump side. I do not know if he had asked whisky from anybody else prior to asking from me. When he asked two whiskys from me, I showed my inability saying sorry, Bar was closed. Then he kept asking me and Jessica for drinks, but we kept on saying that the bar was closed and whisky could not be served."

"Then he said that he had cash to pay for drink. I said it did not matter. I could not give sip even for thousand rupees it being not available. Then he said O.K. could I

have sip of you for thousand rupees. Then at that point of time, I just left the room because I was irritated about the whole incident. Sanjay Mehtani and myself walked out together. When I walked out, I crossed my mother in courtyards as I was walking out. Again said, I crossed my mother, she was walking towards the restaurant. I went to the passage way where the shops were located. It was on the other side of the courtyard and I was standing next to speaker (amplifier). After about a minute and a half/two minutes, Shyan Munshi came running to me and Sanjay Mehtani and he was screaming that Jessica had been shot. I just passed out after hearing about it and fainted. I can identify that person, who had asked drink from me and who was wearing jean and t-shirt. Witness has pointed out towards accused Siddhartha Vashisht @ Manu Sharma and said that he just look like him. I had seen this accused in the police station on 8th May. I had gone there as I was arrested in a case under Excise Act."

"Question:- Are you certain that the person to whom you had just identified was the same person who had asked drinks from you and was wearing jean and T-shirt?

Answer:- I am sure he is the same person."

About PW-6's testimony, Mr. Ram Jethmalani criticized the question put by the public prosecutor which according to him is not permissible. It is relevant to point out that before considering her answer that ''I am sure he is the same person'', we have to see her statement in the previous paragraph. She identified Manu Sharma who had asked drinks from her who was wearing Jean and T-shirt. It is also relevant to note that she pointed out towards the accused Manu Sharma and said that ''he just looked like him.'' As rightly pointed by learned Solicitor General, the above mentioned question by the public prosecutor is in addition to the earlier ones relating to identity of the person who was wearing jean and T-shirt and who asked for drinks. It

is relevant to note that PW-6 is not an ordinary person and it is not the case of the defence that she is an illiterate, unable to understand what she said to the earlier questions. We have already noted that she is a fashion designer by profession. In other words, she is highly qualified and it is not her grievance that she was unable to understand her earlier answers. In such circumstances, we are unable to appreciate the objection of Mr. Ram Jethmalani. On the other hand, it is clear from the evidence of PW-6 that the accused Manu Sharma was very well present at the scene of offence and she correctly identified him. Further, as rightly observed by the High court, though she was not an eye-witness, she is certainly a witness identifying Manu Sharma along with 4 or 5 persons present at the Tamarind Court who asked her for whisky and later misbehaved with her. We agree with the observation and the ultimate conclusion about PW-6 reached by the High Court.

(d) *Beena Ramani PW-20*

She is the wife of George Mailhot PW-24. She is a Fashion Designer. She purchased the property near Qutub Minar at H-5/6 Mehrauli Road, New Delhi in the year 1995. This property is being used as a Shopping Arcade and a Restaurant. The Shopping Arcade is known as ''Qutub Colonnade''. The name of the Restaurant was ''Tamarind Court Cafe''. She had a proper license for eating house in the aforesaid complex. The license for the restaurant was in the name and style ''Once Upon A Time''. She admitted that the license of eating house was not valid beyond one year. She has two children namely Malini Ramani and Geetanjali. In 1999, her daughter Malini Ramani was assisting her in running the restaurant. On Thursdays, there used to be special private parties where guests could come by invitation. Alcohol was never served in the Restaurant but were served only in the courtyard on Thursday Parties. She further deposed –

"I knew Jessica Lal, Shyan Munshi. We had a proper staff to run the Restaurant and occasionally any of our

friends could reach out and help the Thursdays Parties. Jessica Lal and Shyan Munshi were friends of my daughter Malini and were helping her on that night"

"The date was 29th of April, 1999. On that night, apart from the normal Thursday Party, I had also organized a special farewell party for my husband who was leaving in two hours time for a World Trip. The party was over by 1 or 1:30 a.m. This Thursday Party and special party was organized jointly and was being held in the courtyard and on the roof top. After the party was over, I was anxious to clean up the place and relieve the waiters etc. so that they may take up duty next morning properly. There were few guests left in the courtyard and I also spotted some guests in the Restaurant where nobody was supposed to be. I walked towards the Restaurant. When I was walking, towards restaurant I ran into Malini. I mounted the steps of the restaurant. I saw a few people standing next to the counter and I heard a shot. A moment later, I heard another shot. Jessica Lal was standing with people at the far end and I saw her falling down. There was a door to my right. It could be swung open and Shyan Munshi came out with another person who was either ahead of him or behind him. Shyan Munshi said that Jessica Lal had been shot. I told Shyan Munshi to call the Police or doctor or ambulance and I stopped the man accompanying them. There was commotion. All the people who were with Jessica Lal earlier, started coming out. The companion of Shyan was wearing white T-shirt. He was chubby and fair and I asked him as to who he was. ''Why are you here and why he shot Jessica Lal. I also asked him to give me his gun. I thought he might be having a gun.'' He said that it was not him. I asked him again and he kept quiet and shaking his hand that it was not him. As all others were leaving, therefore, the companion of Shyan also shoved me aside and went out. I ran after him. Again said behind him. All the way to the front gate of the main building. He was

a few steps ahead of me and I could not catch him. In the meantime, I was shouting instructions to the guests to call Hospital or to take Jessica Lal. I reached the gate my husband was standing there and I told him that this was the man who had shot Jessica Lal and to see in which car he gets into."

"That person who was told to be seen by my husband was with some friends at the time of occurrence inside the cafe. I think that I can identify the person whom I had tried to stop and talked to. After taking sometime and examining the accused over and over again, the witness has pointed towards accused Sidhartha Vashisht @ Manu Sharma and when asked to touch him, she touched him."

She also identified the other persons who were with Manu Sharma, though she has not mentioned the name of persons but on the instructions of the Court she has touched those persons named by the Court. She further informed—

"About a week later, at the Police Station, the name of which I do not remember, I saw that person. I saw Manu Sharma".

If we analyze her evidence along with the sketch/map of the occurrence, when she mounted steps of the restaurant, she heard a shot, a moment later, she heard another shot. It is also relevant to note that she mentioned that Jessica Lal was standing with the people at the far end and she saw her falling down. She also informed that Shyan Munshi PW-2 said that Jessica Lal had been shot. It is relevant to point out that she was shouting to the guests to call the Doctor or to take Jessica Lal for treatment, she reached the gate where her husband was standing and she told him *"that this was the man who had shot Jessica Lal and to see in which car he gets into".* If we read her entire evidence she refers only Manu Sharma. She also correctly identified the presence of other accused persons, namely, Amardeep Singh Gill, Alok Khanna and Vikas Yadav.

Her evidence remained unchallenged, though the Trial Court discarded her evidence as she was not an eye-witness to the occurrence but accepted that she is a witness to the presence of Manu Sharma, Amardeep Singh Gill, Alok Khanna and Vikas Yadav at the Qutub Colonnade. We have already quoted her own statement namely *"I saw a few people standing next to the counter and I heard a shot, a moment later I heard another shot. Jessica Lal was standing with people at the far end and I saw her falling down."* It is also relevant that on noticing Shyan Munshi she asked him *"Why are you here and why he shot Jessica Lal?".* Her statement clearly proves the prosecution case that she had herself seen Manu Sharma shooting Jessica Lal. As rightly observed by the High Court, if the evidence of Beena Ramani is analyzed in depth, it is clear that she not only asserted the presence of Manu Sharma at the scene of occurrence and heard two shots one by one but also asked a pertinent question to Shyan Munshi that why he (Manu Sharma) shot Jessica Lal. Whether she has to be treated as an eye-witness to the occurrence or not is to be discussed at later point of time by analyzing her entire evidence. However, for the limited purpose of proving the presence of accused at the scene of offence, her evidence fully supports the case of the prosecution.

(e) *George Mailhot PW-24*

He is a Canadian citizen and according to him, he has been residing in India since February, 1992. Beena Ramani PW-20 is his wife. Her business premises were at H-5/6 Mehrauli Road, New Delhi. This complex was popularly known as ''Qutub Colonnade''. It had a number of shops and a restaurant. The licence of eating place was in the name of Beena Ramani. He was also involved in the said business for several years before the date of occurrence. Several parties were arranged and last Thursday Party was held on April 29, 1999. On that day, he was leaving for World Trip for a few months, partly that was the occasion for that party. At the

instance of the police, he prepared a list of guests who were invited in that party and gave the list to the police which was signed by him on 22.05.1999. It is Ex. PW24/A. According to him, time of occurrence might be around 2 AM. At that time he was standing in the courtyard near a large tree which is in the middle of the courtyard. This must be about 20 ft. away from the door of the restaurant. He further deposed:

> "I was facing opposite side of the entrance door of the restaurant and then I heard two pop shots like balloon. I turned towards the restaurant door from where I had heard the sound and within a few seconds Shyan Munshi came running and said to me someone shot Jessica. I immediately went to the restaurant. When I reached the door of the restaurant I saw some people to my right to my left and ahead of me. Ms. Beena was moving at a place which may be described as ahead of me towards the left side. Beena was addressing a young man who was moving, someone whom I had not seen before. This person was moving around and Ms. Beena Ramani was following him and saying that you are the one give me the gun. I could see everyone present there watching that person who was being addressed to by Ms. Beena. The young man said that why everyone was looking at him that he did not do anything. Then I saw Jessica lying on the floor with her head towards my feet, almost near my feet. Jessica was looking quite in pain and not moving and there was no sign of blood. Then I saw another man standing at the door. At that time, about 2/3 people were ahead of me and are by my side in the restaurant. I was focusing on the danger point. The young man whom I saw at the door was a beard person i.e. Sardarji. He was the only one present there who was keeping/maintaining calm. Thereafter, I went to the gate of Qutub Colony leaving others in the restaurant, in search of Police man. I ran out and went into the street there was no one there. While I was in the street a number of people came up to the gate of Colonnade

walking. There was a bunch of them that is a first person behind him a second person and then behind them many persons they were walking very rapidly. The first person was the one whom I had seen in the restaurant and whom Beena had accosted and asking for the gun. Right behind him or directly behind him was Beena. I focused only on first person or Beena I did not notice the others."

"I believe I can identify that person who had come out first and was being followed by Beena. The witness touched Siddhartha Vashist as the person who was being followed by Beena."

His evidence makes it clear that at the relevant time on hearing the shot, Shyan Munshi PW-2 came running shouting that someone shot Jessica. He reached the door of the restaurant. It is also clear that Beena Ramani PW-20 was moving at a place ahead of him towards the left side. This witness subsequently stated that Beena Ramani was addressing a young man who was moving with someone. He also identified the person who had come out first followed by Beena and he touched Manu Sharma as the person who was being followed by Beena. As rightly pointed out by learned Solicitor General, his evidence also proves the presence of the accused-Manu Sharma at the scene of offence.

(f) *Rouble Dungley PW-23:*

In his evidence, he admitted that he had told the police that he saw Beena Ramani going after a boy. In his deposition, he mentioned that:

"It is correct that I had told the police that I saw Beena Ramani going after a boy. But I do not remember whether I had told the police that the said boy was a fat boy. It is correct that I had seen Beena Ramani going there Vol. I had seen her from a distance. It is correct that I had told the police that Beena Ramani was saying "Stop that Man"

"I heard that Jessica had been shot."

(g) *Rohit Bal PW-70:*

He deposed that:

"Beena Ramani was actually running in the courtyard area shouting catch that man, catch that man, stop him or something like that pointing towards the exit and running behind someone. I saw the person being pointed out by Beena Ramani but I did not know him. Again said I did not see that person, being pointed out by Beena Ramani from face."

The above statement makes it clear that after the shooting incident Beena Ramani was running behind a man shouting *"catch that man"*

From the evidence of above mentioned witnesses, namely, PWs 1, 2, 6, 20, 23, 24 and 70 which are all admissible in evidence clearly show the presence of accused Sidhartha Vashisht @ Manu Sharma at the scene of offence. This evidence of the ocular witnesses is duly corroborated by Ex PW 12/D-I, the wireless message received at PS Mehrauli.

In addition to the evidence of the above mentioned witnesses, who were present at the party, the presence of appellants is also proved by other evidence, namely, 3 PCR calls Ex PW 11/A, B and C which were received. The evidence of PWs 11, 12 and 13 clearly proves that immediate and prompt action was taken.

(h) *HC Devi Singh PW 83 — In-charge of PCR Van:*

He reached the scene of occurrence within two minutes at around 02.17 a.m. and reported back at 02.35 a.m. It is relevant to refer the message received that is Ex PW 12/D-1 which states:

"From E-43 (PCR Van), A party hosted by Malini and Beena was going on in Qutub Colonnade Hotel situated at the road which leads towards Mehrauli where a person had demanded whiskey from Jessica Lal but she (Jessica Lal) said that the restaurant had already been closed. At this the aforesaid person had fired shot at Jessica Lal, which had hit her on her chest. Jessica Lal has been admitted in Ashlok Hospital, Safdarjung Enclave and the person who had fired shot has fled from there."

"One person has fled after firing (at someone) 35 years, stout body 5' 4'' R/F fat, T-Shirt of white colour. All the persons will search him".

Ex. PW 12/D-1, a contemporaneous document, clearly corroborates the testimony of ocular witnesses which we have already mentioned in the earlier paragraphs. From the evidence adduced, it is clear that the appellants-accused Nos. 1-3 were present at the scene of occurrence. Admittedly without setting up a plea of alibi to show their presence elsewhere, they have flatly denied their presence.

It is the stand of Mr. Ram Jethmalani, learned senior counsel for the accused that the police deliberately framed Manu Sharma as an accused and made out a false story against him concealing the actual offender who is a tall Sikh gentleman and on this made up theory witnesses from the same family who were vulnerable were made to depose in favour of the prosecution. In an answer to the said question, it was pointed out that apart from the testimony of HC Devi Singh PW-82, PCR in-charge, read with Ex. PW-12/D-1 clearly prove the case of the prosecution. It is relevant that the said witness reached around 02.17 a.m., on a message from PCR to PS Mehrauli takes around 10 minutes as from local PCR it goes to headquarter from where it is transmitted to concerned district net which further transmits it to the local police station. In this way, around 02.25 a.m., even before the local police had

arrived at the spot HC Devi Singh PW-83 had sent the version available at the spot. The prosecution placed specific reliance on the same. In the absence of rebuttal evidence, there is no reason to reject the evidence of PW-83 as well as Ex. PW-12/D-1. In those circumstances, the entire premise of the defence argument that it was not a person in white T-shirt, stocky and fair, who shot at Jessica Lal over a row over the drink and fled away from the spot and this was a planted and concocted story of the prosecution to rope in Manu Sharma and make escape good of the tall Sikh gentleman is wholly erroneous and without any basis.

Evaluation of evidence throwing light on the actual incident:

16. It is the stand of the defence that the testimony of Madan Kumar PW 46 and Jatinder Raj PW-47 belies the fact that Beena Ramani PW-20 had seen actual shooting as the witness says that they both entered together. Madan Kumar PW 46 worked in Qutub Colonnade in April, 1999 as a waiter. In his evidence, he informed the Court that:

"the day of occurrence was Thursday. The occurrence took place at about 1.30 or 1.45 AM. At that time, I saw some people rushing in and some people rushing out of the restaurant and they were shouting ''GOLI LAG GAI'', ''Jessica Lal KO GOLI LAG GAI".

I knew Jessica Lal before the incident, Jatinder Raj was the Manager of the restaurant. I was coming downstairs, and on hearing the noise, I went to restaurant. I saw Jessica Lal, lying on the floor. Some guests, Beena Ramani and Jatinder Raj were present there. Two – three other workers were also present, but I do not remember their names. Beena Ramani made a telephone call. Thereafter, Shiv Dass brought a sheet of cloth. Jatinder Raj, Beena Ramani and I wrapped the said Jessica Lal in the bed-sheet. We took/carried her to an Esteem Car,

parked outside. Beena Ramani, Jatinder Raj and I also sat down in the Car. There was a driver in the car. We left and reached Ashlok Hospital. Jessica Lal was removed on a stature for medical treatment. I returned to the restaurant at about 3/3.15 a.m. Police met me there in the Restaurant.''

"Jatinder Raj and Beena Ramani were already, near Jessica Lal, when I reached there. I did not see Mr. George there, at that time. George had left at about 12.30 or 12.45 a.m. from there. When I saw Jessica Lal lying on the floor, I also saw that she had some injury on the left forehead, from which blood was coming out. There was also blood on the floor, where Jessica Lal was lying."

17. Jitender Raj PW 47 was working as a Manager-cum-Supervisor. He used to check the supplies, cash and sanitation. A system of ''Thursday Parties'' had been started in Qutub Colonnade. The occurrence took place on such 3rd or 4th party on 29.04.1999. It was a Thursday. Generally food was served but on Thursdays liquor was also being served. The supply of articles through coupons was made in the open space. The party, on 29.04.1999 was over at about 12.30 a.m. and he told the waiters to clean up the place. He was counting the cash and tallying the same. He narrated further:

"The time might be 2 AM. I heard the firing of two shots, and the noise of firing had come from the side of cafe. I opened the gate of my office, which I had closed, before counting the cash etc. I saw from that gate of my office that people were coming in and going out. At that time, I saw Beena Ramani on the stairs of cafe. I rushed towards her and we both went inside the cafe. We saw, Jessica Lal lying on the floor, near the counter. Shiv Dass, Madan Lal, Surender and Wiplub, members of the staff and one-two guests also reached the spot. There was scratched on the forehead of Jessica Lal. Shiv Dass PW-3, brought a bed-sheet. We wrapped Jessical Lal in that

bed-sheet. Shiv Dass is an electrician in Qutub Colonnade. We removed Jessica Lal in a car to the Ashlok Hospital. Mrs. Beena Ramani, Madan Kumar, waiter, myself and driver were in that car, apart from Jessica Lal."

I came out of my office, immediately, after hearing the shots of firing. I saw, 'AFTRA TAFARI' at the gate of cafe after coming out of my office. At that time, I saw Beena Ramani on the steps, to which I have made reference. By the time Beena Ramani reached the gate of cafe. I reached there, by running."

18. The analysis of evidence of PWs 46 and 47 shows that when PW-47 heard the noise of the shots he was in the office counting cash and after hearing the noise of firing he opened the gate of his office which he had closed at the time of counting the cash. He saw from the gate of his office that people were coming in and going out. At that time, he saw Beena Ramani on the steps of the cafe, he rushed towards her and they both went inside the cafe. It is clear from the testimony of this witness that he was inside his office counting the cash when he heard the shots, thus after taking care of the cash when he opened the gate he saw people coming in and going out, which means that his act of coming out from the office is considerably after and not immediately after the shots were fired and, therefore, he saw people running back and forth whereas Beena Ramani PW-20 has stated that when she mounted the steps of the restaurant she saw a few people standing next to the counter and heard a shot. A moment later she heard another shot. Jessica Lal was standing with people at the far end and she saw her falling. It is pertinent to note that as per the scaled site plan, the point at which Beena Ramani PW-20 was standing was only four feet from the point at which the shot was fired at Jessica Lal. Therefore, it can never be alleged that there was no way in which the said witness could have had any doubt as to the identity of Manu Sharma. Thereafter, she accosted Manu Sharma till the gate of Qutub Colonnade where she told George

Mailhot PW-24 that this was the man who had shot Jessica Lal and that he should see in which car he i.e. Manu Sharma gets into and after that Beena Ramani PW-20 came back to the spot. It is when she came back to the cafe this witness PW-47 joined PW-20 entering the cafe, thus the testimony of this witness does not negate the fact that PW-20 witnessed the incident. It is relevant to mention the very fact that PW-20 followed the appellant is a clear indication of the fact that she was more than certain that he was the culprit responsible for the crime, and, therefore, she did not chase anybody else as the person who was having the gun. It has to be borne in mind that Beena Ramani had no enmity with the appellant-Manu Sharma and also the whole theory of planting of witnesses at the instance of the police is false since the accused has not led any defence evidence or brought on record any evidence to suggest that the investigation was motivated by mala fide.

19. It was argued by the defence, since PW-47 in his cross examination has stated that Beena Ramani PW-20 stated to him as to what had happened and who had done it, an inference has to be drawn that she did not witness the incident. As rightly pointed out, the above statement does not lead to the inference that Beena Ramani PW-20 did not witness the incident rather it could further reinforce what she had witnessed. Even otherwise, admittedly, thus, Beena Ramani was available she was not recalled to confront her with the testimony of PW-47. In those circumstances, the defence cannot take advantage out of a portion of statement of PW-47.

20. It is relevant to mention that Madan Kumar PW-46 also stated that when the occurrence took place he was present on the stairs leading to terrace and that time he saw people rushing in and some people rushing out of the restaurant who were also shouting ''Goli Lag Gai, Jessica Lal Ko Goli Lag Gai''. He came downstairs after hearing the noise and went to the restaurant, thus it is evident that this witness did not hear the shots of the fire but only realized about the occurrence after people were

rushing in and rushing out shouting. A perusal of the testimony of PW-46 reveals that when he came down, PW-20 was already there. Thus PW-46 is not in a position to say as to what PW-20 witnessed. It may be further pointed out that the stairs leading to the terrace are not on the cafe but on the main building of Qutub Colonnade which houses the shops beyond the verandah and Tamarind Court. Hence, the testimony of PW-46 cannot negate the evidence of PW-20 that she witnessed the incident. It is submitted that the mere absence of Beena Ramani PW-20 in the site plan also does not negate her presence or her having not witnessed the incident, specifically when she had given her statement to the police under Section 161 CrPC on 30.04.1999, itself.

