

Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

THE HON'BLE THE CHIEF JUSTICE SRI RAGHVENDRA SINGH CHAUHAN

AND

THE HON'BLE SRI JUSTICE ALOK KUMAR VERMA

CRIMINAL APPEAL NO.119 OF 2015

Reserved on: 21.09.2021

Delivered on: 10.11.2021

BETWEEN:

Dharmpal Singh Yadav @D.P. YadavAppellant.

And

Central Bureau of InvestigationRespondent.

Counsel for the Appellant : Mr. Surendra Singh, learned Senior
Counsel assisted by Mr. S.R.S. Gill.

Counsel for the Respondent : Mr. Sandeep Tandon, learned counsel
with Ms. Tejaswina Sagar.

The Court made the following:

JUDGMENT: (per Hon'ble The Chief Justice Sri Raghvendra Singh Chauhan)

Aggrieved by the judgment dated 10.03.2015, passed by the IIIrd Additional Sessions Judge/Special Judge (C.B.I.), Dehradun, the appellant, Dharmpal Singh Yadav @ D.P. Yadav, has filed the present appeal before this Court.

2. By the said judgment, the appellant has been convicted for offences under Section 302 read with 120-B of the Indian Penal Code (for short "the IPC"). He has been sentenced to life imprisonment. He has further been directed to pay a fine of Rs.1,00,000/-, and to further undergo a simple imprisonment of one year in default thereof. He was

further convicted for offences under Section 307 read with 120-B IPC, and sentenced to undergo ten years' rigorous imprisonment. He was directed to pay a fine of Rs.10,000/-, and to further undergo six months of simple imprisonment in default thereof. Furthermore, he has been convicted for the offences under Section 326 read with 120-B IPC, sentenced to undergo seven years rigorous imprisonment, directed to pay a fine of Rs.5,000/- and to undergo one month of additional simple imprisonment in default thereof. All the sentences were directed to run concurrently.

3. Briefly, the facts of the case are that on 13.09.1992, Anil Kumar Bhati (P.W. 39), the nephew of one of the deceased person, namely Mahendra Singh Bhati, lodged a written report (Ex. Ka-30) with the Police Station Dadri, District Ghaziabad, Uttar Pradesh, wherein he claimed that on 13.09.1992, around 6:30 PM, Mahendra Singh Bhati, the M.L.A. Dadri Constituency, Ghaziabad, received a telephonic call from Mool Chand Tiwari, Inspector C.B.C.I.D. Mool Chand Tiwari informed Mahendra Singh Bhati that his presence is required in order to record his statement for the murder of Santram. Therefore, he is directed to come to village Bhangel. Upon this information, Mahendra Singh Bhati, left in his Maruti car, along with his driver, Devendra, and his gunman, Vedram Kaushik (P.W.31), for village

Bhangel. On the way, his friend, Udai Ram Arya also got into the car, and sat in the back seat. However, as the Dadri railway crossing gate, on the way to village Bhangel, was closed, Mahendra Singh Bhati's car stopped at the railway crossing gate. According to the complainant, he and Dharamveer Singh also reached the railway crossing gate on their motorcycle. As soon as the railway crossing gate opened, around 7:00 PM, and as soon as the driver, Devendra started the car, about seven to eight unknown persons fired at the car. Consequently, both Mahendra Singh Bhati, and Udai Prakash Arya died on the spot. The gunman, Vedram Kaushik (P.W. 31), was also injured. The driver, Devendra ran away as soon as the firing was started. Near the car of Mahendra Singh Bhati, in another car, O.P. Kayal (P.W. 35) was also injured. Moreover, Dharamveer Singh, who was on his bicycle, and was standing near the railway crossing gate, he, too, was injured. O.P. Kayal (P.W. 35) was rushed to Yashoda Hospital; the gunman, Vedram Kaushik (P.W. 31), was taken to the Narendra Mohan Hospital; the bicyclist, Dhramveer Singh was carried to the District Hospital for medical treatment. After killing Mahendra Singh Bhati, the killers sat in a Maruti car, and escaped. When they were fleeing, they shouted *"try again to have Prakash Pehelwan contest the elections"*. According to the complainant, Amar Singh, Omveer Singh, Manveer Singh,

Prakash, Atar Sigh, Dharamveer Singh and others, standing at the scene of the crime, have seen the incident. Although, these eye-witnesses have recognized the assailants, due to fear that the assailants were armed, they did not try to catch hold of them.