21. Mr. Ram Jethmalani, learned senior counsel, by drawing our attention to Ex PW 21/A, which is a site plan and Point B is the approximate place where the deceased was shot, argued that it was impossible for PW-20 (Beena Ramani) to have seen the actual shooting, since they both entered together and PW-47 came in after the shot was fired. In other words, it was argued that PW-20 only saw the ''fallen woman'' and it is incorrectly written ''falling'' and PW-20 is not the person who saw the incident. We meticulously verified the site plan as well as the evidence of PWs 20, 46 and 47. The absence of PW-20 in the site plan does not belie her presence and her having witnessed the incident especially when her statement under Section 161 Cr.P.C. was recorded on 30.04.1999 in the morning itself. It was pointed out by the prosecution that she was neither contradicted nor confronted with her statement under Section 161 Cr.P.C. as she firmly stood to her statement in the witness box.

22. Mr. Ram Jethmalani, further submitted that due to the pressure by the prosecution for registering a case under the Punjab Excise Act against Malini Ramani PW-6, Beena Ramani PW-20 and George Mailhot PW-24, virtually, they were pressurized to yield to the case of prosecution. While stoutly

denying the said allegation, Mr. Gopal Subramanium, submitted that the registration of case under the Punjab Excise Act has nothing to do with their evidence in the case of death of Jessica Lal. He also submitted that ultimately they were fined, the said action cannot be construed as a threat to them or keeping the sword hanging for taking action either under Section 201 IPC or the Punjab Excise Act. It was pointed out by the learned senior counsel for the appellant that Malini Ramani PW-6 during her statement admitted that her mother Beena Ramani was accused of having removed the blood from the spot. PW-6 further admitted that during the first five days of May, 1999, the interrogation of three of them ''PWs 6, 20 and 24'' was very intense. She also stated that for quite long hours they were kept in the Police Station and they were used to be subjected to prolonged interrogation in the Jessica Lal's case as well as in other Excise Act case. It is true that SHO S.K. Sharma PW 101, admitted that the FIR in the excise case was lodged against the above said three persons. It was also highlighted that all the three were arrested in the excise case on 08.05.1999 which was pending in the Court of Metropolitan Magistrate, New Delhi. In that case, application on behalf of Beena Ramani and George Mailhot was moved for seeking permission to go abroad for treatment of Beena Ramani alleging that she is a cancer patient. Mr. Jethmalani argued that notice of which was given to the State and instead of filing reply by the State counsel PW-101, who appeared in person, vehemently opposed on the ground that their presence may be required during the investigation of FIR No. 287 of 1999 for filing additional charge-sheet including the issue of cleaning of blood. Ultimately, the Metropolitan Magistrate rejected their application for permission and they were not allowed to go abroad because of the reason that their presence may be required for filing additional charge-sheet in FIR No. 287 of 1999. By pointing out the above information, it was argued by the learned senior counsel that the investigation agency had been pressurizing these witnesses to toe their line in their deposition in the present case, but PW-20 was not made as accused under Section 201

in the present case because they had agreed to toe the line of the prosecution but this sword was kept hanging on them to ensure that the entire family members i.e. PWs 6, 20 and 24 continue to toe the line of prosecution. All the allegations have been stoutly denied by the prosecution. It was submitted by the prosecution that the statement of S.I. Sunil Kumar PW-100 is inadmissible on the ground that it is sought to be used as opinion evidence and, therefore, hit by the rule against hearsay evidence. Even if it is held to be admissible, it was pointed out that Beena Ramani was right in saying that statement of Shyan Munshi should be recorded because Shyan Munshi was inside the cafe and had witnessed the entire incident including conversations which occurred prior to the incident. It was further pointed out that the statement of Beena Ramani to this effect which she also deposed before the trial Court was recorded on the same date i.e. on 30.04.1999 that too in the morning itself. In her statement, before the Court PW-20 Beena Ramani had clearly stated *"at the hospital, the police met me. The report about the incident was lodged in my presence by Shyan Munshi."* In view of the same it was submitted that because PW-20 told PW-100 to ask PW-2, it does not mean that she did not know anything, since her statement was recorded on the same day soon after the statement of Shyan Munshi to which statement she stuck even in her testimony before the trial Court.

23. It has been vehemently argued that PW-20 is not an eye witness since both Investigating Officers i.e. PWs-100 and 101 admitted the same. It was submitted by the State that this argument runs counter to the well settled proposition of law that a witness cannot be discredited without the said piece of the testimony having been put to her. The accused had a statutory option available by way of Section 311 of the Code to call PW-20 for the purposes of further examination. This argument of the defence also runs counter to their own argument used to discredit the investigation that PW-6 was placed in the 'rukka' by the Police for the purposes of being shown as an eye-

witness. The said part of the testimony of PWs-100 and 101 are at best in the nature of opinion evidence which are inadmissible pieces of evidence and for the aforesaid reasons cannot wipe out the unchallenged testimony of PW-20, which is the case of the prosecution.

24. Further, the appellant-Manu Sharma has also been clearly identified by Malini Ramani PW-6 as the person in the White T Shirt who had asked for whisky and thereafter on her refusal to oblige, he misbehaved with her in the most vulgar fashion.

25. It was argued that PW-6 could not have seen anything since she was on the other side of the Colonnade and that the prosecution in fact planted her into Ex.PW-2/A i.e. the 'rukka' prepared at the instance of Shyan Munshi as an eye witness. It has been reiterated that all the three key witnesses are planted witnesses who have deposed under pressure of false implication. It has been further argued that the deposition of PW-6 that she entered the bar for a drink is improbable as she knew that the drinks were over. It is contended by the defence that PW-6 did not say that she heard the gun shots since she was inebriated, which further supports the fact that she could not identify anybody else. Her statement that there were four or five guys at the spot is also not corroborated by Deepak Bhojwani PW-1. The Prosecutor has put a leading question to her as to the identity of the appellant and, therefore, the said question and answer should be expunged from the record. The Police recorded a couple of her statements but the defence was not supplied with all of them. In any case the photo of the appellant was shown to her even prior to his refusal of the Test Identification Parade. It was pointed out that these contentions are totally erroneous and contrary to the record. It is pertinent to note that FIR No. 288 of 1999 at PS Mehrauli under Excise Act was registered on 30.04.99 itself and thus the question of making her an accused on 08.05.99 does not arise. Moreover, the excise offence is a bailable offence. Further, the statement

of Malini Ramani was recorded under Section 161 Cr.P.C. on 03.05.99 itself vide Ex PW 6/DA and thus the contention of making her an accused on 08.05.99 on this count is also fallacious.

26. As regards the argument that Malini Ramani PW-6 was shown as an eye-witness to the incident of shooting in the 'rukka', a perusal of the same reveals that at no point of time Shyan Munshi, PW-2, stated either in the positive or the negative that PW-6 was or was not there when the shots were fired. In any case, as rightly pointed out on the side of the State that the alleged prosecution planted PW-6 as an eye-witness goes contrary to all reasoning, since on 30.04.1999 at the time of recording the 'rukka', none of the witnesses had disclosed the identity of the appellant – Manu Sharma, therefore, to allege that the Police had planted the witness is wholly incorrect.

27. As regards the argument that PW-6 was under the influence of alcohol, therefore, could not have identified the appellant – Manu Sharma, is also wrong since she clearly stated in her testimony, particularly, in cross-examination, that she had consumed only one drink.

28. The argument that deposition of PW-6 as regards the presence of other accused, does not find corroboration from the testimony of PW-1 is incorrect since the said witness categorically mentioned the presence of other accused. The grievance that the identification of the appellant-Manu Sharma was based on a leading question is also wrong since even before the alleged leading question was put to the witness, the witness, PW-6 had positively identified the appellant – Manu Sharma by specifically pointing out and stating that he just looks like him. It was explained by the State that the appellant was not personally known to the said witness or her family and, therefore, the manner of identification in the present case wherein the present witness by pointing out towards him stated that he just looks like the man she saw at the party is most conclusive and reliable. Further the argument of her having

been shown the photo her identification is of little value since her statement that she saw the photographs prior to 05.05.1999 is most wavering and unclear. In the same manner, she has deposed that photos were also shown to Beena Ramani PW-20 and George Mailhot PW-24 is of little value since neither PW-20 nor PW-24 stated that they had been shown the photos of the accused in spite of having all the opportunities failed to confront the said witnesses with the said part of PW-6's testimony. Based on the statement of Rohit Bal PW-70, that he saw her screaming out, the defence has sought to discredit PW-6's, statement. It is relevant to note that it is the case of PW-6 that she came to know when she was in the courtyard, Shyan Munshi came running towards her and Sanjay Mehtani, screaming that Jessica Lal had been shot. Thereafter, PW-6 fainted, thus, in the process, if PW-70 saw her screaming in the courtyard, it cannot be said that there is any contradiction in the statement of PW-6 and PW-70.

29. It was pointed out by the defence that the firing was not over a drink, the act to refuse supply of liquor was not the motive to murder Jessica. After perusing the evidence of PW-6, it is clear that after refusal of the drink, the appellant-Manu Sharma misbehaved in the most vulgar fashion. The testimony of PW-23 further corroborates the testimony of PW-6. As rightly pointed out by the State that it was a case where the deceased Jessica Lal was murdered for a row over the drink.

30. It was also pointed out on the side of the appellant-Manu Sharma, that the evidence of Malini Ramani, PW-6 and George Mailhot, PW-24 does not corroborate the statement of Beena Ramani, PW-20. In this regard, it is relevant to note that these three witnesses have deposed on three different situations in the chain of circumstances. The evidence of these three witnesses, if read in whole in conjunction and in harmony with each other, would show the chain of circumstances of evidence leading to only one inference. It was highlighted by the defence that PWs 46 & 47 stated that they did not see PW-

24 after the party was over at 12.30 a.m. By saying so, it was contended that PW-24 was never there at the time of the alleged incident. It was also contended that PW-24 reached the Mehrauli police station at around 2.25 a.m. whereas if the story of the prosecution is true then he should have reached around 2.10 a.m. It is relevant to mention that PW-24's statement was recorded on the same day i.e. 30.04.99. The presence of PW-24 at the time of incident is also supported by the testimony of ASI Kartar Singh PW-13, who deposed that a person bearing the description of PW-24 came to the Police Station to report about the firing incident, which fact corroborates the testimony of PW-24 that he went to the Police Station. It was urged by Mr. Ram Jethmalani that Rohit Bal PW-70 was a witness who have been examined first as his telephone number appears on Ex. PW-12/D1 which are the PCR messages. It was clarified that in the PCR only the mobile number was recorded. Further on receipt of information, police officers immediately reached the place of occurrence and came to know that the deceased had been taken to Ashlok Hospital. SI Sunil Kumar, PW-100 reached Ashlok Hospital and made enquiries from PW-20 who directed him to take the statement of Shyan Munshi as he was present at the bar counter and conversant with every thing. The prosecution has explained that in view of the statements of the eye-witnesses having been taken immediately at 03.40 a.m. on 30.04.99 itself on the basis of which FIR was registered and number of other investigation processes like post-mortem, site plan etc. and immediately thereafter search for Tata Safari, ownership of the alleged vehicle, search for Manu Sharma in the case being made, as such even if there is delay in recording of statements of other witnesses, it cannot be fatal to the prosecution case. The said claim of the prosecution cannot be rejected as unreasonable.

31. In the earlier part of our judgment, we have noted that PW-20 has categorically stated that she heard the two shots, saw the people inside and Jessica falling down, which shows

that she had witnessed the entire incident as is evident from the relevant portion of her testimony extracted in paragraphs supra. Malini Ramani in categorical terms informed the Court about Manu Sharma asking about the whisky, his misbehaviour immediately before the shooting and also identified the same person in white T-shirt asking for the whisky and misbehaving with her as Manu Sharma. PW-6 further corroborates the testimony of PW-20 and part testimony of PW-2 with regard to the presence of the accused Manu Sharma. The scrutiny of the entire evidence of PW-6 clearly shows that her evidence is not only relevant but also admissible.

32. Coming to the cause of death, Dr. R.K. Sharma PW-9, who conducted post-mortem on the body of deceased Jessica Lal has stated that on 30.04.1999 at about 11:20 a.m. 7 sheets of papers i.e. inquest papers, request of post-mortem, inquest report, copy of FIR, brief facts of the case, were submitted to him along with the dead body. He informed that the cause of death to the best of his knowledge and belief was head injury due to firearm, injury was ante-mortem in nature. He also deposed that Injury no. 3 was sufficient to cause death in the ordinary course of nature.

33. Coming to the evidentiary value of PW-2, on behalf of the defence, it was stated that PW-2 is not a reliable witness in view of the fact that according to him he made his statement in English, however, SI Sunil Kumar recorded it in Hindi. In the absence of any suggestion to the contrary, as rightly pointed out by the counsel for the State that it must be presumed that PW-100 recorded the statement correctly. It is also relevant to mention that in his statement as a witness he said ''I can understand spoken Hindi. Hindi was my third language when I was studying in the seventh standard. I was never good in Hindi.'' It is also pointed out that Shyan Munshi has acted in a number of Hindi films. Even if a prosecution witness is challenged in cross-examination, that part of his testimony which is corroborated by other witnesses or from other evidence

can clearly be relied upon to base conviction. Further it was pointed out that PW-2 was under the influence of accused Manu Sharma as he was accompanied by Mr. Ashok Bansal who had appeared as proxy counsel for him i.e. accused Manu Sharma in his bail application dated 06.03.2000. Thus, reliance could have been placed only on that aspect of the testimony which is corroborated by other evidence on record.

34. With regard to the allegation that statements of PW-6, PW-20 and PW-24 were taken under pressure as a case under Excise Act was lodged against them and when they were to be examined, an application for pre-ponement of the case was moved where they pleaded guilty and fine of Rs. 200 was imposed on each. For this, it was pointed out that there is nothing on record to suggest that PW-6 was threatened or humiliated by the Police or that she would be implicated in a case of destroying the evidence i.e. removal of blood from the spot. In fact, PW-20 has denied the suggestion that she is deposing falsely at the instance of Police. In the same way, PW-24 has also denied the suggestion that a deal was struck between him and the investigation agency to make a false statement, thereafter, the Excise case could be hatched up. It is relevant to point out that the case under Punjab Excise Act which was registered as FIR No. 288/99 on 30.04.1999 has not been withdrawn by the prosecution against the accused. On the other hand, the fact remained that the accused had pleaded guilty. As rightly pointed out by the State that on the quantum of sentence for an offence, the prosecution has no role and it is the Court concerned which can impose appropriate sentence considering the evidence and the role of the accused. It was also highlighted that the charge was only under Section 68 of the Punjab Excise Act to which all the three accused, namely, Malini Ramani, Beena Ramani and George Mailhot pleaded guilty. The maximum penalty/fine under Section 68 is Rs. 200, therefore, the maximum fine which could have been imposed on the accused is Rs. 200. In those circumstances, the allegation that these three witnesses were kept under

pressure is not acceptable.

What constitutes the First Information Report

35. Let us consider whether the three telephonic messages received by the Police at around 2:25 a.m. on 30.04.1999 or the statement made by Shyan Munshi recorded at Ashlok Hospital constitute the FIR. It is the submission of the learned senior counsel for the appellant-Manu Sharma that the statement of Rohit Bal PW-70 ought to have been used for the purpose of registration of FIR instead of Shyan Munshi PW-2. It was demonstrated that Rohit Bal had made two calls on '100' on coming to know by other persons that Jessica Lal has been shot inside the cafe. As against this, Shyan Munshi PW-2 was very much within the vicinity of the place of occurrence and, therefore, the statement of Shyan Munshi was used for the purpose of registration of FIR. It is relevant to point out that PW-70 has never claimed to have witnessed the incident. He confirmed his presence on the spot and having seen PW-20 accosting a man.

36. It was further contended by the learned senior counsel for the appellant-accused that PW-2 Shyan Munshi's statement could not be looked into as the same is hit by Section 162 Cr.P.C. and on the other hand the defence seeks to rely on his testimony. In support of the above claim, the learned senior counsel for the appellant relying upon the judgments of this Court in *State of U.P. vs. Bhagwant Kishore Joshi* AIR 1964 SC 221 and *Emperor vs. Khwaja Nazir Ahmad* AIR 1945 PC 18 contended that investigation of an offence can start either on information or otherwise and that the receipt and recording of FIR is not a condition precedent to the setting in motion of criminal investigation. Placing reliance upon the said judgments, it has been further argued by the learned senior counsel for the appellant that in the present case the three cryptic telephonic messages received by the Police at around 2.20 a.m. on 30.04.1999 should be treated as FIR upon which the investigation started and, therefore, the statement of PW-2

recorded by the Police later on around 3.40 a.m. could not be treated as FIR but a statement under Section 162 of Cr.P.C.

37. Insofar as the decision in *Bhagwant Kishore* (supra), it was noted in para 8 at page 224 that the information received by the officer was not vague, but contained precise particulars of the acts of misappropriation committed by the accused and, therefore, the said information could be treated as FIR. On the contrary, it is evident from the facts established on record in the present case that none of the three telephonic messages received by police furnished any detail about the offence or the accused. The judgment in *Khwaja Nazir Ahmad* (supra) is also distinguishable as the law laid down in the said case does not concern the issue involved in the present case. Cryptic telephonic messages could not be treated as FIR as their object only is to get the police to the scene of offence and not to register the FIR. The said intention can also be clearly culled out from a bare reading of Section 154 of the Criminal Procedure Code which states that the information, if given orally, should be reduced in writing, read over to the informant, signed by the informant and a copy of the same be given free of cost to the informant. In the case on hand, the object of persons sending the telephonic messages including PW-70 Rohit Bal was only to bring the police to the scene of offence and not to register the FIR. Learned senior counsel for the accused-Manu Sharma has also relied upon a judgment of this Court in *H.N. Rishbud & Inder Singh vs. The State of Delhi* (1955) SCR 1150 wherein this Court has held that investigation usually starts on information relating to commission of an offence given to an officer in-charge of a police station and recorded under Section 154 of the Code. A reading of the said judgment clearly shows that investigation starts on information relating to commission of an offence given to an officer in charge of a police station and recorded under Section 154 of the Code. By applying the ratio of the said judgment to the case on hand, it can be clearly said that the investigation started after the recording of the statement of PW 2 as FIR around 3.40 a.m.

on 30.04.1999.

38.Learned senior counsel for the appellant also relied on judgment of the Gujarat High Court in *Mehr Vajsi Deva vs. State of Gujarat,* AIR 1965 Guj 143. A perusal of the said judgment shows that the details of the offence given by the telephonic message in the said judgment clearly described that *'one man was assaulted by means of an axe at Sudama Chowk*', on the other hand, in the case on hand the telephonic message did not give any details of the offence or accused and the same was a vague information. The said judgment should be read per incuriam in view of plethora of judgments of this Court wherein it has categorically held that cryptic telephonic messages not giving the particulars of the offence or accused are bereft of any details made to the police only for the purpose of getting the police at the scene of offence and not for the purpose of registering FIR.

39. Learned senior counsel for the appellant also relied on the judgment of this Court in Superintendent of Police, *CBI and Others vs. Tapan Kumar Singh,* (2003) 6 SCC 175. In the said case, detailed information was given on telephone including the offence and the whereabouts of the accused. On the other hand, in the present case, as observed earlier all the three telephone calls barely mentioned that a fire was shot and a girl was killed. The said information could only be concluded to have been given to the police to get the police to the scene of offence and not with the object of registering FIR. In those circumstances, the judgment in Tapan Kumar Singh (supra) has no application to the facts of the case on hand.

40. It was further pointed out by the defence that Ex.P-12/A wherein three PCR calls were recorded is the real FIR and the statement of PW-2 which was taken during investigation and got signed by him is not the FIR and is thus to be treated as a statement recorded under Section 161 Cr.P.C. and is hit by the bar under Section 162 Cr.P.C. This argument is unacceptable since as observed in the earlier paragraph the telephone call

from PW-70 was too cryptic to amount to an FIR. At this juncture, it is useful to refer to the decision of this court in the case of *State of U.P. vs. P.A. Madhu,* (1984) 4 SCC 83 wherein this Court has not accepted a similar argument and held as under:-

> **5.** To begin with, it appears that there was some dispute about the dearness allowance claim of the labour from the management which was referred to the Industrial Tribunal. The respondent, who was the Secretary of the Union, was looking after the case on behalf of the workers, while PWs 5 and 7 were the officers appearing on behalf of the management before the Tribunal. The deceased, S.J. Sirgaonkar, was Deputy Personnel Manager of the Bombay Branch of M/s Hindustan Construction Company. He was shot dead by the respondent after he (deceased), along with the other officers of the management, had come out of the Tribunal's office at Meerut after filing their written statements. Thereafter one of the eyewitnesses, S.K. Gui (PW 7) asked someone to give a telephone call to the police station, which was nearby, on receipt of which the police arrived at the spot, seized the pistol and took the accused and some of the witnesses to the police station where a formal FIR was registered. The Panchnama was prepared and other formalities were, however, done at the spot.
>
> **11.** Durga Das, DW 1 who was admittedly at the scene of the occurrence has stated that as the shooting started, PW 7 had given a telephonic message to the police station. The High Court by an implied process of reasoning has observed that if PW 7 had given the telephonic message he would have mentioned the name of the assailant because he was a full-fledged eye-witness but since his name had not been mentioned it is the strongest possible circumstance to discredit the prosecution case. We are, however, unable to agree with this somewhat involved

reasoning of the High Court. In fact, DW 1 merely says that Gui telephoned to the police station about the firing and said something in English. The High Court seems to have presumed that from this the irresistible inference to be drawn is that Gui did not mention the name of the assailant of the deceased and on this ground alone the prosecution must fail. This argument is based on a serious error. In the first place, the telephonic message was an extremely cryptic one and could not be regarded as an FIR in any sense of the term. Secondly, assuming that Gui had given the telephonic message in utter chaos and confusion when shots after shots were being fired at the deceased, there was no occasion for Gui to have narrated the entire story of the occurrence. In fact, in his evidence Gui has denied that he personally telephoned the police but he stated that he asked somebody to telephone the police which appears to be both logical and natural. Moreover, such a cryptic information on telephone has been held by this Court to be of no value at all. In *Tapinder Singh v. State of Punjab* this Court in identical circumstances observed thus: [SCC para 4, p. 117: SCC (Cri) p. 332]

"The telephone message was received by Hari Singh, ASI Police Station, City Kotwali at 5.35 p.m. on September 8, 1969. The person conveying the information did not disclose his identity, nor did he give any other particulars and all that is said to have been conveyed was that firing had taken place at the taxi stand, Ludhiana. This was, of course, recorded in the daily diary of the police station by the police officer responding to the telephone call. But prima facie this cryptic and anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as first information report. The mere fact that this information was the first in point of time does not by itself clothe it with the character of first information report."

Similar views have been expressed in *Tapinder Singh vs. State of Punjab* (1970) 2 SCC 113, *Damoder vs. Rajasthan* (2004) 12 SCC 336 and *Ramsinh Bavaji Jadeja vs. State of Gujarat* (1994) 2 SCC 685.

It was argued and highlighted that since PW-2 Shyan Munshi has been confronted with his signed statement i.e. Ex.PW-2/A and B, the whole evidence goes in light of *Zahidurddin vs. Emperor,* AIR 1947 PC 75. Apart from the above decision reliance has further been placed on Superintendent and Remembrancer of Legal Affairs to the *State of W.B. vs. Ram Ajudhya Singh & Anr*. AIR 1965 Cal. 348 (Para 9) and *Mer Vas Deva vs. State of Gujarat,* AIR 1965 Guj. 143 (Para 9 & 10). We have carefully perused those decisions. We are satisfied that nothing turns on this argument since the said decisions only provide that where a statement made/given by a witness under Section 161 of the Code and signed by the same is hit by the bar prescribed under Section 162 of the Code, but nowhere do they say that the evidence deposed to in Court by the said witness becomes admissible. As a matter of fact, similar argument of the defence counsel was rejected in *Ranbir Yadav vs. State of Bihar,* (1995) 4 SCC 392.

"37. In assailing the above findings Mr Jethmalani first contended that both the courts below ought not to have taken into consideration and relied upon the evidence of PC PW 1 as the same was clearly inadmissible. In expanding his argument Mr Jethmalani submitted that while being examined in court the witness was permitted to refresh his memory from the report he lodged with the police in the morning of 12-11-1985 (Ext. 10/1), which was treated as the FIR of the second incident even though by no stretch of imagination could that report be so treated, as PW 96 had started investigation into the same the previous night. That necessarily meant that Ext. 10/1 was a statement made to a police officer during investigation which could not be read for any purpose except for

contradicting the maker thereof in view of Section 162(1) of the Code, argued Mr Jethmalani. In support of his contention Mr Jethmalani relied upon the judgment of the Privy Council in *Zahiruddin v. Emperor.* It appears that the question as to whether Ext. 10/1 could be treated as an FIR was raised both before the trial court and the High Court and it was answered in the affirmative. The courts held that in the night of 11-11-1985, PW 96 did not examine any witness in connection with the incident that took place in that afternoon and, in fact, he did not take any step towards the investigation as he and other police officers were busy in maintaining law and order in the village.

38. Having gone through the evidence of PW 96 we are constrained to say that the courts below were not justified in treating Ext. 10/1 as an FIR. Undisputedly PW 96 had reached Village Laxmipur Bind Toli in the night of 11-11-1985 to investigate into the two cases registered over the incident that took place in the morning. He deposed that after reaching the village at 10.30 p.m. he got information about the second incident also and in connection therewith he had talked to several persons. He, however, stated that he did not record the statements of the persons to whom he talked to. In cross-examination it was elicited from him that on the very night he learnt that houses of some people had been looted and set on fire, some people had been murdered and that some villagers were untraceable. While being further cross-examined he volunteered that he had started the investigation of the case registered over the second incident in the same night. In the face of such admissions of PW 96 and the various steps of investigation he took in connection with the second incident there cannot be any escape from the conclusion that the report lodged by PC PW 1 on the following morning could only be treated as a statement recorded in accordance with Section 161(3) of the Code and not as an FIR. The

next question, therefore is whether the evidence of PC PW 1 is inadmissible as contended by Mr Jethmalani.

39. In the case of Zahiruddin the police had got the statement of the principal witness which was, admittedly, recorded during investigation signed by him. Besides, during trial, while being examined-in-chief he refreshed his memory from that statement. The trial ended in an acquittal with a finding that when a police officer obtains a signed statement from a witness in contravention of Section 162 of the Criminal Procedure Code his evidence must be rejected. In appeal the High Court set aside the order of acquittal holding that breaches of the provisions of Section 162 Criminal Procedure Code were not in themselves necessarily fatal to the proceedings and might in appropriate circumstances be cured as the expression was under the terms of Section 537 of the Criminal Procedure Code, 1898 (Section 465 of the Code). In setting aside the order of the High Court the Privy Council observed as under:

"... the effect of a contravention of the section depends on the prohibition which has been contravened. If the contravention consists in the signing of a statement made to the police and reduced into writing, the evidence of the witness who signed it does not become inadmissible. There are no words either in the section or elsewhere in the statute which express or imply such a consequence. Still less can it be said that the statute has the effect of vitiating the whole proceedings when evidence is given by a witness who has signed such a statement. But the value of his evidence may be seriously impaired as a consequence of the contravention of this statutory safeguard against improper practices. *The use by a witness while he is giving evidence of a statement made by him to the police raises different considerations. The categorical prohibition of such use would be merely*

disregarded if reliance were to be placed on the evidence of a witness who had made material use of the statement when he was giving evidence at the trial. When, therefore, the Magistrate or presiding Judge discovers that a witness has made material use of such a statement it is his duty under the section to disregard the evidence of that witness as inadmissible. In the present case there is in the note at the end of Mr Roy's examination-in-chief and, in the judgment of the Magistrate what amounts to a finding of fact that Mr Roy while giving his evidence made substantial and material use of the signed statement given by him to the police, and the Magistrate was accordingly bound to disregard his evidence. The Magistrate's reason for doing so is too broadly stated, for it is not the mere fact that Mr Roy had signed the statement but the fact that he had it before him and consulted it in the witness box that renders his evidence incompetent." (emphasis supplied)

40. In our considered view the above-quoted passage is of no assistance to the appellants herein for in the instant case after PC PW 1 testified about the incident, prosecution got the statement of PC PW 1 exhibited Ext. 10/1 as according to it Ext. 10/1 was the FIR. Such a course was legally permissible to the prosecution to corroborate the witness in view of Section 157 of the Evidence Act. Of course in a given case – as in the present one – the court may on the basis of subsequent materials hold that the statement so recorded could not be treated as the FIR and exclude the same from its consideration as a piece of corroborative evidence in view of Section 162 of the Code but then on that score alone the evidence of a witness cannot be held to be inadmissible. The case of *Zahiruddin* turned on its own facts, particularly the fact that during his examination-in-chief the witness was allowed to refresh his memory from the statement recorded under Section 161 Criminal Procedure Code, unlike the present one where the

statement was admitted in evidence after PC PW 1 had testified about the facts from his own memory."

41. The information about the commission of a cognizable offence given *"in person at the Police Station'' and the information about a cognizable offence given ''on telephone"* have forever been treated by this Court on different pedestals. The rationale for the said differential treatment to the two situations is, that the information given by any individual on telephone to the police is not for the purpose of lodging a First Information Report, but rather to request the police to reach the place of occurrence; whereas the information about the commission of an offence given in person by a witness or anybody else to the police is for the purpose of lodging a First Information Report. Identifying the said objective difference between the two situations, this Court has categorically held in a plethora of judgments that a cryptic telephonic message of a cognizable offence cannot be treated as a First Information Report under the Code. It has also been held in a number of judgments by this Court that merely because the information given on phone was prior in time would not mean that the same would be treated as the First Information Report, as understood under the Code. This view has been reiterated in *Ramesh Baburao Devaskar and Others vs. State of Maharashtra* (2007) 13 SCC 501, that a cryptic message given on telephone by somebody who does not disclose his identity may not satisfy the requirement of Section 154 of the Code of Criminal Procedure.

42. In view of the above discussion, the three telephonic messages received by the police around 2.25 a.m. on 30.04.1999 did not constitute the FIR under Section 154 of the Code and the statement of Shyan Munshi PW-2 was rightly registered as the FIR.

42A. Seizure of Tata Safari & broken glass pieces and live cartridge:

(i) The testimony of PW-30 has proved the presence of Tata Safari CH-01-W-6535 at the spot after the incident which testimony is duly corroborated by PW-83, PW-78, PW-100 and PW-101 and by documents Ex PW 101/DK-1, which shows about the PCR message about this vehicle at 6.00 a.m. on 30.04.1999. In his evidence, PW-30 has informed that he left PS Mehrauli along with Inspector Surender Sharma at 2.30/2.45 a.m on 30.04.1999 and reached 'Qutub Colonnade' within 2-4 minutes. He further informed that SHO S.K. Sharma directed him to keep vigil at the parking so that nobody is allowed to take away cars parked there. The following information is relevant:

"When I was giving duty there, I saw a vehicle, came at about 3:40 or 3:45 a.m. It came from the side of Qutub. The vehicle came slowly. The vehicle was Tata Sierra of white colour. There were two persons in that vehicle, on the front seats. They went ahead and took 'U' turn and stopped the vehicle near the vehicle, near which I was standing. I was standing by the side of Tata Safari vehicle, of black colour. One boy came down from that vehicle. He opened the vehicle Tata Safari, with a key. I told him not to do so, but he forcibly entered the said Tata Safari. He started the vehicle even though I asked him, not to do so. I gave a lathi blow on the last window-pain on the side of the driver. The number of the black TATA Safari, bore Registration no. CH-01-W-6535. When I gave danda-blow, the glass of window-pain broke. Both the persons, took-away the vehicles. I had seen the driver and companion on the Tata Sierra. The TATA Sierra vehicle was being driven by Sikh Gentleman. I can identify the driver of the said Tata Sierra and his companion.

At this stage, the witness has been sent out to examine the vehicle, parked, outside the court room, along

with Junior of Shri G.K. Bharti, Advocate and Shri Ghai, Advocate.

It is the same Tata Safari vehicle, which was hit by me on that night. It is exhibited as article Ex.PW 30/X.''

It is clear from his evidence that while Tata Safari CH-01-W-6535 was being taken away forcibly from the scene of occurrence at about 3.45 a.m. by accused Vikas Yadav and both Vikas Yadav and Amardeep Singh Gill came in a Tata Sierra, PW-30 gave a danda blow on the right rear side of the window of the car.

(ii) The prosecution case further shows that the first police officer to reach the place of occurrence at 02.17 a.m. on 30.04.1999 was HC Devi Singh PW-83. He has stated that there was one black Tata Safari parked on the left side towards Mehrauli besides other cars on the right side of the gate. He has further stated that PW-30 was deputed by SHO near the parked vehicles at Qutub Colonnade. He further stated that SI Sarath Kumar PW-78 and SI Sunil Kumar PW-101 had also visited the spot.

(iii) SI Sharad Kumar PW-78 has stated that on receipt of DD No 41 A Ex PW 13/A in respect of firing incident in Qutub Colonnade, he along with Ct. Meenu Mathew reached Qutub Colonnade. SI Sunil Kumar and Ct Subhash Chand also reached Qutub Colonnade almost the same time when he reached. At Qutub Colonnade on the left side near the gate a black Tata Safari car was parked besides other cars. SHO Insp. Surender Kumar Sharma also reached there. While leaving for Ashlok Hospital, the SHO asked Delhi Home Guard Shrawan Kumar to remain at the gate of the 'Qutub Colonnade'. PW-100 SI Sunil Kumar has stated that when he reached Qutub Colonnade he found a black Tata

Safari car parked on the left side besides as he entered the colony and other vehicles were parked on the right. The PW-30 also identified the black Tata Safari CH-01-W-6535 to be the same which he had seen parked at the scene of crime and the same in exhibit article PW 30/X. SHO S.K. Sharma had also reached the spot along with staff including DHG Shrawan Kumar. SHO detailed DHG Shrawan Kumar to watch the vehicle already parked there and asked him (SI Sunil Kumar) to proceed immediately to Ashlok Hospital.

(iv) Surender Kumar Sharma PW-101, SHO PS Mehrauli has stated that on receipt of information he, ASI Kailash, Ct Ram Niwas, Ct Ramphal, Ct Yatender Singh left for the spot in the official gypsy. PW-30 met them at the gate of police station and he also picked him (Sharvan Kumar) up in the Gypsy and reached Qutub Colonnade. He found one black colour Tata Safari on the left side of Qutub Colonnade gate and 4 or 5 vehicles including one PCR Van on the right side. PW-30 was left at the gate to ensure that no vehicles leave the spot.

It is clear from the above testimony that black Tata Safari was found parked near the gate of 'Qutub Colonnade' when they reached at the spot on receipt of intimation regarding firing incident and Shravan Kumar PW-30 was detailed by SHO PW-101 to ensure that no vehicle leaves the spot. It is the argument of the learned senior counsel for the appellant Manu Sharma that PW-30 was not present at the spot of the incident placing its reliance on DD No.40A and 43A dated 30.04.1999. A perusal of FIR 286 of 1999 dated 30.04.1999 under Section 308/34 IPC PS Mehrauli Ex-CW-2/B shows that the said 'rukka' was sent by SI Rishi Pal through Balwan Singh from AIIMS and not from Dera Gaon. The said FIR also indicates that SI Rishi Pal by 2.30 a.m. had already recorded the statement of the

victim at AIIMS and had not sent the same with Balwan Singh with 'rukka' to PS, Mehrauli. In those circumstances, the version of PW-30 and PW-101 that PW-30 met him at the gate of the PS when PW-101 was going out with other staff is reliable and acceptable. Further, the presence of PW-30 at the spot is corroborated by Sharad Kumar Bisnoi, PW-78, HC Devi Singh, PW-83, SI Sunil Kumar, PW-100 and Surender Sharma, PW-101. It was also highlighted that after this incident PW-30 has been recruited to the post of Constable though he was not eligible as he was under metric and overage. Learned Solicitor General appearing for the State pointed out that instances are not unknown wherein persons other than permanent police officers when help the investigating agency in solving crimes have been recruited in Delhi Police and strongly submitted that the evidence of Shravan Kumar cannot be discredited on this point. The said submission cannot be ignored.

43. PW-30 has categorically stated that while he was on duty he saw a vehicle Tata Sierra White Colour coming slowly from the side of Qutub at about 03.40 am or 03.45 am. There were two persons in the said vehicle on the front seat. They stopped the vehicle near Tata Safari of black colour. One boy came down from the said vehicle and opened Tata Safari with a key. PW-30 told him not to do so but the said boy forcibly entered the Tata Safari and took it away. He gave a lathi blow on the glass of window pane and it broke due to danda blow. He noted down the number of the black Tata Safari as CH-01-W-6535. The witness also identified Tata Safari which was hit by him on that night, which is exhibit PW 30/X. PW 30 also identified that Tata Sierra was driven by Amardeep Singh Gill whereas Vikas Yadav drove away black Tata Safari.

44. Insp. Surender Kumar Sharma PW-101 also stated that when he came back, he found SI Sunil & SI Sharad as well as Shravan, they told him that two boys had come and had forcibly taken away the Tata Safari. Out of the two boys one was Sikh, PW-30 also informed that he had broken the right backside

window panel of Safari with his Danda. He also gave the number of the Tata Safari as CH-01-W-6535. SI Sunil Kumar PW-100 has also stated that two persons had got into the Tata Safari and had driven away. The testimony of the above witnesses is duly corroborated by document Ex PW 101/DK-1. Thus it is clearly established by cogent evidence that on 30.04.1999 at about 03.40 or 03.45 am accused Amardeep Singh Gill and Vikas Yadav came in a white colour Tata Sierra Car and accused Vikas Yadav got down and drove away black Tata Safari No. CH-01-6535.

Tata Safari at Noida:

45. It was argued that even according to PW-100, the Tata Safari was found available in Karnal, hence seizure of the very same vehicle (Tata Safari) at Noida is not acceptable. It is true that PW-100 has stated that he discussed the case with Inspector Surender Sharma and who informed him that Vehicle No. CH-01-W-6535 which was lifted from the spot in the morning is found to have been registered in the name of Piccadilly Agro Industries and it was also found in Karnal and he further informed that Sidharth Vashisht alias Manu Sharma is the Director of the said Industries who is residing in H.No.229, Sector 9C, Chandigarh. A perusal of his entire evidence shows that he had stated that the vehicle was found registered in the name of Piccadilly Agro Industries, Bhadson, which was also found in Karnal and SI Pankaj Malik along with his staff has been detailed for the investigation of the aforesaid aspect of the case. As rightly pointed out by the counsel for the State, the testimony of PW-100 show that he was referring to the Piccadilly Agro Industries having been found at Bhadson Karnal and not the vehicle/Tata Safari. It was also pointed out when Manu Sharma was questioned under Section 313 Cr.P.C. particularly question No. 119 the doubt about the vehicle has been erased. Question No. 119 put to Manu Sharma and his answer is as follows:-

"Q.119 It is further in evidence of PW 100 that when he came back to Qutub Colonnade nearly at about 03:15 PM on 30.04.99 where he met Surinder Sharma (PW 101) and discussed the case with SHO Surinder Sharma who informed him that vehicle No. CH-01-W-6535 which was lifted from the spot in the morning is found to have been registered in the name of Piccadilly Agro Industries, Bhadson and it was also found in Karnal and he further informed him that you Sidharth Vashist @ Manu Sharma is a Director of the said industry who is residing in House No. 229, Sector 9C, Chandigarh. What you have to say in this regard?

Ans. It is correct that Vehicle No. CH-01-W-6535 is registered in the name of Piccadilly Agro Industries Ltd., Piccadilly Cinema, Sector 34, Chandigarh.''

46. Apart from this, PW-101 also stated that his senior officers found out the name of the owner and informed him that it was registered in the name of Piccadilly Agro Industries Ltd., Sector-34, Chandigarh. He further explained that his officers informed him that this vehicle was used by Manu Sharma's office which was at Bhadson, District Karnal. It is further seen from his evidence that he sent SI Pankaj to Chandigarh and Inspector Raman Lamba to Bhadson. In this regard the evidence of PW-87 Raman Lamba is relevant. He deposed before the Court that he was instructed that the inmates of Black Tata Safari No. CH-01-W-6535 was involved in the case and he was asked to search the same. As directed, he left Delhi on 30.04.1999 and reached Bhadson at the premises of Piccadilly Agro Industries. According to him, he met Major Sood and the sugar mill was closed at that time. He also learnt that the sugar mill was not functioning because of off season since 25.04.1999. From Bhadson, he went to Kurukshetra and he tried to locate Black Tata Safari in the aforesaid sugar factory at Bhadson but did not find it. Even at Chandigarh, Tata Safari was not available in his house at Sector 229, Sector 9C,

Chandigarh. SI Pankaj Malik PW-85 also deposed before the court that on 30.04.1999 he was deputed by Inspector Surender Kumar to trace out black colour Tata Safari car bearing Registration No. CH-01-W-6535. As rightly pointed out that the vehicle being recovered at Karnal on 30.04.1999, the question of sending SI Pankaj Malik does not arise. From the statements of Sunil Kumar PW-100, Inspector Surender Kumar Sharma PW-101, Inspector Raman Lamba PW-87, ASI Nirbhaya Singh PW-80 and SI Pankaj Malik PW-85, it is clear that Tata Safari vehicle was being searched by Inspector Raman Lamba PW-87 and SI Pankaj Malik PW-85 and other police officers at various places in Delhi, Haryana and Chandigarh. As the said vehicle was found on 02.05.1999 at Noida and the same was taken into possession through a seizure memo prepared by Noida Police. The same was taken into possession by Delhi Police on 03.05.1999 after taking appropriate orders from the Magistrate Ghaziabad.

Recovery of Tata Safari with live bullet and broken glass pieces at Noida:

47. PW-91 SI BD Dubey, in his evidence has stated that information was received that the vehicle involved in Jessical Lal murder case was parked at NTPC Township. They reached NTPC Township at about 06.30 p.m. on 02.05.99 and found a Safari Vehicle parked there bearing No. CH-01-W-6535. He identified the vehicle Ex. article PW 30/X in the court. Recovery memo prepared is Ex PW 74/A which is in his handwriting and bears his signatures at point C and that of Sudesh Gupta SO at point B. PW-74 stated that vehicle Tata Safari was recovered vide Ex. PW 74/A on 02.05.99. He also identified signatures of SI BD Dubey & SI Sudesh Gupta on the same. Ex PW 74/A Seizure Memo of Tata Safari and live cartridge with 'C' mark etc. clearly establish the recovery of the same at Noida, beyond any shadow of doubt vide Ex PW 74/C Seizure of Live cartridge by Insp. Surender Kr. Sharma dated 26.06.1999.