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

5. Initially, the investigation was handed over to the S.S.I., Jagdish Singh (P.W. 21). The Investigating Officer immediately reached the scene of the crime, and recovered five empty cartridges of AK-47 rifle, and seven empty cartridges of 7.62 mm rifle. Through the recovery memo (Ex. Ka. 96), the dead bodies of Mahendra Singh Bhati, and Udai Prakash Arya were sent for post-mortem.

6. Since a sitting M.L.A., Mahendra Singh Bhati, was assassinated by unknown persons, his assassination generated sufficient heat. But as the investigation by the police was not upto the mark, on 10.08.1993, the

investigation was transferred to the Central Bureau of Investigation (for short "the CBI") by notification No.228/58/92 A.B.D..

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

8. During the course of investigation, the CBI recorded the confessional statements of Maharaj Singh and Aulad Ali under Section 15 of the TADA Act. After completing the investigation, the CBI submitted its charge-sheet not only against the present appellant, Dharmpal Singh Yadav@ D.P. Yadav, but also against the other co-accused persons, namely Karan Yadav, Tejpal Bhati, Praneet Bhati, Maharaj Singh, Pal Singh @Pala @Lakkar @Harpal Singh, Jaipal Gujjar and Aulad Ali.

9. Initially, by order dated 07.01.1996, the Special Judicial Magistrate, CBI, Dehradun, took cognizance against the accused, Dharmpal Singh Yadav, Karan Yadav, Praneet Bhati, Maharaj singh, Tejpal Bhati, Aulad Ali for offences under Section 302, 307, 326 read with 120-B IPC. The learned Special Judicial Magistrate further took cognizance

against Pal Singh @Pala @Harpal Singh, and Jaipal Gujjar for offences under Sections 302, 307, 326 IPC, and under Section 27 of the Arms Act.

10. Since the appellant was aggrieved by the said cognizance order, he filed a Criminal Miscellaneous Petition, under Section 482 of Cr.P.C., before the Hon'ble High Court of Allahabad. The Hon'ble High Court of Allahabad initially stayed the appellant's arrest. Subsequently, by order dated 22.04.2000, the Hon'ble High Court of Allahabad allowed the petition filed by the appellant, and quashed the prosecution against him.

11. Since the CBI was aggrieved by the order dated 22.04.2000, it challenged the same before the Hon'ble Supreme Court. By order dated 26.09.2001, the Hon'ble Supreme Court set aside the order dated 22.04.2000 passed by the Hon'ble High Court of Allahabad. Consequently, by order dated 30.03.2001, the Special Judicial Magistrate, CBI, Dehradun, committed the appellant's case to the Special Judge, CBI; the case was registered as Sessions Trial Case No. 48 of 2001.

12. Since the other co-accused persons were being tried under a different Session Case, by order dated 23.04.2001, the Special Court, CBI, consolidated the Session

Trial No.87 of 2000, "*C.B.I. vs. Tejpal Bhati and others*", with Session Trial No.48 of 2001, "*C.B.I. vs. D.P. Yadav*".

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

14. During the trial four co-accused persons expired, namely, Maharaj Singh, Tejpal Bhati, Jaipal Gujjar & Aulad Ali. Therefore, trial *qua* them abated. After appreciating the evidence produced by the prosecution, by a common judgment dated 10.03.2015, the learned Trial Court convicted and sentenced the present appellant as aforementioned. A number of appeals have been filed by other co-accused persons. But presently we are dealing with the appeal filed by the appellant, D.P. Yadav. The other appeals shall be decided separately.