48. PW-101 in his evidence has stated that:

> "On 03.05.1999 in the morning with SI Vijay Kumar and other staff I went to Sector 24 NOIDA and found the Tata Safari No CH-01-W-6535 Black Tata Safari lying in case FIR No. 115/99 U/s 25 Arms Act. SI BD Dubey handed over a pullanda of glass pieces which were found inside the vehicle by the NOIDA police. I seized the vehicle pullanda and the documents two tape recorder, one prescription of Nagpal Nursing Home and one letter written to Vijay Sharma. Every thing was seized vide seizure memo Ex PW 100/DB which bears my signature at point A and of SI BD Dubey at point B. The pullanda of broken glasses were sealed with the seal of BD when it was presented to me."

49. SI BD Dubey PW-91 and Ct. Satish Kumar PW-74 of PS Sec.24, Noida have deposed that they found black Tata Safari No. CH-01-W-6535 abandoned at the NTPC Township pursuant to which FIR No. 115/99 u/s 25 Arms Act was registered vide Ex. PW 74/B. The said Tata Safari was seized under seizure memo Ex PW 74/A. PW 101 has clearly deposed that about 10 pm on 02.05.1999 he got the information with regard to the Tata Safari having been found at Noida. On 03.05.1999, he moved an application before the ACJM, Noida for the superdari of the Tata Safari vide Ex. PW 101/1 and in pursuance of the orders of ACJM Ex. PW 101/2 and he seized the same vide seizure memo dated 03.05.1999 vide Ex. PW 100/DB along with other articles including broken glass pieces which were duly sealed with the seal of BD. The seizure memo Ex. PW 100/DB is duly signed by SI BD Dubey. The said Tata Safari and the broken glass pieces duly sealed with the seal of BD have been deposited in the Malkhana of PS Mehrauli on 03.05.1999. PW-101 has also stated that SI Vijay Kumar accompanied him to Noida and that seizure memo Ex. PW 101/DB was in the handwriting of SI Vijay Kumar of PS Mehrauli. Ex PW 18/DA at item no. 7 & 9 in the letter sent to CFSL mentioned about the seal of BD on the sealed parcel containing broken glass pieces. The report of CFSL vide Ex PW 90/A

proved that on comparison of S1 and S2 the two window panes of the left and the right rear side of the said Tata Safari are different. Thus this convincing testimony of PW 101 duly corroborated by documents cannot be discarded simply because SI Sudesh Gupta (Noida Police) failed to mention the seizure of broken glass pieces on 02.05.1999.

Tata Safari being used by Manu Sharma on the day of occurrence:

50. From the evidence on record it has been proved by the prosecution that appellant/accused Sidhartha Vashisht @ Manu Sharma along with co-accused Amardeep Singh Gill, Alok Khanna and Vikas Yadav were present in the said party at Tamarind Cafe on the night of occurrence. The presence of Tata Safari CH-01-W-6535 at the place of occurrence and its being forcibly taken at around 3.45 am after the incident has also been proved beyond reasonable doubt. Manbir Singh PW-18 has proved that the said Tata Safari CH-01-W-6535 is registered in the name of Piccadilly Agro Industries Ltd., Chandigarh. It has also been proved from the testimony of PW-25, PW-26, PW-48 and the annual report of Piccadilly that accused Siddhartha Vashisht @ Manu Sharma was the director in Piccadilly Agro Industries which finding has also been arrived at by the Trial Court in favour of the prosecution. Thus a reasonable inference has to be drawn from the above mentioned evidence that accused Manu Sharma used the said Tata Safari for coming to Qutub Colonnade on the fateful night of 29/30.04.1999.

Non-Recovery of the weapon of offence and the evaluation of Bullets & Cartridges:

51. Sh. Surender Singh PW-14 has proved that pistol No. B-56943 U make P. Berretta made in Italy of .22'' bore was sold to accused Sidhartha Vashisht @ Manu Sharma on 31.01.1999. The relevant exhibits in this regard are Ex. PW 14/A in the stock register for purchase of P. Berrette Pistol from

Smt. Azra Javed, Ex. PW 14/C at Sr. No. 3350 of sale of Pistol to Sidharth Vashisht, Ex. PW 14/D photocopy of cash memo, seizure memo Ex PW 14/F dated 19.05.1999 by SI Vijay Kumar PW-76. The endorsement on the license of Manu Sharma regarding sale of Pistol is Ex. PW 14/B.

52. It is relevant to point out that the accused Sidharth Vashisht @ Manu Sharma, when he surrendered on 06.05.1999, also surrendered his arms license Ex PW 7/B which has been seized vide seizure memo vide Ex. PW 80/B by Inspector Raman Lamba PW 87. The testimony of PW-87 is further corroborated by PW-80. The said arms license duly bears endorsement about the sale of .22'' bore pistol No. B-56943 U, make P. Berretta, made in Italy. The case of accused Sidhartha Vashisht @ Manu Sharma as per his statement u/s 313 Cr.P.C. is that on the night of 30.04.1999 and 01.05.1999 when a raid was conducted at his farm house at Samalkha, his pistol ammunitions and arms license were taken away. As rightly pointed out by the counsel for the State that the defence of the accused is totally incorrect in view of the positive evidence adduced on record. This defence of the accused Sidharth Vashisht @ Manu Sharma is a clear afterthought as no complaint was lodged by the accused in this regard nor the same was mentioned when he was twice produced for police remand before the MM for recovery of the pistol employed in the incident.

53. It is the claim of the learned senior counsel for the appellant/Manu Sharma that the seizure memo dated 06.05.1999 with reference to the arms license is fabricated as the license has been taken from the farmhouse of the accused on 30.04.1999/01.05.1999. Learned Solicitor General appearing on the side of the State demonstrated that the above contention is false one. Since, on 06.05.1999, when the accused Manu Sharma surrendered, he was accompanied by the lawyer in whose presence his arrest memo was prepared and the lawyer also signed the same. However, as rightly

pointed out with reference to the arms license which was also produced by them, the same does not bear the signature of the said lawyer. The learned counsel for the State further pointed out that the said lawyer declined to sign the seizure memo that was the reason that it does not bear the signature of the said lawyer. It is to be remembered that admittedly the appellant/ accused nowhere came out with an explanation. His arms license was taken away by the Police in 30.04/01.05.1999 with any seizure memo, why he has not lodged any report about the same. It is also relevant to point out when the accused after surrendering before the police of Chandigarh on 06.05.1999 was produced before the Magistrate in Delhi. The police sought remand on two occasions specifically for recovery of the weapon of the offence. It was pointed out by the prosecution that Manu Sharma was duly represented by lawyers who did not point out on both occasions that the pistol had already been taken by the Police. The State also denied the said claim of the accused as false and concocted.

54. Even, Shanker Mukhiya PW-44, who is the caretaker of farm house of Manu Sharma at Samalkha who was produced by the prosecution for the purpose of accused's visit to farm house also did not mention in his examination in chief or in cross by the Spl. PP about the pistol. It is only to a leading question put up by the counsel for accused that those articles included pistol and arms licence of Manu Sharma, witness stated ''it is correct''. The defence of the accused was for ammunition as well as for which no suggestion has been ever put. C.N. Kumar PW-43, Dy. SP NCRB has deposed that he had not received any complaint of theft or loss of this P. Berretta pistol. The pistol could not be recovered despite extensive efforts made to trace the pistol pursuant to the disclosures of the accused and the arms license was however surrendered on 06.05.1999 vide seizure memo Ex. PW 80/B. It is thus the case of the counsel for Manu Sharma that he was in possession and custody of his P. Beretta pistol on 29/30.04.1999 as even according to him it has been taken away on 30.04.1999/

01.05.1999. This was a licensed pistol and thereby the onus was on the accused to show where it was and that the possession and whereabouts of the pistol are in the special knowledge of accused Sidharth Vashisht @ Manu Sharma and having failed to produce the same an adverse inference has to be drawn against him in terms of Section 106 of Evidence Act. In this regard reliance may be placed on *Sucha Singh vs. State of Punjab* (2001) 4 SCC 375 at page 381:

> "It is pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference"

In addition, the prosecution by way of acceptable evidence has proved beyond reasonable doubt that:

(a) Manu Sharma accused was the owner and possessed .22'' P. Berretta Pistol made in Italy.

(b) Two empty cartridges cases of the .22'' with 'C' mark recovered from the spot.

(c) The mutilated lead recovered from the skull of deceased was of .22'' and could have been fired from a standard .22'' caliber firearm.

(d) From the Tata Safari live cartridge of .22'' with mark 'C' was recovered on 02.05.1999.

(e) The two .22'' cartridge cases from the spot and the .22'' cartridge recovered from Tata Safari have similar head stamp of 'C' indicates that they are of

the same make.

(f) The two .22'' cartridge cases recovered from the spot are to be rim fired, rimmed steel cartridge cases.

(g) The two .22'' cartridge cases of 'C' mark were lying near each other on the counter and so could not have been fired by 2 different persons.

The testimony of Naveen Chopra PW-7 that he sold 25 cartridges of .22'' bore on 04.02.1999 is also of no relevance to the defence of the accused when PW-7 says in the witness box that he had sold 25 cartridges of .22 bore with Mark 'KF' and not with 'C'. The appellant/accused has relied on the testimony of PW-7 to show that the cartridges sold to appellant/accused had 'KF' marking is wholly unwarranted.

55. The prosecution has established that the appellant/accused was the holder of a .22'' bore Pistol; he was witnessed by Beena Ramani as the perpetrator of the crime; a mutilated .22'' lead was recovered from the skull of the deceased; two empties of .22'' make with mark 'C' were found at the spot; a .22'' live cartridge with mark 'C' was found in the Tata Safari of the appellant/accused which was found abandoned at Noida and for which no theft report was lodged; that his prior and subsequent conduct of having got the Tata Safari removed from the spot, of absconding; refusal to TIP without having any basis; that he even denied his presence at the spot, clearly prove beyond reasonable doubt leaving no manner of doubt that he is guilty of the offence of murdering Jessica Lal by using firearm and destroying evidence thereafter.

56. It is pointed out by the State that when the accused Manu Sharma was arrested on 06.05.1999, the police filed an application dated 07.05.1999 for police remand of the accused for recovery of pistol. The defence filed a reply to the said application on the same day i.e., 07.05.1999 and thereupon the

Metropolitan Magistrate passed an order on the same day granting seven days police custody of the accused for recovery of pistol. The accused despite forever maintaining that the police had illegally taken away the pistol from his farmhouse on 30.04.1999/01.05.1999, did not take this ground in the reply to remand application and argument to the said effect was recorded in the remand order by the Magistrate. The only inevitable conclusion that could be reached from the said turn of events is that the pistol was still in custody of the accused and had never been recovered by the police from his farmhouse. In the reply dated 07.05.1999 filed by the accused to the remand application, there are interpolations in the reply in black ink in two handwritings to the effect that the pistol had already been recovered from the person of the accused. The assertion that the words in two handwritings in black ink are interpolations gain strength from the fact that nowhere in the remand order dated 07.05.1999 has it come that the accused has taken the plea that the pistol had already been recovered. It is pointed out by the learned Solicitor General that the Courts below ought to have drawn an adverse inference from the said facts but have failed to do so. Thus this evidence coupled with the testimony of Shyan Munshi, PW-2, that the person in white T-shirt who was asking for whisky took out a pistol from dub of his pant and fired a shot in the air and the other witnesses PWs 1,6, 20 and 24 that the person in white T-shirt was Manu Sharma, a positive inference beyond reasonable doubt has to be drawn that Manu Sharma fired from his .22'' bore pistol which resulted in the death of Jessica Lal on the fateful night of 29/30.04.1999.

57. Mr. Ram Jethmalani, learned senior counsel, appearing for the accused pointed out that no question has been put to the accused in his examination under Section 313 Cr.P.C. with reference to the pistol and shooting by him for this. The State has placed reliance on the following questions which were specifically put to the accused Manu Sharma being Question Nos. 64, 65, 66, 67 & 72 which are as under:

"Q.64 It is further in evidence of PW-20 that she had identified you Manu Sharma as the person whom she has tried to stop and talked to. She added further that the person who was confronted by her on the stairs was some what like you Manu Sharma and also identified you on 08.05.1999 at PS Mehrauli. What you have to say in this regard?

Ans. It is false and incorrect.

Q.65. It is further in evidence of PW-20 that the companion of Shyan Munshi (you Manu Sharma) was wearing T-shirt and she asked you Manu Sharma as to why you were here and why you shot Jessica and she also asked you to give her your gun as she thought you were having the gun. What you have to say in this regard?

Ans. It is false and incorrect.

Q.66 It is further in evidence of PW 20 that she asked you Manu Sharma again but you kept quiet and shaking your hands that it was not him and thereafter you pushed her aside and went out and she ran after you but should could not catch you. What you have to say in this regard?

Ans. It is false and incorrect.

Q.67 It is further in evidence of PW-20 that while running behind you (Manu Sharma), she reached the gate where her husband was there, to whom she told that you (Manu Sharma) shot Jessica and asked her husband to see in which car you (Manu Sharma) gets in. What you have to say in this regard?

Ans. It is absolutely false and incorrect.''

A perusal of above questions and answers given by Manu Sharma were either evasive or incorrect and as rightly pointed out by the learned Solicitor General, an adverse inference

deserves to be drawn for such acts of the appellant-Manu Sharma.

The implication of delay in recording statements

58. Mr. Ram Jethmalani, learned senior counsel for the appellant-Manu Sharma by placing various decision contended that the delay in recording statements of witnesses is fatal to the case of the prosecution, when the trial Court rightly accepted the same, however, the High Court committed an error in ignoring the said vital aspect. For this, learned Solicitor General submitted that the said contention is based on incorrect understanding of law and its wrong application to the facts of this case. The first judgment relied on by the learned senior counsel for the appellant-Manu Sharma is in *Ganesh Bhavan Patel vs. State of Maharashtra,* (1978) 4 SCC 371. In that case, the witnesses were known and could have been examined when the Investigating Officer visited the scene of occurrence or soon thereafter. In the present case, there were about 100 or more persons present at the party. The identity of all such persons took substantial amount of time to determine. Consequent to the large number of witnesses, their interrogation also consequently took a substantial amount of time. Unlike the said decision, in the present case, there are no concomitant circumstances to suggest that the investigator was deliberately making time with a view to give a particular shape to the case. The details of investigation conducted on each day are very clearly brought out in the evidence of the various witnesses. Furthermore, the identity of the appellant as a suspect in the present case was not the consequence of any delay. Thus, the delay, if any, in recording the evidence of witnesses in the present case cannot be considered as an infirmity in the prosecution case.

59. The judgment in *Maruti Rama Naik vs. State of Mahrashtra,* (2003) 10 SCC 670, relied on is also distinguishable. The delay in recording the statement in that case was coupled with the unnatural conduct of the witness and

that was what made the evidence of the said witness unreliable, which is not so in the present case.

60. The other judgment in *Jagjit Singh vs. State of Punjab* (2005) 3 SCC 689 is also distinguishable. In that case, the delay in recording the evidence of PW-6 was coupled with several other factors which made her testimony unreliable, including the finding that she implicated the appellant only at the prompting of her father and that otherwise she had not named the appellant as an accused. Furthermore, there was no explanation regarding the delay in that case. The facts of that case are, therefore, clearly different from the present case.

61. The defence seeks to discredit the statement of PW-1 Deepak Bhojwani on two counts, firstly that statement is recorded after 14 days and secondly, there are various improvements, in his statement. It is next contended by the defence to believe this man is to disbelieve Beena Ramani. According to him, the prosecution did not know even on 14.05.1999 the details of their story and thus resulting in various improvements in the testimony of this witness, in the witness box. This contention of the defence looses sight of the fact that much prior to 14.05.1999 Manu Sharma had surrendered on 06.05.1999 and had made his disclosures and thus there could be no question of not knowing the facts on 14.05.1999. Had the witnesses been planted, the witnesses would have rendered a parrot like testimony. PW-1 has explicitly stated that on 30.04.1999 he had told the police at the Apollo Hospital all that he knew. This being the case, it cannot be said that the testimony of the witness should be thrown out for the delay in recording the statement by the Police. Clearly, PW-1 was not an eye witness, this fact must have been realized by PW-100 and 101, therefore, they felt no urgency in addressing this aspect of the investigation i.e., recording of the statement of PW-1. It is stated by the State that as there were number of witnesses to be examined the said examination continued for days. Witnesses Parikshit Sagar and Andleep Sehgal were

also examined on 14.05.1999. Further the presence of Deepak Bhojwani can also not be belied in view of the testimony of Sahana Mukherjee PW-29 and Sabrina Lal PW-73. In any case, any defect by delay in examination of witnesses in the manner of investigation cannot be a ground to condemn the witness. Further Section 162 Cr.P.C. is very clear that it is not mandatory for the police to record every statement. In other words, law contemplates a situation where there might be witnesses who depose in Court but whose previous statements have not been recorded.

62. It is next contended by the learned senior counsel for the appellant-Manu Sharma that there was a delay in recording the statement of Deepak Bhojwani and his name having not been found from the list of guests prepared by George Mailhot, Ex. 24/A. It was further pointed out that the list was not a conclusive list and was prepared by George Mailhot on the basis of remembrance and other witnesses have also admitted the presence of Deepak Bhojwani. This is more so relevant as the invited guests were also entitled to bring guests with them. The statements of witnesses were recorded not only by the I.O. himself but by other officials as well who were helping him in investigation. The delay in recording the statement of Deepak Bhojwani occurred due to natural flow of statements of various witnesses. The statement of Deepak Bhojwani PW-1, was recorded by ACP Durga Prasad PW-92, who stated the name of Deepak Bhojwani occurred during the course of interrogation of other guests/witnesses. The evidence of PW-1 is relevant for a limited purpose i.e., proving the presence/identity of Manu Sharma and his desire for liquor in the party which part of evidence has also been given by other witnesses in so many words, prior to Deepak Bhojwani as well. The said witness in his evidence has categorically stated as under:

> "Few of the police officials came to Apollo Hospital along with the Ambulance and few of them returned to Qutub Colonnade. I did not make any statement to the police in

Apollo Hospital. Since I had not seen the incident being taking place and at Ashlok and Apollo Hospital discussion was going on as to who had done this and it was also being discussed that the culprit was wearing Blue Denim Jean and White Shirt and was fair and was little short in height then I assessed that he was the same person who came to me to arrange drinks for him. I had told the police in Apollo Hospital that it was Manu Sharma who was with the similar description as was discussed amongst friends on which police had told me that they would call me."

63. In *Mohd. Khalid Vs. State of W.B.,* (2002) 7 SCC 334, this Court held that mere delay in examination of the witnesses for a few days cannot, in all cases, be termed to be fatal so far as the prosecution is concerned. There may be several reasons. When the delay is explained, whatever be the length of the delay, the Court can act on the testimony of the witness if it is found to be cogent and credible. In *Prithvi vs. Mam Raj,* (2004) 13 SCC 279, it was held that delay in recording the statement of the witness can occur due to various reasons and can have several explanations and that it is for the Court to assess the explanation and, if satisfied, accept the statement of the witness. The same principle has been reiterated in *Ganeshlal vs. State of Mahrashtra* (1992) 3 SCC 106.

Evaluation of Laboratory reports and examination of experts.

64. The evidence in respect of two FSL reports is as under:

By letter dated 06.07.1999, the seized material was forwarded to CFSL for examination and expert opinion and, inter alia, the following queries were made to be opined by the CFSL :

"5. Please examined and opine whether the two empties present in parcel mentioned at Sl No.5 have been fired from the same weapon?

6. Please examine and opine whether the bullet lead in parcel No.6 and the bullet empties in parcel No.5 have been fired from a standard five arm or a countrymade fire arm?

7. Please examine and opine whether ejector, trigger, chamber, magazine or other chamber marks are present on the live bullet empties contained in parcel Nos. 6 & 5 respectively?

8. If answer to querry No. 7 is yes then whether these marks are similar and caused by the same fire arm?''

The Ballistics Division of CFSL gave report in respect of the queries as under:

"(1) The .22'' badly mutilated lead bullet (marked BC/1) of No.3 could have been fired from a standard .22'' caliber firearm.

(2) The two .22'' cartridge cases marked C/1 and C/2 have been fired from two different .22'' caliber standard firearms.

(3) The .22'' cartridge (marked C/3) of parcel No.5 is a live cartridge and no characteristic tool marks (i.e. firing pin, ejector, extractor, breechface, magazine or chamber marks etc.) could be observed on this cartridge.

(4) The two .22'' cartridge cases (marked C/1 & C/2) of parcel No.4 and the .22'' cartridge (marked C/3) of parcel No.5 have similar Head Stamp of 'C' indicating that they are of the same make. No opinion on their series (lot/batch) could however be given.''

According to the State the same also contained inconclusive opinion. It was pointed out that the State has neither relied on the report of the expert Sh. Rup Singh nor had filed it in the trial Court. An application was moved by the accused for the supply of the document and vide order dated 14.01.2000, the Metropolitan Magistrate directed that the State will have to supply all the deficient copies and also the remaining CFSL reports sent by CFSL to SHO. The opinion of Sh. Rup Singh, Ballistic expert finally exhibited as Ex. PW 89/DB only says that *"it appears that the two cartridge cases are from two different pistols.*" As rightly pointed out such a vague opinion of the expert can neither be relied upon nor can be any basis to come to a conclusion that there were two persons who had fired two different shots.

65. With regard to Prem Sagar Manocha PW-95, Ballistic expert at FSL, Jaipur, a specific query being query No.3 that whether both the empty cartridge cases have been fired from the same firearm or otherwise. In the reply to the said query, the expert opined that no definite opinion could be given on the two .22'' bore cartridge cases C-1 and C-2 in order to link with the firearm unless the suspected firearm is available to examination. It was pointed out that the trial Court puts a question to the witness and while putting the question first gives a specific fact finding that for reply to Query No. 3, the presence of the firearm was not necessary. This incorrect finding of fact given by the trial Court based on no expertise and had resulted in grave miscarriage of justice. It is well settled that while giving reports after Ballistic examination, the bullets, cartridge case and the cartridges recovered and weapon of offence recovered are carefully examined and test firing is done at the FSL by the said weapon of offence and then only a specific opinion is given.

66. It is contended by the learned counsel for the appellant/ Manu Sharma that the prosecution tried their level best to suppress the report of the Ballistic expert Shri Rup Singh which

was not favourable to them and that the same was exhibited at the instance of the defence as Ex. PW 89/DB. It has been further argued that while the charge sheet was filed on 03.08.1999, the police sought an expert opinion practically at the end of the investigation i.e. vide letter dated 16.07.1999, Ex. PW-89/DA. At Sl. No. 67 of the charge sheet one finds mention of the letters sent by the SHO seeking the expert opinion. The charge sheet was filed without the expert opinion. The accused on seeing Sl. No.67, approached the committal Court and asked for the expert report. It has been argued that the I.O. had received the opinion in the first week of December, 1999 but did not file the same. On 21.12.1999, the Court directed the prosecution to file the report. The SPP objected to the same on the ground that the order required modification but the same was rejected and on 14.01.2000, the Court again directed supply of the expert report. It has been argued that since the report did not favour the prosecution, the same was withheld. It has been further argued by the defence that failure on the part of the prosecution to bring on record material which is in favour of the accused is a breach of Article 21 of the Constitution. It has been argued by the defence that it was improper on the part of the prosecution to condemn a ballistic expert, i.e., Rup Singh without calling him in for cross-examination. It has been further argued by the defence that by virtue of Section 293 Cr.P.C., the report is admissible in evidence and that the weapon is not required to show whether the two empties are fired from the same gun and the weapon is only required when one has to determine as to whether a particular weapon was responsible for firing the empties in question. The expert evidence is only good if it appeals to the judicial lines; appreciation of such evidence can only be the work of the Court. Reliance has been placed on *A.E.G. Carapiet vs. A.Y. Derderian,* AIR 1961 Calcutta 359 paras 10-14 to assert that every witness must be cross-examined before being discredited. The prosecution cannot challenge the expert at the stage of appeal when his testimony went unchallenged at the stage of the trial. 67) It has been argued that the Court

must lay down in clear terms the duties of a public prosecutor i.e., to tell the truth even if the same is in favour of the accused. Reliance has been placed on Rule 16 of the Bar Council of India Rules which are to the said effect. Reliance is further placed on Attorney Generals Guidelines contained in Archbold Criminal pleadings edition 2003 to say that it is obligatory on the part of the prosecution to disclose all the material. It has been argued that even after an application under Section 391 Cr.P.C. has been filed, the prosecution still chose not to call the expert Rup Singh and cross-examine him. Ex.PW-89/DB supports PW-2 and vice versa, since his evidence is corroborated by the expert report. Attention of the Court was invited to the results of the examination. As regards the 2nd opinion given by PW-95, it has been argued that this court must assume that the prosecution sought a favourable opinion from the said witness. The said witness obliged them and created confusion by saying that no conclusive opinion can be given without examining the weapon in question.

67. It was pointed out by the State that the said report of Rup Singh is inadmissible in law since it is a photocopy and, therefore, does not fall within the purview of a report in terms of Section 293 of the Code. In other words, in terms of the relevant provisions of the Indian Evidence Act unless the original document is placed for the scrutiny of the Court, no reliance can be placed on the photocopy without leading proper secondary evidence in this regard. In any case, both Section 293 and Section 294 of the Code which dispense with formal proof of documents under certain circumstances make it abundantly clear that the documents sought to be relied upon must be the originals. Assuming for the sake of the argument, though not admitting, that the said report of Rup Singh, i.e. Ex. PW-89/DB is admissible even though a photocopy has been placed on record and even though nowhere it has come in evidence that the same i.e. the photocopy has been compared and scrutinized with the original by the Court and then placed on record, the same still looses all credence in the light of the fact

that a perusal of the forwarding letter and report would show that there seems to have been some tampering with the said documents since the sequence of numbering of the parcels as between the forwarding letter and the report has been changed by somebody which fact remains unexplained as, therefore, casts a further doubt on the genuineness of the said report. The report itself with regard to query No.3 shows that *"it appears that the two cartridge cases C-1 and C-2 have been fired by two different weapons".* This opinion of the expert was vague and on the basis of said opinion no credence can be lent to the fact adverted to by the defence that there were two persons who fired two different shots from two different weapons. Moreover the said report is oddly silent on query No.7 of the forwarding letter wherein it was specifically asked about the various markings on the live cartridge and the bullet empties. The stand of the defence that to opine the two cartridge cases are from the same weapon or not the pistol is not required and the pistol is only required when the opinion is sought whether they are from that particular weapon or not cannot be accepted. It is well settled that when pressure is built inside the cartridge case, which results in the pushing out of the bullet from the barrel, there is difference in the marks to the extent that it may be either clear or unclear and flattened or deepened thus no opinion can be rendered on account of this dissimilarity in the absence of the weapon of offence and test firing. Further once the report of Rup Singh is rendered inadmissible the two gun theory of the defence becomes wholly inadmissible and what remains is that the two empties found at the spot are .22'' bore cartridges, that the live bullet found in the Tata Safari is a .22'' cartridge and that the gun belonging to the appellant is a .22'' bore pistol which was used for the commission of the crime of murder of Jessica Lal.

68. The prosecution obtained another opinion from FSL Rajasthan and the queries made are as under:

"1. Please examine and opine the bore of the two

empty cartridges present in the sealed parcel.

2. Please opine whether these two empty cartridges have been fired from a pistol or a revolver.

3. Whether both the empty cartridges have been fired from the same fire arm or otherwise.''

In response to these queries, the expert opinion of the FSL, Rajasthan is as under:

"1. The caliber of two cartridge cases (C/1 and C/2) is .22.

2. These two cartridge cases (C/1 and C/2) appear to have been fired from a pistol

3. No definite opinion could be given on two .22 cartridge cases (C/1 and C/2) in order to link with firearm unless the suspected firearm is available for examination."

It was pointed out by the State that this opinion also was inconclusive in nature. In the worksheet, it was categorically recorded that the Investigating Officer be informed to make available the suspected fire arm used for definite opinion on linking of C-1 and C-2 with the same fire arm or otherwise. The worksheet also records that the fire arm involved be sent for definite opinion. At this juncture, it is relevant to note that the trial Court posed a leading question as under:

"Q. From reply to query No.3 the presence of the fire arm was not necessary. The question was whether the two empty cartridges have been fired from one instrument or from different instruments?

Ans. The question is now clear to me. I can answer the query here and now. These two cartridge cases were examined physically and under sterio and comparison

microscope to study and observe and compare the evidence and the characteristics marks present on them which have been printed during firing. After comparison, I am of the opinion that these two cartridge cases C/1 and C/2 appeared to have been fired from two different fire arms."

The said witness in further cross-examination replied as under:

"There is nothing in the record of the Court on my report on the basis of which I had given this finding that C/1 and C/2 were fired from two different fire arms"

The said witness in further cross-examination deposes that no photographs were taken or there is any other evidence to show the basis of opinion given by the witness before the trial Court.

69. The learned senior counsel for the appellant-accused has contended that the contention of the prosecution that the trial Court could not have asked the particular Court question to PW-95 is contrary to Section 165 Cr.P.C. inasmuch as the power of Judge is very wide. It has been further argued by the defence that the duties of a Presiding officer are set out in Section 165 of the Indian Evidence Act. Reliance is sought to be placed on *Ram Chander vs. State of Haryana,* AIR 1981 SC 1036. It has been argued that the judge knew that the issue was whether two empties were fired from the same gun. It has been further argued that the judge has seen EX. PW-89/DB and, therefore, any judge would have noticed that the controversy was whether these two bullets were fired from the same weapon or not. The Judge also found out that this query went to the CFSL and CFSL answered the same. It has been argued that, therefore, the Judge knew that to answer this query weapon was not required. It has been argued that the Court must read in between the lines.

70. It is pointed out by the State that the contention of the prosecution was that the trial Court could not have first put a

specific finding of its own opinion to the expert witness and then ask him questions. Learned Solicitor General pointed out that in the attempt of the trial Court to extract the truth from the said witness, it misdirected itself in law by posing such a question. This is impermissible even as per the judgment in *Ram Chander* (supra) relied on by the defence. This judgment is in fact in favour of the prosecution since the same clearly puts an embargo on the power of a judge to ask questions so as to frighten, coerce, confuse or intimidate the witness. The danger inherent in a judge adopting a much too stern an attitude towards witness has been duly explained in the said decision. The judge cannot ask questions which may confuse a witness. The argument that the judge knew that the issue in question was whether the two empties found on the spot were fired from the same gun is wrong and misleading. The judge knew that as per the charge framed against Manu Sharma it was he alone who was charged with the possession and use of a gun. The judge also knew that the first expert opinion was brought on record at the instance of the accused; the judge further knew that PW-95 had stated in no uncertain terms that no opinion can be given as regards the two empties without receipt of the weapon of offence. In spite of knowing all this, the judge first put a finding of its own to the witness that he did not need the firearm in question in order to reply as to whether the two empties were fired from the same gun i.e., a gun and not the gun. The Court exceeded its power under Section 165 of the Evidence Act by putting the question after giving its own finding.

71. On behalf of the prosecution, it is pointed out that the entire argument of the accused that an expert opinion was sought at the fag end of the charge sheet to seek a favourable opinion in favour of the prosecution in fact suggests that the I.O. in question was oblivious of the fact that such an opinion could work to the detriment of the case of the prosecution i.e. two empties having been fired from the same weapon of offence belonging to accused Manu Sharma. The fact that the I.O. sought to mention at S.No. 67 of the list of documents in the

Charge Sheet about the forwarding letter to the expert only suggests that the prosecution had no intention of carrying out the act of seeking an expert opinion, is hiding. The discretion on the part of the I.O. and the superior officers was rightly exercised when they decided not to file the expert report since they realized that the expert report is ambiguous as it uses the term ''appear'' when it suggests that the two empties appear to have been fired from different weapons. Clearly the said opinion was far from conclusive and would have only created confusion in the case of the prosecution. Thereafter a second opinion was sought wherein the expert i.e. PW-95 opined that a conclusive opinion can only be given after the receipt of the weapon of offence. The argument that the weapon of offence is not required to determine whether the two bullets have been fired from the same gun is based on the wrong premise that the two empties would necessarily consist of features which would enable an expert in determining the said fact. For instance, as in the case of a handwriting expert who has to give an opinion about two different sets of near identical questioned documents and as to whether the same belong to different persons, if the argument of the accused has to be accepted then the expert should be able to give such an opinion without having in his possession the specimen handwriting and the admitted handwriting of the accused. It is stated that such an approach would render the opinion as that of a layman and not an expert. Similar would be case of a finger print expert who undertakes the process of discovering two different sets of finger print which are in question, without having the specimen or the admitted finger print of the accused in question. In other words, an expert is only an expert if he follows the well accepted guidelines to arrive at a conclusion and supports the same with logical reasoning which is a requirement of law as laid down in the Indian Evidence Act. In the present case, the moment Rup Singh uses the word ''appear'' his opinion unsupported by reasons becomes inconclusive and stands discredited for the purpose of placing reliance on. The opinion of Rup Singh was at query No.7 as to *"please examine and opine whether*

ejector, trigger, chamber, magazine or other tool marks are present on the live bullet and the bullet empties contained in parcel Nos. 6 & 5 respectively." Though Shri Rup Singh has given opinion qua query No.5 that the two .22'' cartridge cases appears to have been fired from two different .22'' caliber standard firearms but his opinion is completely silent on the marks i.e. ejector, trigger, chamber, magazine or other tool marks on the bullet empties (Ex. PW 89/DB). Clearly an option was available to the accused under Section 293 Cr.P.C. to call for the witness and ascertain from his for sure that the two empties were in fact fire from two different weapons, however, the accused did not choose to do so in terms of Section 293 Cr.P.C. In any case, the opinion of Rup Singh as of today is of little use to the accused for the reasons stated above and since it is both inconclusive and unsupported by any reasoning whatsoever and, therefore, cannot appeal to the judicial mind of this Court. Similar is the case with the expert opinion of PW-95 which is again inconclusive. There is no evidence on record to suggest that PW-95 gave an opinion to oblige the prosecution. On the contrary, his response to the Court question reveals that he was extremely confused as to the issue which had to be addressed by him in the capacity of an expert. In the concluding part of his testimony he reaffirms the opinion given by him which is that without test firing the empties from the weapon of offence no conclusive opinion can be given.

72. It is pertinent to note that the testimony of the experts i.e., Rup Singh exhibited as Ex.PW-89/DB and PW-95 Prem Sagar Minocha exhibited as Wx PW-95/C-1 in inconclusive. The expert PW-95 Prem Sagar Minocha has stated in his report that it is only on receiving the weapon of offence that a conclusive opinion as to whether the two empties (cartridge cases) found at the spot were fired from the same weapon or from two different weapons could be given.

73. The defence seeks to reply upon the testimony of PW-2 with regard to the two gun theory put forward. In this regard,

the defence seeks to corroborate the said part of PW-2's testimony with the testimony of the two ballistic experts. It has also been contended by the defence that the testimony of a hostile witness must be corroborated by the other reliable evidence on record in order to be admissible. The law is very clear that where a witness for the prosecution turns hostile, the Court may rely upon so much of the testimony, which supports the case of the prosecution and is corroborated by other evidence. PW-2's testimony as regards the identity of the person shooting, is certainly not corroborated by the testimony of the experts since both the experts have given opinions which cannot qualify as conclusive opinion of experts.

Role of Public Prosecutor and his duty of disclosure:

74. It was argued by Mr. Ram Jethmalani, learned senior counsel for the appellant-Manu Sharma that the prosecutor had suppressed vital evidence relating to the laboratory reports which were useful for the defence in order to establish the innocence of the accused. Learned senior counsel further argued that the prosecutor had not complied with his duty thus violating fair trial and vitiating the trial itself.

75. It is thus important for us to address the role of a prosecutor, disclosure requirements if placed by the prosecutor and the role of a judge in a criminal trial.

76. A public prosecutor is appointed under Section 24 of the Code of Criminal Procedure. Thus, Public Prosecutor is a statutory office of high regard. This Court has observed the role of a prosecutor in *Shiv Kumar v. Hukam Chand and Anr.,* (1999) 7 SCC 467 as follows:

> "13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by any one other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an

accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the Court if it comes to his knowledge, A private counsel, if allowed frees hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor."

This Court has also held that the prosecutor does not represent the investigation agencies, but the State. This Court in *Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others,* (1994) 4 SCC 602 held:

"22. ... A public prosecutor is an important officer of the State Govt. and is appointed by the State under the CrPC. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in

the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation"

Therefore, a public prosecutor has wider set of duties than to merely ensure that the accused is punished, the duties of ensuring fair play in the proceedings, all relevant facts are brought before the court in order for the determination of truth and justice for all the parties including the victims. It must be noted that these duties do not allow the prosecutor to be lax in any of his duties as against the accused.

77. It is also important to note the active role which is to be played by a court in a criminal trial. The court must ensure that the prosecutor is doing his duties to the utmost level of efficiency and fair play. This Court, in *Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat and Ors.,* (2004) 4 SCC 158, has noted the daunting task of a court in a criminal trial while noting the most pertinent provisions of the law. It is useful to reproduce the passage in full:

"43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the

prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In *Mohan Lal v. Union of India, this* Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, "any Court" "at any stage", or "any enquiry or trial or other proceedings" "any person" and "any such person" clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence,

if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to upheld the truth.

45. It is not that in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

46. Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any

irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a justice decision in the case.

47. Section 391 of the Code is another salutary provision which clothes the Courts with the power of effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, specially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

48. The legislature intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under Section 391.

49. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court. As re-iterated supra the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the public prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions.''

78. The appellants have placed heavy reliance on the position in England to argue that there is a wide duty of disclosure on the public prosecutor. It was argued that any non-disclosure of evidence, whether or not it is relied upon by the prosecution, must be made available to the defense. In the absence of this, it was argued, there would be a violation of the right to fair trial.

79. In the light of this argument, let us examine the exact nature of the duty of disclosure on the public prosecutor in ordinary cases of criminal trial. The Cr.P.C. imposes a statutory obligation on the public prosecutor to disclose certain evidence to the defense. This is brought out by sections 207 and 208

as follows:

"207. Supply to the accused of copy of police report and other documents.

In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following.

(i) The police report;

(ii) The first information report recorded under section 154:

(iii) The statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding there from any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section 173.

(iv) The confessions and statements, if any, recorded under section 164;

(v) Any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in Clause (v) is Voluminous, he shall, instead of furnishing the

accused with a copy thereof', direct that he will only be allowed to inspect it either personally or through pleader in court."

"208. Supply of copies of statements and documents to accused in other cases triable by court of Session.

Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following.

(i) The statements recorded under section 200 or section 202, or all persons examined by the Magistrate;

(ii) The statements and confessions, if any, recorded under section 161 or section 164;

(iii) Any documents produced before the Magistrate on which the prosecution proposes to rely:

Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in court."

"Rule 16 of the Bar Council of India Rules.

Rule 16 of the Chapter II, part VI of the Bar Council of India Rules under the Advocates Act, 1961 is as under:

16. An advocate appearing for the prosecution of a criminal trial shall so conduct the prosecution that

it does not lead to conviction of the innocent. The suppression of material capable of establishing the innocence of the accused shall be scrupulously avoided."

Therefore, it is clear that the Code & the Bar Council of India Rules provide a wide duty of disclosure. But this duty is limited to evidence on which the prosecutor proposes to place reliance during the trial. Mr. Ram Jethmalani argued that this duty extends beyond these provisions, and includes even that evidence which may not have been used by the prosecutor during the trial. As we have already mentioned, for this purpose, he relied upon the position in England.

80. Currently, the position in England is governed by the Criminal Procedure and Investigations Act, 1996. Prior to this enactment, the position was squarely covered by common law. This position comes out primarily in two cases. In *R. v Ward (Judith Theresa)* (1993) 2 All E.R. 577, Court of Appeal held that it was the duty of the prosecution to ensure fair trial for both the prosecution and the accused. The duty of disclosure would usually be performed by supplying the copies of witness statements to the defense and all relevant experiments and tests must also be disclosed. It was held that the common law duty to disclose would cover anything which might assist the defense. Non-compliance with this duty would amount to ''irregularity in the course of the trial'' under Section 2(1)(a) of the Criminal Appeal Act, 1988.

81. In *R v. Preston & Ors.* (1993) 4 All ER 638, on which the appellants specifically relied upon, dealt with the non-disclosure of a telephonic conversation in a matter dealing with the Interception of Communications Act, 1985. The relevant material had been destroyed in pursuance of Section 6 of the same Act. In appeal, the defendants essentially argued that the non-disclosure of the contents of the call to the defense amounted to a material irregularity. The court held that it is true that the mere fact that the material was not to be used as

evidence did not mean that the material was worthless, especially, when it might have been of assistance to the defendant. But at the same time, it was also held that:

"since the purpose of a warrant issued under s.2(2)(b) of the 1985 Act did not extend to the amassing of evidence with a view to the prosecution of offenders, and since the investigating authority was under a duty under s.6 of the Act to destroy all material obtained by means of an interception as soon as its retention was no longer necessary for the prevention or detection of serious crime, the destruction of the documents obtained from the interception and their consequent unavailability for disclosure could not be relied upon by Defendants as a material irregularity in the course of their trial".

Thus the position under common law is clear, i.e. subject to exceptions like sensitive information and public interest immunity, the prosecution should disclose any material which might be exculpatory to the defence.

82. In the Indian Criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India. A person is entitled to be tried according to the law in force at the time of commission of offence. A person could not be punished for the same offence twice and most significantly cannot be compelled to be

a witness against himself and he cannot be deprived of his personal liberty except according to the procedure established by law. The law in relation to investigation of offences and rights of an accused, in our country, has developed with the passage of time. On the one hand, power is vested in the investigating officer to conduct the investigation freely and transparently. Even the Courts do not normally have the right to interfere in the investigation. It exclusively falls in the domain of the investigating agency. In exceptional cases the High Courts have monitored the investigation but again within a very limited scope. There, on the other a duty is cast upon the prosecutor to ensure that rights of an accused are not infringed and he gets a fair chance to put forward his defence so as to ensure that a guilty does not go scot free while an innocent is not punished. Even in the might of the State the rights of an accused cannot be undermined, he must be tried in consonance with the provisions of the constitutional mandate. The cumulative effect of this constitutional philosophy is that both the Courts and the investigating agency should operate in their own independent fields while ensuring adherence to basic rule of law. It is not only the responsibility of the investigating agency but as well that of the Courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of bias mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society. In the case of *Kashmeri Dev v. Delhi Administration and Anrs.* [JT 1988 (2) SC 293] it has been held that the record of investigation should not show that efforts are being made to protect and shield the guilty even where they are police officers and are alleged to have committed a barbaric offence/crime. The Courts have even declined to accept the report submitted by the investigating officer where it is glaringly unfair and offends basic canons of criminal investigation and

jurisprudence. Contra veritatem lex nunquam aliquid permittit: implies a duty on the Court to accept and accord its approval only to a report which is result of faithful and fruitful investigation. The Court is not to accept the report which is contra legem but to conduct judicious and fair investigation and submit a report in accordance with Section 173 of the Code which places a burden and obligation on the State Administration. The aim of criminal justice is two-fold. Severely punishing and really or sufficiently preventing the crime. Both these objects can be achieved only by fair investigation into the commission of crime, sincerely proving the case of the prosecution before the Court and the guilty is punished in accordance with law.