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

A) The complaint (Ex. Ka-30) lodged by Anil Kumar Bhati (P.W. 39) is against seven or eight unknown persons. In the said complaint, Anil Kumar Bhati (P.W. 39), does not cast any suspicion either on the appellant, or on any of the other co-accused persons.

B) Although Anil Kumar Bhati (P.W. 39) claims to be an eyewitness of the incident, his complaint (Ex. Ka. 30) and his statement under Section 161, both are bereft of any concrete details. Although he claims that seven to eight persons attacked the deceased, he does not describe the features or details of the alleged assailants. He does not even mention the weapons wielded by them. This is especially surprising as the prosecution claims that an AK-47 gun was used. An AK-47 is not an ordinary firearm weapon which could be missed by an eyewitness. Moreover, he claims that the assailants left in two cars. Yet, he neither mentions the color of the cars, the company of the cars, nor the registration numbers of the car. His general and vague description of the incident, especially in which his uncle, Mahendra Singh Bhati, was allegedly killed, makes his presence at the scene of the crime suspect.

C) In his complaint (Ex. Ka-30), Anil Kumar Bhati (P.W. 39) merely states that the assailants left in “a *Maruti car*”. Since generic words, “a *Maruti car*” have been used by the complainant, from the very initial stage, the prosecution has failed to prove any link between the appellant, the car, and the alleged crime.

D) The prosecution has fabricated a false story that Mahendra Singh Bhati was killed due to a gang warfare which had erupted between the gang belonging to one, Satbir Gujjar, and another gang belonging to Mahendra Singh Fauji. The prosecution would have the Court believe that while Mahendra Singh Bhati, a sitting M.L.A. of Dadri, patronized Satbir Gujjar's gang, the appellant, D.P. Yadav, a sitting M.L.A. of Bulandshahar, patronized the gang belonging to Mahendra Singh Fauji. It is because of this gang warfare, that the appellant ensured that Mahendra Singh Bhati is killed by hired assailants. But despite the fabrication of an elaborate story, the prosecution has miserably failed to establish the basic elements of this story.

E) The prosecution has also claimed a political rivalry between the deceased, Mahendra Singh Bhati, and the appellant, which has motivated the latter to get rid of the former. But even this claim is unsupported by the prosecution witnesses. For, Sameer Bhati (P. W. 32), the son of the deceased, and Anil Kumar Bhati (P. W. 39), the nephew of the deceased and the complainant in this case, are totally silent about a political rivalry between the deceased and the appellant. Narayan Yadav (P. W. 37) has mentioned the political rivalry, but only in his second statement (Ex. Ka 114) recorded under Section 161 Cr. P. C. However, during the

trial, Narayan Yadav (P. W. 37) turned hostile. Thus, in his testimony he is silent about any political rivalry between the two.

F) For convicting the appellant, the learned Trial Court has relied on three pieces of evidence, namely (a) the statement of Narayan Yadav (P.W. 37) (Ex. Ka. 114) given under Section 161 of the Code of Criminal Procedure (for short "the Cr.P.C."), wherein he had claimed that Karan Yadav, one of the co-accused persons, had told him that the white Maruti car, which was the getaway car, was given to him by the appellant; (b) on 15.07.1996, Pala @Pal Singh @Lakkar @Harpal Singh had made a disclosure statement (Ex. Ka. 113) before the police, under Section 27 of the Evidence Act, wherein he had claimed that the car used for committing the crime was supplied by the appellant to Karan Yadav, another co-accused person; (c) the learned Trial Court has believed the prosecution that the alleged murder of Mahendra Singh Bhati is the result of a gang warfare which had erupted between the gangs of Satbir Gujjar, and Mahendra Singh Fauji. It has further believed that while the deceased, Mahendra Singh Bhati had patronized Satbir Gujjar's gang, the appellant, had patronized Mahendra Singh Fauji's gang.