83. Historically but consistently the view of this Court has been that an investigation must be fair and effective, must proceed in proper direction in consonance with the ingredients of the offence and not in haphazard manner. In some cases besides investigation being effective the accused may have to prove miscarriage of justice but once it is shown the accused would be entitled to definite benefit in accordance with law. The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and 21 and expensive power of the police to make investigation. These well established principles have been stated by this Court in the case of *Sasi Thomas vs. State & Ors.* [(2007) 2 SCC (Criminal) 72], *State Inspector of Police vs. Surya Sankaram Karri* [(2006) 3 SCC (Criminal) 225 and *T.T. Antony vs. State of Kerala* [(2001) 6 SCC 181. In *Nirmal Singh Kahlon vs. State of Punjab* [AIR 2009 SC 984] this Court specifically stated that a concept of fair investigation and fair trial are concomitant to preservation of fundamental right of accused under Article 21 of the Constitution of India. We have referred to this concept of judicious and fair investigation as the right of the accused to fair defence emerges from this concept itself. The accused is not subjected to harassment, his right to defence is not unduly hampered and what he is entitled to received in accordance with law is not denied to him contrary to law.

84. It is pertinent to note here that one of the established canons of just, fair and transparent investigation is the right of defence of an accused. An accused may be entitled to ask for certain documents during the course of enquiry/trial by the Court. Let us examine the extent of this right of an accused in light of the statutory provisions and the manner in which the law has developed under the criminal jurisprudence. To understand this concept in its right perspective we must notice the scheme under the provisions of Section 170 to 173 of the Criminal Procedure Code. All these provisions fall under Chapter XII of the Code which deals with, information of the police and their powers to investigate. The power of the police to investigate freely and fairly is well recognized and codified in law. In terms of Section 170, the investigating officer when satisfied that sufficient evidence or reasonable grounds exist he shall forward accused under custody to a Magistrate along with such weapons or articles which may be necessary to be produced before the Court. Section 172 of the Code has a meaningful bearing on the entire investigation by a police officer. It is mandatory for him to maintain a diary under this chapter where he shall enter day-by-day proceedings in the investigation carried out by him. He is expected to mention time of events and his departure, reporting back and closing of the investigation, the place/places he visited and the statements he recorded during investigation. The statement of the witness is recorded during the investigation under Section 161 shall be inserted in that diary. A Criminal Court is empowered under Section 172 (2) to send for the diaries and they could be used by the Court but not as evidence in the case but to aid it in such inquiry for trial. However, Sub-section 3 of the same Section provides that neither the accused nor his agents shall be entitled to call for such diaries, nor they are entitled to see them but it is only where the police officer who makes them to refresh his memory or the Court uses them for the purposes of contradicting such police officers in terms of Section 172 than Sections 161 or 145 provisions would apply. Section 173

commands the investigating agency to complete the investigation expeditiously without unnecessary delay and when such an investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of offence on a police report with the details in the form as may be prescribed by the State Government and provide the information required under this Section. Provisions of Section 173 (5) contemplates and make it obligatory upon the investigating officer where the provisions of Section 170 apply to forward to the Magistrate along with his report, all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation in terms of Section 170 (2) of the Code. During investigation the statement recorded under Section 161 of all the persons whom the prosecution proposes to examine as witnesses shall also be sent to the Magistrate. Some element of discretion is vested with the police officer under Section 173 (6) where he is of the opinion that any such statement is not relevant to the subject matter of the proceedings or its disclosure to accused is not essential in the interest of justice and is expedient in the public interest he shall indicate that part of the statement refusing a Magistrate that part from the copies to be granted to the accused and stating his reason for making such a request. Sub-Section 7 of the same Section is indicative of another discretion given to the police officer under law that where he finds it convenient, he may furnish the copy of documents refer to Sub-section 5 of the Section. Section 173 (8) empowers an investigating officer to submit a further report if he is able to correct further evidence. Once this report in terms of Section 173 is received the court shall proceed with the trial of the case in accordance with law.

85. What is the significance of requiring an investigating officer/officer in charge of a police station to maintain a diary? The purpose and the object seems to be quite clear that there should be fairness in investigation, transparency and a record should be maintained to ensure a proper investigation.

86. In the case of *Habeeb Mohammad v. State of Hyderabad,* A.I.R. 1954 S.C. 51, this Court stated the principle of law that the criminal court may send for the police diaries of a case under inquiry/trial in such court and may use such diaries, not as evidence in the case but to aid in such inquiry or trial. It seems to the Court that the learned Judge in error in making use of the police diaries at all in his judgment and in seeking confirmation of his opinion on the question of appreciation of evidence from statements contained in those diaries. The proper use of diaries he could make in terms of Section 172 Cr.P.C. by elucidating points which need clarification. The Court in this case was primarily concerned with the argument that diaries were not produced.

87. Further in the case of *Khatri v. State of Bihar* A.I.R. 1981 SC 1068 though in a writ petition this Court was concerned with a question whether the documents called for by the Court vide its Order dated 16th February, 1981 liable to be produced by the State or production of those documents is barred under Sections 162 & 172 of the Code and the petitioners in those cases are not entitled to see such documents. The Court rejecting the contention held as under:

> "It is common ground that Shri L.V. Singh was directed by the State Government under Section 3 of the Indian Police Act, 1861 to investigate into twenty four cases of blinding of under-trial prisoners where allegations were made by the under-trial prisoners and First Information Reports were lodged that they were blinded by the police officers whilst in police custody, Shri L.V. Singh through his associates carried out this investigation and submitted his reports in the discharge of the official duty entrusted to him by the State Government. These reports clearly relate to the issue as to how, in what manner and by whom the twenty-four under-trial prisoners were blinded, for that is the matter which Shri L.V. Singh was directed by the State Government to investigate. If that be so, it is difficult

> to see how the State can resist the production of these reports and their use as evidence of these reports and their use as evidence in the present proceeding. These reports are clearly relevant under Section 35 of the Indian Evidence Act."

88. In the case of *Malkiat Singh and Ors. v. State of Punjab* (1991) 4 SCC 341 this Court reiterated the principle that use of entries in the case diary is really of no use and is of benefit to the accused but unless the investigating officer or the Court uses the entries in the case where either to refresh the memory or contradicting the investigating officer as previous statement under Section 161 in terms of Section 145 of the Evidence Act the entries can be used by the accused as evidence. The free use thereof is not permissible under defence.

89. In case *Mukund Lal v. Union of India* A.I.R. 1989 SC 144, this Court clearly stated the denial to the accused of an unfettered right to make roving inspection of the entries in the case diary regardless of whether these entries are used by the police officer concerned to refresh his memory or regardless of the fact whether the Court has used these entries for the purpose of contradicting such police officer cannot be said to be unreasonable. This was treated to be a very important safeguard as the Legislature has reposed complete trust in the Court which is conducting the inquiry or the trial and has empowered the Court to call for these diaries therefore the right of the accused is not unfettered but in fact is limited as noticed.

90. Usefully, reference can also be made to the judgment of this Court in the case of *Shamshul Kanwar v. State of U.P.* A.I.R. 1995 SC 1748 wherein this Court while issuing direction for requiring the State to make a general hearing in terms of Section 172 of the Code clearly stated that it was mandatory for the police officer/in charge to maintain the diary in terms of the said provision and there is jurisdiction in the criminal code to call such diaries and make use of them not as evidence but

only to aid such inquiry or trial. It is generally confined to utilize the information therein as foundation for the question put to the witnesses, particularly, to the police witnesses where the police officer has used the entries to refresh his memory or if the Court uses them for the purpose of contradicting such police officer then provisions of Section 161, or 145, would be applicable. The right of the accused to cross-examine the police officer with reference to the entries in the General Diary is very much limited in extent and even that limited scope arises only when the Court uses the entries for the aforestated purposes. The investigating officer has a right to refresh his memories and can refer to the general diary. The Court has power to summon the case diary in exercise of its powers and for the purposes stated. The accused is vested with the power of making use of the statements recorded during investigation for the purposes of contradiction and copies thereof the accused is entitled to see in terms of Section 2 & 7 of the *Code State of Kerala v. Babu* (1999) 4 SCC 621 and *State of Karnataka vs. K. Yarappa Reddy* (1999) 8 SCC 715.

91. As is evident from the consistently stated principles of law, that right of the accused in relation to the police file and the general diary is a very limited one and is controlled by the provisions afore-referred. But still the accused has been provided with definite rights under the provisions of the Code and the constitutional mandate to face the charge against him by a fair investigation and trial. Fairness in both these actions essentially needs to be adhered to. Under Section 170, the documents during investigation are required to be forwarded to the Magistrate, while in terms of Section 173 (5) all documents or relevant extracts and the statement recorded under Section 161 have to be forwarded to the Magistrate. The investigating officer is entitled to collect all the material, what in his wisdom is required for proving the guilt of the offender. He can record statement in terms of Section 161 and his power to investigate the matter is a very wide one, which is regulated by the provisions of the Code. The statement recorded under

Section 161 is not evidence per se under Section 162 of the Code. The right of the accused to receive the documents/ statements submitted before the Court is absolute and it must be adhered to by the prosecution and the Court must ensure supply of documents/statements to the accused in accordance with law. Under proviso to Section 162 (1) the accused has a statutory right of confronting the witnesses with the statements recorded under Section 161 of the Code thus indivisible. Further, Section 91 empowers the Court to summon production of any document or thing which the Court considers necessary or desirable for the purposes of any investigation, inquiry, trial or another proceeding under the provisions of the Code. Where Section 91 read with Section 243 says that if the accused is called upon to enter his defence and produce his evidence there he has also been given the right to apply to the Court for issuance of process for compelling the attendance of any witness for the purpose of examination, cross-examination or the production of any document or other thing for which the Court has to pass a reasoned order. The liberty of an accused cannot be interfered with except under due process of law. The expression 'due process of law' shall deem to include fairness in trial. The Court gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused places an implied obligation upon the prosecution (prosecution and the prosecutor) to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in Court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused. The role and obligation of the prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English System as afore-

referred. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. As already noticed the provisions of Section 207 has a material bearing on this subject and makes an interesting reading. This provision not only require or mandate that the Court without delay and free of cost should furnish to the accused copies of the police report, first information report, statement, confessional statement of the persons recorded under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173 (6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under Sub Section 5 of Section 173. In contradistinction to the provisions of Section 173, where the Legislature has used the expression 'documents on which the prosecution relies' are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173 (5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170 (2) of the Code.

92. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the Court. But

certain rights of the accused flow both from the codified law as well as from equitable concepts of constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the Court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bonafidely and has bearing on the case of the prosecution and in the opinion of the public prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially. The concept of disclosure and duties of the prosecutor under the English System cannot, in our opinion, be made applicable to Indian Criminal Jurisprudence stricto senso at this stage. However, we are of the considered view that the doctrine of disclosure would have to be given somewhat expanded application. As far as the present case is concerned, we have already noticed that no prejudice had been caused to the right of the accused to fair trial and non-furnishing of the copy of one of the ballistic reports had not hampered the ends of justice. Some shadow of doubt upon veracity of the document had also been created by the prosecution and the prosecution opted not to rely upon this document. In these circumstances, the right of the accused to disclosure has not received any set back in the facts and circumstances of the case. The accused even did not raise this

issue seriously before the Trial Court.

Call Details:

93. The evidence of the telephone calls in the present case is admissible under Sections 8 and 27 of the Indian Evidence Act. PW-16, Raj Narain Singh, has deposed that Tel. No. 3782072 is installed at 15, BR Mehta Lane in the name of O.P. Yadav - Ex.PW-16/C. Print out for the period 25.04.1999 to 11.05.1999 is Ex. PW-16/C-1. The evidence of PW-19 further proved that Tel. No. 4642868 was installed at Majid Chakkarawali, Mathura Road vide Ex. PW 16/D and the print out for the period 03.05.1999 to 05.05.1999 is Ex. PW-16/D-1. PW-17, Mohd. Jaffar stated that Tel. No. 4642868 was installed at his PCO. Phone calls were made to USA from his STD Booth on 04.05.1999. Photocopy of calls made is Ex. PW-17/A. PW-16 also proved that Tel. No. 3793628 was shifted to 23, Safdarjung (Ex. PW-16/E) and print out for the period 03.04.1999 to 31.05.1999 is Ex. PW-16/E-1. It is further in evidence of PW-45, Sanjay Garg, that Tel. Nos. 660550, 660499, 705692, 741001, 741002 are installed in the various premises of Piccadilly and the same is Ex. PW-45/B.

94. The details of the phone numbers subscribed to Piccadily group are Ex. PW 45/C and the bill printouts are 45/C were received by the police vide Ex. PW 45/D. PW-66, Maj. AR. Satish has deposed that Mobile No. 9811100237, which was in the name of Amardeep Singh Gill and the print out of the same is exhibited PW-66/B. He also deposed that Mobile No. 9811096893 was being purchased against a cash card. The print out of the calls for the month of April, 1999 are in Ex. PW-66/D. He further proved that Mobile No. 9811068169 stood in the name of Alok Khanna and its print out is Ex. PW 66/C.

95. PW-32, Ved Prakash Madan proved that Tel. No. 521491 was intalled at PCO, Ambala and its print out is Ex. PW-32/B. PW-33, PV. Mathew has corroborated the version of PW-32 and has proved that the calls were made to USA.

PW-15, Sumitabh Bhatnagar stated that Tata Sierra No. HR-26N4348 and Tata Sierra MP-04-2634 were allotted to Amardeep Singh Gill and Alok Khanna respectively. Similarly Mobile Nos. 981110237 and 9811068169 were also allotted to Amardeep Singh Gill and Alok Khanna respectively. PW-51, Sh. Rajiv Talwar has stated that Te. No. 660500 was installed in the office of Harvinder Chopra. PW-39, Mansvi Mittal STD/PCO Booth Inderlok-Mittal Communication Tel. No. 5157498 is installed at this booth. Calls made remain in memory for a period of one month. Police has seized record of 04.05.1999 and 05.05.1999 in respect of Tel. No. 0017184768403 to which calls were made. Figure 00 is international access code and 171 is the code call to be made to USA. 001 is also code call for America. Print out dated 04.05.1999 is Ex. PW-39/1 and dated 05.05.1999 is Ex. PW-39/2 to 7, Seizure Memo dated 27.05.1999 is Ex. 39/A where entries Ex. PW-39/3-7 were made was present. PW-40, Ayub Khan, PCO/STD/ISD Booth Okhla Phase II Tel. No. 6924575 was installed on 10.05.1999. He also furnished similar details. Print out slips were seized vide Ex. PW-40.A and print out is Ex. PW-40/1-3 respectively. The testimony of PW 85, SI Pankaj Malik also corroborates the version of the aforesaid witnesses.

96. The above phone call details show that the accused were in touch with each other which resulted in destruction of evidence and harboring. Thus the finding of the trial Court that in the absence of what they stated to each other is of no help to the prosecution is an incorrect appreciation of evidence on record. A close association is a very important piece of evidence in the case of circumstantial evidence. The evidence of phone calls is a very relevant and admissible piece of evidence. The details of the calls made by the various accused to one another are available in Ex. PW-66/B, PW-66/D and PW-66/C.

Effect of leading question by Public Prosecutor:

97. Mr. Ram Jethmalani, learned senior counsel next

contended that the Public Prosecutor in the present case had put a leading question to Malini Ramani regarding identification of the accused Manu Sharma. We verified the said question. The question put by the Public Prosecutor, was at best clarificatory, and by no stretch of imagination can be termed as a leading question favouring/eliciting an answer favouring the prosecution. The evidence of Ms. Malini Ramani two paragraphs prior to the leading question and two paragraphs thereafter, if read in conjunction with each other clarifies the whole scene and sequence of events. Learned senior counsel has relied upon the judgment in *Varkey Joseph vs. State of Kerala,* 1993 Supp (3) SCC 745 to support his contention. The said judgment is clearly distinguishable. On the facts in that case, this Court found that the prosecutor had put leading questions, without objections by the defence, to several material and key witnesses regarding the culpability of the accused. The extent of the leading questions put, were on the facts of that case found to violate the constitutional right of a fair trial of the accused. The facts of the present appeal are wholly different. The petitioner had adequate and competent legal representation before the trial Court and leading questions, if any, put by the prosecutor were objected to by the defence and several questions were disallowed by the trial court. Furthermore, the finding of guilt of the appellant herein by the High Court has not been on account of any of the answers elicited to any such questions. It is not as if every single leading question would invalidate the trial. The impact of the leading questions, if any, has to be assessed on the facts of each case.

Efforts made to trace Sanjay Mehtani:

98. It has been contended by the learned senior counsel for the appellant/Manu Sharma that the Sanjay Mehtani, friend of Malani Ramani, who was also present at Qutub Colonnade at the scene of offence was deliberately not examined by the Prosecution. Respondent has pointed out that Sanjay Mehtani was examined during the course of investigation and his

statement was recorded under Section 161 Cr.P.C. He was also cited as a prosecution witness. During the trial summons were issued for him and it was learnt that Sanjay Mehtani had left India and was residing at Hong Kong and as such could not be examined in the court. Further, it was pointed out that bare perusal of the trial Court record of the present case will clearly bring out the fallacy in the said argument of the defence. The Police while filing the charge-sheet before the Magistrate had enlisted Sanjay Mehtani's name in the list of witnesses. This fact clearly shows that the prosecution had the intention to examine Sanjay Mehtani as their witness. Further, the said witness was summoned by the Court for examination vide orders dated 28.11.2001, 08.02.2002, 27.11.2003 and 11.12.2003. The said sequence of events clearly show that the prosecution not only wanted to examine him as a witness, but tried serving him with the summons many times, but the same could not be achieved as Sanjay Mehtani had by then shifted to Hong Kong and was not staying in India. Therefore to contend that Sanjay Mehtani was deliberately not examined by the Prosecution is absolutely baseless and not founded on the basis of the record.

The conduct of Absconding:

99. From the testimony of PW-20 and PW-24, it is proved beyond reasonable doubt that accused Sidharth Vashisht @ Manu Sharma after committing the murder of Jessica Lal fled away from the scene of occurrence. It is further proved from the testimony of PW-100, PW-101, PW-87 Raman Lamba, PW-85 and PW-80 that from afternoon of 30.04.1999 search was made for the black Tata Safari bearing Regn. No. CH-01-W-6535 and for Sidharth Vashisht @ Manu Sharma, Director of Piccadilly Sugar Industries at Bhadson, Kurukshetra, Chandigarh, his farmhouse at Samalkha and Okhla Delhi. It is also proved that even after the seizure of vehicle on 02.05.1999 the search for accused Sidharth Vashisht @ Manu Sharma continued and search was made at Piccadilly Cinema,

Piccadilly Hotel, his residence at Chandigarh, PGI Hospital where his father was subsequently admitted. However, accused Sidharth Vashisht @ Manu Sharma was not found nor anybody informed his whereabouts and it is only on 06.05.1999 that accused Sidharth Vashisht @ Manu Sharma surrendered at Patiala Guest House, Chandigarh in the presence of Shri Harish Ghai, advocate and Sh. Vinod Dada. The above evidence of the witnesses clearly establishes beyond reasonable doubt that accused Manu Sharma absconded after committing the crime and surrendered on 06.05.1999 after extensive searches were made.

100. A criminal trial is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material. In this regard, it is useful to refer *Anant Chaintaman Lagu vs. State of Bombay* AIR 1960 SC 500:-

> "Circumstantial evidence in this context means a comBeenation of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt.....this conduct of the accused was so knit together as to make a network of circumstances pointing only to his guilt....his methods was his own undoing; because even the long arm of coincidence could not explain the multitude of circumstances against him, and they destroyed the presumption of innocence with which law clothed him."

Thus, it has been proved beyond reasonable doubt that accused Manu Sharma absconded after the incident which is a very relevant conduct u/s 8 of Evidence Act.

Disclosure statements of the accused persons and their

admissibility u/s 27 Evidence Act:

101. PW-100 SI Sunil Kumar and PW-101 Inspector Surender Kumar Sharma deposed that on the early morning of 05.05.1999 accused Amardeep Singh Gill @ Tony Gill was arrested and he made a voluntary disclosure vide Ex.PW 100/7 that on 29.04.1999 he had a talk with Alok Khanna over telephone and thereafter a telephone call was received at about 8.30 p.m. from Sidharth Vashisht @ Manu Sharma. He has further disclosed that Alok Khanna came to his house in Tata Sierra car no. MP 04V 2634. He has further disclosed that he and Alok Khanna went to Qutub Colonnade in Alok Khanna's Tata Sierra bearing No. MP-04-V-2634. Accused Manu Sharma surrendered on 06.05.1999 at 2.30 p.m. at Patiala Guest House, Chandigarh before Inspr. Raman Lamba PW-87 and ASI Nirbhay Singh PW-80. After his arrest accused Manu Sharma had made four disclosure statements. The first was an oral disclosure made to Inspr. Raman Lamba wherein he said that he could recover the pistol from Ravinder Sudan at Mani Majra. However, it was pointed out that the search of the house at Chandigarh was taken and since the diary containing the address of Ravinder Sudan could not be found, no recovery could be affected.

102. On 07.05.1999, he made a disclosure to Inspr. Surender Kumar Sharma PW-101 which was recorded as Ex. PW 100/12. In the said disclosure, he disclosed that he was using his younger brother Kartik's Cellphone No. 9811096893 in making calls to his friends like Tony Gill, Alok Khanna, Amit Jhingan and others. He also disclosed the phone Nos. of some of the co-accused and that he handed over his cell bearing No. 9811096893 to Yograj Singh in Panchkula and can recover the same. Pursuant to the disclosure of Sidharth Vashisht @ Manu Sharma the mobile phone used by him was recovered from accused Yograj Singh. Vide Ex.PW 100/23.

103. The third disclosure is Ex. PW 100/Article-1 which was video recorded on 07.05.1999 itself after the accused was

produced before the Metropolitan Magistrate and copies of which were duly supplied to the accused during trial. From the disclosure Ex PW 100/Article-1 there were further discovery of facts admissible under Section 27 of the Evidence Act. Pursuant to the disclosures of Manu Sharma investigations were carried out and it was that the accused were in close contact with each other over phone and accused Manu Sharma had made number of calls from the house of Vikas Yadav son of DP Yadav to his house in Chandigarh and to Harvinder Chopra at Piccadilly.

104. The fourth disclosure of accused Sidharth Vashisht @ Manu Sharma was recorded by PW-101 wherein he had disclosed that Ravinder Sudan @ Titu having concealed the pistol, had gone to Manali (HP) where he met his uncle Shyam Sunder and he very well knew the place where they concealed the pistol and that he could lead to Manali to recover the pistol used in the incident. It further came on record that calls were made to USA to Ravinder Sudan. It may not be out of place to mention that calls were exchanged between the accused and made to USA were discovered pursuant to disclosures made by the accused persons.

Test Identification Parade-Refusal:

105. The witnesses Deepak Bhojwani PW-1, Malini Ramani PW-6, Beena Ramani PW-20 and George Mailhot PW-24 have clearly proved beyond reasonable doubt the identification of the accused persons Manu Sharma, Amardeep Singh Gill, Alok Khanna and Vikas Yadav. PW-1 Deepak Bhojwani had met Manu Sharma on the night of 29.04.1999 at Qutub Colonnade when Manu Sharma introduced himself to Deepak Bhojwani and they were about to exchange visiting cards when Amardeep Singh Gill @ Tony Gill took him away towards the cafe. Both Amardeep Singh Gill and Manu Sharma refused their TIP on 06.05.1999 and 07.05.1999 respectively before PW-79 Ld. MM Sh. Rajnish Kumar Gupta without citing any credible reason. Thereafter,

photo identification was conducted in which they were duly identified by Deepak Bhojwani. The said witness has also clearly identified the two of them in the Court.

106. PW-6, Malini Ramani has categorically stated that she identified Manu Sharma as the accused in the Police Station. She had seen accused in the police station on 08.05.1999 and thus the same was after 07.05.1999 when accused Manu Sharma refused his TIP. In cross-examination, PW-6 states that

> "During the first five days of May 1999, the interrogation of three of us was very intensive, and photographs were shown to us of the culprits for identification. It could be that the photograph of Manu Sharma had been shown to me but since I was not in good frame of mind and rather disturbed for the whole week and therefore, I do not remember whether the photograph of Manu Sharma was shown to me or not on 01.05.1999. It is correct that between 01.05.1999 to 05.05.1999, I had been shown the paragraph of Manu Sharma."

Thus she was not sure about her having been shown the photograph prior to 08.05.1999. PW-6 has nowhere stated in her testimony that photograph of Manu Sharma were shown to her parents. Moreover, no photographs of the other three accused were shown to her or her parents of the other accused i.e. of Vikas Yadav, Amardeep Singh Gill or Alok Khanna as contended. Further, PW-20 has categorically identified all the four accused in the witness box and there is no cross examination of PW-20 to the effect that the photographs of the accused were shown only in the police station. Even, PW-24 has identified accused Manu Sharma in the court and his testimony also remains unshaken on this aspect. PW-30 has also clearly identified accused Amardeep Singh Gill and Vikas Yadav in the court and the photo identification with regard to them was resorted after Amardeep Singh Gill @ Tony Gill had refused TIP on 06.05.1999 and Vikas Yadav was granted

anticipatory bail. That the photographs of Vikas Yadav were taken from the Asstt. Registrar, Ghaziabad Authority RTO, PW 38 on 20.05.1999.

107. PW-2 Shyan Munshi had left for Kolkata and thereafter, photo identification was got done when SI Sharad Kumar PW 76 went to Kolkata to get the identification done by picking up from the photographs wherein he identified the accused Manu Sharma though he refused to sign the same. However, in the court PW-2 Shyan Munshi refused to recognize him. In any case, the factum of photo-identification by PW-2 as witnessed by the concerned Officer is a relevant and an admissible piece of evidence. In this regard reliance may be placed on, *R vs. McCay* (1991) 1 All ER 232. There the accused was identified by the witness in the presence of the IO who took note of the said fact, later the witness could not identify the accused in Court due to lapse of time, thus the testimony of the IO was relied upon to prove the said identification. The IO's testimony was upheld as admissible on the ground that the act of the IO was contemporaneous with the act of identification by the witness.

108. PW-78 SI Sharad Kumar deposed

> "I thereafter went to Calcutta. The four photographs X1 to X4 were identified by Shyan Munshi as those of the accused in my presence. (Objected to by Sh. R.K. Naseem). I asked Shyan Munshi to sign on the back of these photos but he refused to do so. Then I gave separate markings on the back of the photographs X1 to X4 and signed them. Markings and my signatures at the back of the photographs are at points A on all the four photographs. I recorded the statement of Shyan Munshi in this regard. The photocopy of the said statement is Ex PW2/C which is in my hand and bears my signatures at point A. I correctly recorded statement of Shyan Munshi and did not add or omit therefrom on my own. After return from Calcutta, I handed over the photographs and

> statement of Shyan Munshi and other documents to SHO Surender Kumar".

109. PW-2 Shyan Munshi in this regard stated,

> "It is correct that Delhi Police had contacted me in Calcutta at my residence but I do not remember it was on 19th May, 1999. .... ..It is correct that some photographs were shown to me by Delhi Police at Calcutta in May, 1999 at my residence''... ''Police had shown me the photograph and asked me if I could identify but I did not identify any of the culprits. I was asked by the police to sign on the reverse of those four photographs but I did not sign any such photograph."

110. Mr. Jethmalani next contended that identification is inherently illegal because the witnesses were not only shown the photographs but also the accused was physically shown. According to him, it was further in evidence that accused Manu Sharma was shown to all the three witnesses on 08.05.99 and they even admitted that it may have been on 07.05.99. It is further contended that it is not denied that the photos came in the newspaper during the prosecution. However, it was pointed out by the defence that prosecution is certainly not responsible for showing the photos. As far as refusal of TIP by accused Manu Sharma is concerned, there is no justification in the stand of the defence that TIP was not held due to his photo or he himself being shown to the witness. In this regard, it would be relevant to note that accused Manu Sharma surrendered on 06.05.99 and on 07.05.99 he was produced in muffled face before the MM Shri Rajneesh Gupta PW-79 and the proceedings thereof are recorded vide Ex PW-79/G wherein accused Manu Sharma's contention for refusal of TIP is that his photograph has appeared in newspapers and his photograph has been shown to the witnesses and that he has been shown physically to the witnesses. All the three contentions of the accused Manu Sharma are incorrect and misconceived with regard to the appearance of the photos in the newspapers. It

is submitted that vide Ex PW 101/11 to 22 the newspapers from 01.05.99 to 06.05.99 have been duly exhibited by PW-101. It was pointed out that in none of those newspapers is the photograph of accused Manu Sharma shown. As a matter of fact vide Ex. No. PW 101/15 photograph dated 06.05.1999 clearly shows that he is in muffled face. In the absence of any defence refusal of TIP on this ground is totally unjustified and an adverse inference ought to be drawn in this regard.

111. The next contention of the defence for refusal of TIP is that his photograph has been shown to the witnesses is also incorrect. It is not disputed that the photograph of accused Manu Sharma was obtained from his farmhouse located in Samalkha on the intervening night 30.04.1999 & 01.05.1999. However, it is further in evidence of PW-87 that he went to Chandigarh and he took the photograph of accused Manu Sharma for the purposes of identification and it was with him till 06.05.1999. Thus the photo of accused Manu Sharma could not have been shown to any of the witnesses because the witnesses were either in Delhi or Kolkata not in Chandigarh. The only witness who has deposed with regard to the photograph having been shown is PW-6 wherein she has stated:

> "It could be that the photograph of Manu Sharma that had been shown to me on 01.05.1999 but since I was not in good frame of mind and rather disturbed for the whole week and therefore I do not remember whether the photograph of Manu Sharma was shown to me on 01.05.1999."

Her testimony on this point is clearly wavering in view of the fact that immediately after the incident she fainted and that is why her statement under Section 161 Cr.P.C. was recorded only on 03.05.99. Moreover, it was explained that since on 02.05.99 the photograph in question was not available in Delhi itself and therefore there was no chance of showing the photograph to this witness, as on 01.05.99 she was unwell and her statement also could not be recorded and thus the issue

of showing her the photograph could not arise. Further, this witness nowhere says that photographs were shown to her parents as well as being sought to be inferred by the defence. Thus refusal of TIP on this ground was unjustified by accused Manu Sharma in the morning of 07.05.1999. It is further submitted that after the refusal of TIP it is only thereafter that the accused Manu Sharma was shown to the witnesses PW-6, PW-20 and PW-24 and their statements under Section 161 Cr.P.C. were recorded with regard to the identification of accused Manu Sharma. The said process of identification was necessary for the IO to be certain that this is the man that the said witnesses had witnessed/seen as the person responsible. In the light of Manu Sharma's refusal, the police had little choice but to formally show the photo to the witnesses and record their statement in that regard. Thus, firstly his refusal is not justified on the ground that he has been shown to the witnesses, moreover, he was shown to the witness only after his refusal of TIP so that it is verified that he is the same person who is involved in the incident and no adverse inference on this count can be taken against the prosecution.

112. It is further pointed out that the accused Manu Sharma was sent to judicial custody on 15.05.1999 and the statement of witnesses continued even thereafter and thus resort to photo identification was properly taken by mixing the photograph of accused Manu Sharma with number of other photographs and asking the witnesses to pick up the photograph of the person they had witnessed on the fateful night and the morning thereafter i.e. 29/30.04.99. This mode of photo identification was resorted to vis-à-vis Deepak Bhojwani PW-1 on 24.05.1999 at Delhi, Shiv Dass PW-3 and Karan Rajput PW-4 on 29.05.99 and Shyan Munshi PW-2 on 19.05.99 at Calcutta. Thus there is no merit in the contention of the defense that the dock identification was a farce as it was done for the first time in the Court.

113. It is also contended by the defence that since the

photographs were shown to the witnesses this circumstance renders the whole evidence of identification in Court as inadmissible. For this, it was pointed out that photo identification or TIP before the Magistrate, are all aides in investigation and do not form substantive evidence. Substantive evidence is the evidence of the witness in the court on oath, which can never be rendered inadmissible on this count. It is further pointed out that photo identification is not hit by 162 Cr.P.C. as adverted to by the defense as the photographs have not been signed by the witnesses. In support of his argument the senior counsel for Manu Sharma relies on the judgment of *Kartar Singh vs. Union of India* (1994) 3 SCC 569 at page 711 wherein while dealing with Section 22 TADA the Court observed that photo TIP is bad in law. It is useful to mention that the said judgment has been distinguished in *Umar Abdul Sakoor Sorathia vs. Intelligence Officer, Narcotic Control Bureau,* (2000) 1 SCC 138 at page 143 where a Photo Identification has been held to be valid. The relevant extract of the said judgment is as follows:-

> "10. The next circumstance highlighted by the learned counsel for the respondent is that a photo of the appellant was shown to Mr. Albert Mkhatshwa later and he identified that figure in the photo as the person whom he saw driving the car at the time of interception of the truck.
>
> 11. It was contended that identification by photo is inadmissible in evidence and, therefore, the same cannot be used. No legal provision has been brought to our notice, which inhibits the admissibility of such evidence. However, learned counsel invited our attention to the observations of the Constitution Bench in Kartar Singh vs. State of Punjab which struck down Section 22 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. By that provision the evidence of a witness regarding identification of a proclaimed offender in a terrorist case on the basis of the photograph was given the same value as the evidence of a test identification parade. This Court

observed in that context: (SCC p. 711, para 361)

> 361. If the evidence regarding the identification on the basis of a photograph is to be held to have the same value as the evidence of a test identification parade, we feel that gross injustice to the detriment of the persons suspected may result. Therefore, we are inclined to strike down this provision and accordingly we strike down Section 22 of the Act.
>
> 12. In the present case prosecution does not say that they would rest with the identification made by Mr. Mkhatshwa when the photograph was shown to him. Prosecution has to examine him as a witness in the court and he has to identify the accused in the court. Then alone it would become substantive evidence. But that does not mean that at this stage the court is disabled from considering the prospect of such a witness correctly identifying the appellant during trial. In so considering the court can take into account the fact that during investigation the photograph of the appellant was shown to the witness and he identified that person as the one whom he saw at the relevant time. It must be borne in mind that the appellant is not a proclaimed offender and we are not considering the eventuality in which he would be so proclaimed. So the observations made in Kartar Singh in a different context is of no avail to the appellant."

Even a TIP before a Magistrate is otherwise hit by Section 162 of the Code. Therefore to say that a photo identification is hit by section 162 is wrong. It is not a substantive piece of evidence. It is only by virtue of section 9 of the Evidence Act that the same i.e. the act of identification becomes admissible in Court. The logic behind TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not born out of procedure, but out

of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation.

114. Mr. Jethmalani has further argued on the proposition that mere dock identification is no identification in the eyes of law unless corroborated by previous TIP before the Magistrate. It has been further argued that in any case, even identification in Court is not enough and that there should be something more to hold the accused liable. In support of its arguments, he placed heavy reliance on the decision of this Court in the case of *Hari Nath & Ors vs. State of U.P.* (1988) 1 SCC 14 and *Budhsen & Others vs. State of U.P.* (1970) 2 SCC 128. A close scrutiny of these judgments will reveal that they infact support the case of the Prosecution. These judgments make it abundantly clear that even where there is no previous TIP, the Court may appreciate the dock identification as being above-board and more than conclusive.

115. The law as it stands today is set out in the following decisions of this Court which are reproduced as hereinunder in *Munshi Singh Gautam vs. State of M.P.* (2005) 9 SCC 631, at page 643:

> "16. As was observed by this Court in *Matru vs. State of U.P.* 1971 2 SCC 75 identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in Court. (See *Santokh Singh vs. Izhar Hussain* 1973 2 SCC 406.) The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of

> other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.
>
> 17. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is, accordingly, considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to

exception, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigation agency to hold or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad vs. Delhi Administration* AIR 1958 SC 350, *Vaikuntam Chandrappa vs. State of A.P.* AIR 1960 SC 1340, *Budhsen Vs State of U.P.* (1970) 2 SCC 128 and *Rameshwar Singh vs. State of J&K* (1971) 2 SCC 715)

19. In *Harbhajan Singh vs. State of J&K* (1975) 4 SCC 480, though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in court corroborated by other circumstantial evidence. In that case it was found that the appellant and one Gurmukh Singh were absent at the time of roll call and when they were arrested on the night of 16.12.1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held: (SCC p. 481, para 4).

> "In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the investigation officer ought to have held an identification parade and that the failure of

> Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in Jadunath Singh vs. State of U.P. 17 absence of test identification is not necessarioy fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villages only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi am alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant."

Malkhansing vs. State of M.P., (2003) 5 SCC 746 at 752

"7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely,

without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigation agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter fro the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration."

116. Mr. Ram Jethmalani has further placed heavy reliance on two Books by foreign authors, namely, *''Proof of Guilt by Glanville Williams,'* 3rd Edition and 'Eye Witness Identification in Criminal Cases' by Patrick M. Wall, to urge that identification of an accused in Court is a serious matter and the chances of a false identification are very high. These texts only reiterate what the various courts have held time and again. The view of the said author has been quoted by this Court, the earliest judgment being *Shivaji Sahabrao Bobade vs. State of Maharashtra,* (1973) 2 SCC 793, at page 800:

"The evil of acquitting a guilty person light heartedly as a learned Author (Glanville Williams in 'Proof of Guilt') has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted persons and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that a miscarriage of justice

may arise from the acquittal of the guilty no less than from the conviction of the innocent."

117. Learned Solicitor General submitted that, even otherwise, an adverse inference ought to be drawn against the appellants for their refusal to join the TIP. This view has found favor time and again by this Court. It is pertinent to note that it is dock identification which is a substantive piece of evidence. Therefore even where no TIP is conducted no prejudice can be caused to the case of the Prosecution. In *Mullagiri Vajram vs. State of A.P.* 1993 Supp. (2) SCC 198, it was held that though the accused was seen by the witness in custody, any infirmity in TIP will not affect the outcome of the case, since the deposition of the witnesses in Court was reliable and could sustain a conviction. The photo identification and TIP are only aides in the investigation and does not form substantive evidence. The substantive evidence is the evidence in the court in oath.

118. The following decisions relied upon by the learned senior counsel for the appellant are clearly distinguishable from the present facts and thus are not applicable. *N.J. Suraj vs. State* (2004) 11 SCC 346 is distinguishable as there was no direct evidence on record against the accused and the prosecution's case was based on last seen evidence of accused with deceased and circumstantial evidence. The admission of witnesses in regard to showing of photographs prior to TIP was coupled with the fact that the writing of the accused did not match with the entries made in the entry register which was contrary to the case of the prosecution.

119. *Laxmipat Chararia vs. State of Maharashtra,* AIR 1968 SC 938, is distinguishable as the witness whose statement was subjected to arguments as being put under pressure of prosecution and was shown photographs of the accused was infact an accomplice and her statement was also relied upon by the Court and held that her evidence is admissible.

false answers voluntarily offered by him and to provide an additional/missing link in the chain of circumstances. The judgment relied upon is of no use to the defence since the same pertains to a period where the law did not allow the accused to step into the witness box as a witness of his own innocence.

126. Regarding the contention that evidence of each witness must be put to the accused, it must be clarified that only the circumstances need to be put and not the entire testimony. It is apt to quote the following decision of this Court i.e., *State of Punjab vs. Swaran Singh,* (2005) 6 SCC 101 at page 104:

> **"9.** The only reason given by the learned Single Judge of the High Court for acquitting the accused is that the evidence of PW 1 and PW 4 was not specifically put to the accused under Section 313 CrPC and it was held that in the absence of these facts in the form of questions to the accused, the evidence could not have been used against him. It is also pertinent to note in this regard that when PW 1 and PW 4 were examined as witnesses, the accused did not seriously dispute the evidence of PW 1 or PW 4. The only cross-examination was that it was incorrect to suggest that the case property was not deposited with him and he had deposed falsely. So also, the evidence of PW 4 was not challenged in the cross-examination except for a general suggestion that he had been deposing falsely and that no case property was handed over to him by PW 1 Harbhajan Singh. The accused had no case that the seal was ever tampered with by any person and that there was any case of mistaken identity as regards the sample and that the report of the chemical analyst was not of the same sample taken from the accused. Except making a general suggestion, the accused had completely admitted the evidence of PW 1 and PW 4 as regards the receipt of the sample, sealing of the same and sending it to the chemical analyst. This was pointed out only to show that the accused was not in any way prejudiced by the fact of not having been

questioned by making a specific reference to the evidence of PW 1 and PW 4. As regards the questioning of the accused under Section 313 CrPC, the relevant provision is as follows:

> *"313. Power to examine the accused.*—(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court –
>
> (a) may at any stage, without previously warning the accused, put such questions to him as the court considers necessary;
>
> (b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:
>
> Provided that in a summons case, where the court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).
>
> (2) No oath shall be administered to the accused when he is examined under sub-section (1).
>
> (3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.
>
> (4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.''

10. The questioning of the accused is done to enable him to give an opportunity to explain any circumstances which have come out in the evidence against him. It may be noticed that the entire evidence is recorded in his

presence and he is given full opportunity to cross-examine each and every witness examined on the prosecution side. He is given copies of all documents which are sought to be relied on by the prosecution. Apart from all these, as part of fair trial the accused is given opportunity to give his explanation regarding the evidence adduced by the prosecution. However, it is not necessary that the entire prosecution evidence need be put to him and answers elicited from the accused. If there were circumstances in the evidence which are adverse to the accused and his explanation would help the court in evaluating the evidence properly, the court should bring the same to the notice of the accused to enable him to give any explanation or answers for such adverse circumstance in the evidence. Generally, composite questions shall not be asked to the accused bundling so many facts together. Questions must be such that any reasonable person in the position of the accused may be in a position to give rational explanation to the questions as had been asked. There shall not be failure of justice on account of an unfair trial.

15. In the instant case, the accused was not in any way prejudiced by not giving him an opportunity to answer specifically regarding the evidence of PW 1 and PW 4. If at all, the evidence of PW 1 and PW 4 was recorded in his presence, he had the opportunity to cross-examine the witnesses but he did not specifically cross-examine these two witnesses in respect of the facts deposed by them. The learned Single Judge seriously erred in holding that the evidence of PW 1 and PW 4 could not have been used against the accused. The acquittal of the accused was improper as the evidence in this case clearly established that the accused was in possession of 5 kg of opium and thereby committed the offence under Section 18 of the NDPS Act."

127. Further it is not necessary that the entire prosecution evidence need to be put to the accused and answers elicited

from him/even if an omission to bring to the attention of the accused an inculpatory material has occurred that ipso facto does not vitiate the proceedings, the accused has to show failure of justice as held in *Swaran Singh* (supra) and followed in *Harender Nath Chakraborty vs. State of West Bengal,* (2009) 2 SCC 758.

128. *Hate Singh's* case (supra) relied upon by the appellant is clearly distinguishable from the facts of the present case. In the said matter, the case of the prosecution was that two brothers Hate and Bheru fired one shot each at the deceased who received three wounds. It was opined that three wounds which could have been from a single shot. It was the consistent stand of the Bheru that he fired the shots (with double barrel), whose appeal was, therefore, dismissed in limine. While that of Hate (appellant in the said case) was that though present with a gun, he did not fire any shot (with his single barrel). That single barrel was found loaded (Article E) this fact was accepted throughout. Witnesses also saw Bheru firing the first shot. The Court held that the fact that both the brothers absconded was given much importance by the High Court and Sessions Court but were not asked to explain it at any stage.

129. *Ranvir Yadav vs. State of Bihar,* (2009) 6 SCC 595 relied upon by the appellant is also distinguishable on facts as there was no accusation specifically put in the question during examination to the accused.

Adverse Inferences Against the Accused:

130) (i) *False answers under Section 313 Cr.P.C.*

This Court has time and again held that where an accused furnishes false answers as regards proved facts, the Court ought to draw an adverse inference qua him and such an inference shall become an additional circumstance to prove the guilt of the accused. In this regard, the prosecution seeks to place reliance on the judgments of this Court in *Peresadi vs. State of U.P.,* (1957) Crl.L.J. 328, *State of M.P. vs. Ratan Lal*,

AIR 1994 SC 458 and *Anthony D'Souza vs. State of Karnataka* (2003) 1 SCC 259 where this Court has drawn an adverse inference for wrong answers given by the appellant under Section 313 Cr.P.C. In the present case, the appellant-Manu Sharma has, inter alia, has taken false pleas in reply to question nos. 50, 54, 55, 56, 57, 64, 65, 67, 72, 75 and 210 put to him under Section 313 of the Code.

(ii) *Adverse inference qua non explanation of Pistol*

Appellant/Accused – Manu Sharma was holder of a pistol .22'' bore P Berretta, made in Italy duly endorsed on his arms licence. It was his duty to have kept the same in safe custody and to explain its whereabouts. It is proved beyond reasonable doubt on record that extensive efforts were made to trace the pistol and the same could not be recovered. Moreover as per the testimony of CN Kumar, PW-43, DSP/NCRB, RK Puram there is no complaint or report of the said pistol. Thus an adverse inference has to be drawn against the accused-Manu Sharma for non-explanation of the whereabouts of the said pistol. Similarly another plea not supported by any positive evidence led by the appellant-Manu Sharma is that his pistol i.e. the weapon of offence and the arms licence was recovered from his farm house on 30.04.1999, when in fact it is an established fact that the pistol could not be recovered and that the licence was surrendered on 06.05.1999 at the time of his arrest. It defies all logic and ordinary course of conduct to allege that the prosecution has withheld the pistol after seizing the same from his farmhouse. The fact that he has failed to produce the pistol, a presumption shall arise that if he has produced it, the testing of the same would have been to his prejudice. The burden thus shifts on him.

(iii) *Adverse inference since no report of theft or loss of Tata safari CH-01-W-6535*

It is the defence of the accused-Manu Sharma that the Tata Safari was taken away on 30.04.1999 from Karnal. No report or complaint of the taking away of the vehicle or the theft of the

vehicle was ever lodged by the appellant/accused and hence an adverse inference has to be drawn against the accused on this count as well. Further the conduct of the appellant/accused in not taking any steps despite opportunity in reporting the alleged taking away of Tata Safari on 30.04.1999 and his licensed pistol on 01.05.1999 in itself is enough material to draw serious adverse inference against the accused.

(iv) *Appearance of PW-2 Shyan Munshi accompanied by Shri Ashok Bansal, Advocate*

By order dated 06.03.2000, Shri Ashok Bansal, advocate had appeared as proxy counsel for accused-Manu Sharma before the trial Court and on the same day also took copy of the report of FSL/Jaipur on behalf of accused-Manu Sharma. On 03.05.2001, PW-2, Shyan Munshi, was duly accompanied by Shri Ashok Bansal, advocate wherein he clearly says that he has come with a lawyer for his personal security. On behalf of the State, it was contended that an adverse inference against accused-Manu Sharma has to be drawn for influencing the witness. It may not be out of place to mention here that PW-2, Shyan Munshi, who is the maker of the FIR and complainant of the case, did not fully support the prosecution case though he admitted having made statement to the police and having signed the same. The stand of the State cannot be ignored, on the other hand, it is acceptable.

131. Further as per the disclosure of accused-Manu Sharma, the pistol was given to accused - Ravinder Sudan @ Titu (PO). It has been proved by the testimony of PW-37, Martin Raj and PW-49-Inspector Mahender Singh Rathi that accused, Ravinder Sudan @ Titu left the country by Gulf Airways on 04.05.1999. Accused-Manu Sharma surrendered on 06.05.1999 only after accused Ravinder Sudan @ Titu left the country. It is pointed out by the State that calls were made from PCO, Ambala and PCO Hazrat Nizamuddin which have been duly proved by the testimony of PW-36, Ram Lal Jagdev, PW-16-Raj Narain Singh, PW-17-Mohd. Jaffar. This conduct of

accused-Manu Sharma which is relevant and admissible under Section 8 of the Indian Evidence Act an adverse inference has to be drawn against Manu Sharma for this conduct.

Appeals of other accused:

132. We have already discussed the specific evidence, especially of presence at the time of incident, removal of Tata Safari, call details etc. as well as the evidence of PWs 30 and 101, for conviction under Section 201 read with Section 120-B IPC against the other two appellants, namely, Amardeep Singh Gill @ Tony Gill and Vikas Yadav. We are satisfied that the High Court, on appreciation of the relevant materials, found against them and convicted accordingly. On analysis of all the materials, we agree with their conviction and sentence.

Adverse remarks against prosecution and Trial Judge

133. The higher Courts in exercise of their appellate or original jurisdiction may find patent errors of law or fact or appreciation of evidence in the judgment which has been challenged before them. Despite this, what is of significance is that, the Courts should correct the error in judgment and not normally comment upon the judge. The possibility of taking a contrary view is part of the system. The judicial propriety and discipline demand that strictures or lacerating language should not be used by the higher Courts in exercise of their appellate or supervisory jurisdiction. Judicial discipline requires that errors of judgments should be corrected by reasons of law and practice of passing comments against the lower courts needs to be deprecated in no uncertain terms. The individuals come and go but what actually stands forever is the institution.

134. In the present case the High Court in its judgment, on the one hand, explicitly referred to certain criticism/ comments/remarks made by the trial Judge against the investigating agency, and observed that they were uncalled for and that they should have been avoided. But, on the other hand, the Division Bench itself while criticizing the reasoning in the

judgment under appeal made certain sweeping remarks against the trial Judge.

135. In this regard we are intentionally not referring to the criticism of appreciation of evidence in fact and on law, but are restricting ourselves to certain observations and comments which, in our humble opinion, are criticism of the Judge per se and could have been avoided easily by the Division Bench of the High Court. It is also desirable, that the language which may imply an allegation of suspicion in the performance of function of the Court should be carefully examined and unless it is absolutely established on record, comments should be avoided. It will be appropriate to refer to the relevant parts of the judgment in this regard:

> ".....We also find the criticism against him to be a matter of meaningless hair splitting. There is a ring of truth around the deposition of PW 30 whom we find a reliable witness. The trial Court, while dealing with this witness, has, with great respect, termed him as a 'planted witness'. This, we find, is not justified from material on record. The cursory manner in which the witness has been discarded shows a lack of proper appreciation of evidence. Once a reasonable explanation has been given by a witness for his presence at the spot, there was hardly any reason to stretch imagination to belie his presence. Merely, because he was assigned to deliver a DD entry to SI Rishi Pal which, the witness explains, he did not deliver, the explanation given is logical and ought not to have been disbelieved in this strange way of assessing the material and discarding it."
>
> Xxxx xxxx xxxx xxxx
>
> ".....The two weapon theory appears to be a concoction to the defence and a manipulation of evidence in particular that of Shyam Munshi, PW2 who, for the first time in court, introduced such a story. The very fact that the empties were

sent for examination at such a belated stage, cannot rule out the possibility of foul play to destroy the Prosecution's case during trial. We, therefore, do not think it necessary to go into further analysis of the evidence of Prem Sagar Manocha."

136. Let us examine various judgments of this Court which have persistently taken the view and discouraged observations or disparaging remarks by the higher Courts against the other Courts. In the case of *A.M. Mathur vs. Pramod Kumar Gupta & Ors.* (1990) 2 SCC 533 the Court stated the dictum that judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint , this humility of function should be constant theme of our judges. The quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect, that is respect by the judiciary. The avoidance of even the appearance of bitterness, so important in a judge, required him not to cast aspersions on the professional conduct of the appellant and that too without an opportunity for him to meet such situation. The Court set aside the disparaging remarks that had been made by the High Court against the Advocate General.

137. In the case of a judicial officer approaching this Court for expunction of disparaging remarks on his conduct made by the High Court in the matter of 'K' *A Judicial Officer* (2001) 3 SCC 54, this Court cautioned the higher courts to use the power of superintendence with great care and circumference before making remarks on unworthy conduct of an officer, his criticism or adverse remarks in relation to judicial pronouncement should be avoided. The Court held as under:

"A Subordinate Judge faced with disparaging and undeserving remarks made by a court of superior jurisdiction is not without any remedy. He may approach the High Court invoking its inherent jurisdiction seeking

expunction of objectionable remarks which jurisdiction vests in the High Court by virtue of its being a court of record and possessing inherent powers as also the power of superintendence. The view is settled by the law laid down in *Raghubir Saran (Dr) vs. State of Bihar* (1964) 2 SCR 336. However, if a similar relief is sought for against remarks or observations contained in judgment or order of the High Court the aggrieved judicial officer can, in exceptional cases, approach this Court also invoking its jurisdiction under Articles 136 and/or 142 of the Constitution."

138. In the case of *Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors.* (2004) 4 SCC 158 another Bench of this Court in unambiguous terms expressed its concern about entertaining undesirable submissions against the working of an institution and adverse observations being made in the paragraphs of the judgment. The Court noticed that High Court had made observations and remarks about persons/ constitutional bodies like NHRC who were not before it. Proceedings of the Court normally reflect the true state of affairs. Even if it is accepted, that any such submission was made, it was not proper or necessary for the High Court to refer to them in the judgment to finally state that no serious note was taken of the submissions. Avoidance of such manoeuvres would have augured well with the judicial discipline. The expunction and deletion of the contents of paragraph three of the judgment except the last limb therein is ordered and it shall be always read to have not formed part of the judgment.

139. Similarly, a three Judge Bench of this Court in the case of *Samya Sett vs. Shambhu Sarkar & Anr.* (2005) 6 SCC 767, again concerned with expunction of adverse remarks made against the Additional Sessions Judge, who was the appellant. The High Court had observed that, ignoring of directions should imply an arrogant attitude of the learned Judge and was in breach of the canons of judicial discipline and damage the judicial system. This Court has, in several

cases, deprecated the practice on the part of judges in passing strictures and in making unsavoury, undeserving, disparaging or derogatory remarks against parties, witnesses as also subordinate officers.

140. It is also worthwhile to refer to the latest judgment of this Court in the case of Parkash Singh Teji vs. Northern India Goods Transport Company Private Limited and Another, (2009) 12 SCC 577. This Court, while considering the order of the High Court, declining to expunge the adverse remarks against the appellant/judicial officer has observed

> "judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army".

Again it was pointed out,

> "A Judge tries to discharges his duties to the best of his capacity, however, sometimes is likely to err. It has to be noted that the lower judicial officers mostly work under a charged atmosphere and are constantly under psychological pressure. They do not have the benefits which are available in the higher courts. In those circumstances, remarks/observations and strictures are to be avoided particularly if the officer has no occasion to put forth his reasonings."

141. In *Alok Kumar Roy vs. Dr. S.N. Sharma* (1968) 1 SCR 813 the vacation Judge of the High Court of Assam and Nagaland passed an interim order during vacation in a petition entertainable by the Division Bench. After reopening of the Court, the matter was placed before the Division Bench presided over by the Chief Justice in accordance with the High Court Rules. The learned Chief Justice made certain remarks as to ''unholy haste and hurry'' exhibited by the learned vacation Judge in dealing with the case. When the matter reached this Court Wanchoo C.J., observed: (SCR pp 819 F-820A)

> "It is a matter of regret that the learned Chief Justice thought fit to make these remarks in his judgment against a colleague and assumed without any justification or basis that his colleague had acted improperly. Such observations even about Judges of subordinate courts with the clearest evidence of impropriety are uncalled for in a judgment. When made against a colleague they are even more open to objection. We are glad that Goswami J. did not associate himself with these remarks of the learned Chief Justice and was fair when he assumed that Dutta, J. acted as he did in his anxiety todo whdat he thought was required in the interest of justice. We wish the learned Chief Justice had equally made the same assumption and had not made these observations castigating Dutta J. for they appear to us to be without any basis. *It is necessary that judicial decorum has to be maintained at all times and even where criticism is justified it must be in language of utmost restraint, keeping always in view that the person making the comment is also fallible.*"
>
> (emphasis supplied)

142. In *State of M.P. vs. Nandlal Jaiswal* (1986) 4 SCC 566 disparaging and derogatory remarks were made by the High Court against the State Government. When the matter came up before this Court and a complaint was made against these remarks, it was observed by this Court that the remarks were ''totally unjustified and unwarranted''.

Bhagwati, C.J. stated: (SCC p.615,para 43)

> "43 We may observe in conclusion that judges should not use strong and carping language while criticizing the conduct of parties or their witnesses. They must at with sobriety, moderation and restraint. They must have the humilitytorecognise that they are not infallible and any harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and result in injustice."

"I have never known any judges, no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure, unadulterated reason. Alas! we are ''all the common growth of the *Mother Earth' — even those of us who wear the long robe"*. (emphasis supplied)

Similar was the view of Thomas Reed Powell, who said:

"Judges have preferences for social policies as you said and I. They form their judgments after the varying fashions in which you and I form ours. They have hands, organs, dimensions, senses, affections, passions. They are warmed by the same winter and summer and by the same ideas as a layman is".

"In the present case, however, as we have already noted in the earlier part of the judgment, whether the order passed by the appellant was correct or not, but the remarks made, strictures passed and directions issued by the learned Single Judge of the High Court against the appellant were improper, uncalled for and unwarranted. Apart from the fact that they were neither necessary for deciding the controversy raised before the Court nor an integral part of the judgment, in the facts and circumstances of the case, they were not justified. We, therefore, direct deletion of those remarks."

143. In line with the consistent view of this Court, we are of the considered view that the Division Bench could have avoided making such observations which directly or impliedly indicates towards impropriety in the functioning of the Court, appreciation of evidence by the learned Judge and/or any other ancillary matter. The content and merit of the judgment would have remained unaffected even if such language or comments were not made against the learned trial Judge. The respect of judiciary and for the judiciary, is of paramount consideration. Every possible effort should be made and precaution taken which will help in preservation of public faith and individual dignity. A judicial consensus would require that the judgment should be set aside or affirmed as the case may be but

preferably without offering any undesirable comments, disparaging remarks or indications which would impinge upon the dignity and respect of judicial system, actus curiae neminem gravabit. Despite exercise of such restraint, if, in a given case, the Court finds compelling reasons for making any comments in that event it will be in consonance with the basic rule of law and adherence to the principles of natural justice that view point of the concerned learned Judge should also be invited.

144. In view of our discussion supra we direct expunction of all remarks made by the Trial Judge against the prosecution and by the Division Bench against the Trial Judge.

Role of the Media and Press:

145. Mr. Ram Jethmalani, learned senior counsel for the appellant submitted that the appellant-Manu Sharma had been specifically targeted and maligned before and during the proceedings by the media, who proclaimed him as guilty despite even after his acquittal by the Trial Court. He took us through various news items that were published in English & Hindi dailies. He elaborated that *"Justice should not only be done, it should manifestly and undoubtedly be seen to be done."* This common law rule can not be ignored.

146. Cardozo, one of the great Judges of American Supreme Court in his ''Nature of the Judicial Process'' observed that the judges are subconsciously influenced by several forces. This Court has expressed a similar view in P.C. Sen In Re: AIR 1970 SC 1821 and *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express* 1988 (4) SCC 592.

147. There is danger, of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom such that it publishes photographs of the suspects or the accused before the identification parades are constituted or if the media publishes statements which out rightly hold the suspect or the accused guilty even before such an order has been passed by the Court.

148. Despite the significance of the print and electronic media in the present day, it is not only desirable but least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused in any manner whatsoever. It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial.

149. In the present case, certain articles and news items appearing in the newspapers immediately after the date of occurrence, did cause certain confusion in the mind of public as to the description and number of the actual assailants/ suspects. It is unfortunate that trial by media did, though to a very limited extent, affect the accused, but not tantamount to a prejudice which should weigh with the Court in taking any different view. The freedom of speech protected under Article 19 (1) (a) of the Constitution has to be carefully and cautiously used, so as to avoid interference in the administration of justice and leading to undesirable results in the matters sub judice before the Courts.

150. A Bench of this Court in the case of *R.K. Anand v. Delhi High Court* (2009) 8 SCC 106, clearly stated it would be a sad day for the court to employ the media for setting its own house in order and the media too would not relish the role of being the snoopers for the Court. Media should perform the acts of journalism and not as a special agency for the Court. The impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt, regardless of any verdict in a Court of law. This will not be fair. Even in the case of *M.P. Lohia v. State of W.B. & Anr.* (2005) 2 SCC 686, the Court reiterated its earlier view that freedom of speech and expression sometimes may amount to interference with the administration of justice as the articles appearing in the media could be prejudicial, this should not be permitted.

151. Presumption of innocence of an accused is a legal presumption and should not be destroyed at the very threshold through the process of media trial and that too when the investigation is pending. In that event, it will be opposed to the very basic rule of law and would impinge upon the protection granted to an accused under Article 21 of the Constitution [*Anukul Chandra Pradhan v. Union of India & Ors.* (1996) 6 SCC 354]. It is essential for the maintenance of dignity of Courts and is one of the cardinal principles of rule of law in a free democratic country, that the criticism or even the reporting particularly, in sub judice matters must be subjected to check and balances so as not to interfere with the administration of justice.

152. In the present case, various articles in the print media had appeared even during the pendency of the matter before the High Court which again gave rise to unnecessary controversies and apparently, had an effect of interfering with the administration of criminal justice. We would certainly caution all modes of media to extend their cooperation to ensure fair investigation, trial, defence of accused and non interference in the administration of justice in matters sub judice.

153. **Summary of our Conclusion:**

(1) The appellate Court has all the necessary powers to re-evaluate the evidence let in before the trial Court as well as the conclusions reached. It has a duty to specify the compelling and substantial reasons in case it reverses the order of acquittal passed by the trial Court. In the case on hand, the High Court by adhering to all the ingredients and by giving cogent and adequate reasons reversed the order of acquittal.

(2) The presence of the accused at the scene of crime is proved through the ocular testimonies of PWs 1, 2, 6, 20, 23, 24 and 70, corroborated by Ex PW 12/ D-I as well as 3 PCR calls Ex PW 11/A, B and C.

(3) Phone calls made immediately after an incident to the police constitutes an FIR only when they are not vague and cryptic. Calls purely for the reason of getting the police to the scene of crime do not necessarily constitute the FIR. In the present case, the phone calls were vague and therefore could not be registered as the FIR. The FIR was properly lodged as per the statement of Shyan Munshi PW-2.

(4) Delay in recording the statement of the witnesses do not necessarily discredit their testimonies. The court may rely on such testimonies if they are cogent and credible.

(5) The laboratory reports in the present case are vague and ambiguous and, therefore, they cannot be relied upon to reach any specific conclusion regarding the incident.

(6) The evidence regarding the actual incident, the testimonies of witnesses, the evidence connecting the vehicles and cartridges to the accused – Manu Sharma, as well as his conduct after the incident prove his guilt beyond reasonable doubt. The High Court has analyzed all the evidence and arrived at the correct conclusion.

(7) The public prosecutor is under a duty of disclosure under the Cr.P.C., Bar Council Rules and relevant principles of common law. Nevertheless, a violation of this duty does not necessarily vitiate the entire trial. A trial would only be vitiated if non-disclosure amounts to a material irregularity and causes irreversible prejudice to the accused. In the present case, no such prejudice was caused to the accused, and therefore the trial is not vitiated.

(8) No prejudice had been caused to the right of the

accused to fair trial and non-furnishing of the copy of one of the ballistic reports had not hampered the ends of justice. The right of the accused to disclosure has not received any set back in the facts and circumstances of the case.

(9) The High Court has rightly convicted the other two accused, namely, Amardeep Singh Gill @ Tony Gill and Vikas Yadav after appreciation of the evidence of PWs 30 and 101.

(10) Normally, the judgment/order should be set aside or affirmed as the case may be but preferably without offering any undesirable comments, disparaging remarks or indications which would impinge upon the dignity and respect of judicial system.

(11) Every effort should be made by the print and electronic media to ensure that the distinction between trial by media and informative media should always be maintained. Trial by media should be avoided particularly, at a stage when the suspect is entitled to the constitutional protections. Invasion of his rights is bound to be held as impermissible.

154. In the light of the above discussion, we hold that the prosecution has established its case beyond doubt against the appellants and we are in agreement with the conclusion arrived at by the High Court, consequently, all the appeals are devoid of any merit and are accordingly dismissed.

G.N. Appeals dismissed.