G) The learned Trial Court has erred in relying on the statement (Ex. Ka. 114) of Narayan Yadav (P.W. 37) given under Section 161 of Cr. P. C. For, Narayan Yadav (P.W. 37) has turned hostile during the course of trial. According to the learned Senior Counsel, a statement under Section 161 of Cr. P. C. is not a substantive piece of evidence. The statement under Section 161 of Cr. P. C. has a limited function, i.e. only to contradict or to discredit the trustworthiness of a witness. Therefore, the said statement (Ex. Ka. 114) under Section 161 of Cr. P. C. cannot be treated as a substantive piece of evidence. In order to buttress this plea, the learned Senior Counsel has relied upon the cases of ***Tahsildar Singh vs. State of U.P. [AIR 1959 SC 1012]***, and ***V.K. Mishra & another vs. State of Uttarakhand [AIR 2015 SC 3043]***.

He has further pleaded that the statement under Section 161 of Cr. P. C. cannot be used to convict the accused. In order to buttress this plea, the learned Senior Counsel has relied upon the case of ***Virendra Singh vs. State of Haryana [AIR 2017 SC 1228]***. Hence, according to the learned Senior Counsel, the learned Trial Court has erred in convicting the appellant on the basis of the statement (Ex. Ka. 114) given by Narayan Yadav (P.W. 37) under Section 161 of Cr. P. C.

H) In fact, according to the case diary, the statements of Narayan Yadav (P.W. 37) were recorded twice by the CBI. Initially, his statement was recorded on 26.08.1994 (Ex. Ka-103). In this statement, Narayan Yadav (P.W. 37) nowhere mentions either about the white Maruti car, or about any extra-judicial confession made by Karan Yadav to him. It is only in his second statement (Ex. Ka-114), recorded on 16.08.1996, i.e. almost after two years, he mentions about the alleged extra-judicial confession made by Karan Yadav, wherein he was informed by Karan Yadav that it is D.P. Yadav who had given him the car for "*a big job*". According to the learned Senior Counsel, since the first statement (Ex. Ka.103) given by Narayan Yadav (P.W. 37) under Section 161 of Cr. P. C., is silent on the alleged extra-judicial confession of Karan Yadav, and it is introduced only in the second statement (Ex. Ka. 114) recorded on 16.08.1996, therefore, it is a story concocted by the investigating agency. Hence, the second statement (ex. Ka. 114), recorded almost after two years, is highly suspect. Therefore, the said statement (Ex. Ka. 114) could not have been relied upon by the learned Trial Court in order to convict the appellant.

I) The learned Trial Court has mis-read the evidence on record. Despite the fact that Narayan Yadav (P.W. 37), in his examination-in-chief, does not say that Pala @Pal Singh, or Karan Yadav told him that it is the appellant, who had

given the car to the assailants, in paragraph 156 of the judgment, the learned Trial Court claims that Narayan Yadav (P.W. 37) in his testimony revealed the fact that Pala @Pal Singh had told him that the appellant had given the car to the assailants. But, in fact, no such statement has been made by Narayan Yadav (P.W. 37), in his examination-in-chief.

J) The prosecution has used “*a white Maruti car*”, the getaway car, as a linking evidence in order to establish and to prove the involvement of the appellant in a criminal conspiracy to get rid of the deceased, Mahendra Singh Bhati. However, the prosecution case is replete with contradictions about the use of a white Maruti car in the commission of crime: (i) For, all the eyewitnesses, namely Vedram (P.W. 31), D.N. Singhaniya (P.W. 33), Om Prakash Kayal (P.W. 35), and Anil Kumar Bhati (P.W. 39), the complainant, make an omnibus statement that they saw the assailants leave in “*a car*”. None of these eyewitnesses claim that the assailants left in “*a white Maruti car*”; (ii) according to Ms. Meenakshi Saini (P.W. 17), the said white Maruti car was registered in the name of one Kunal Kapoor. Yet, the prosecution has failed to examine Kunal Kapoor as a witness. Further, the prosecution has failed to prove that the appellant had bought the car from Kunal Kapoor. Furthermore, the prosecution has failed to prove that the car was ever seen by any of the

witnesses, either in the possession of the appellant, or in the possession of the co-accused, Karan Yadav. Therefore, the prosecution has singularly failed to link the car to the appellant. Similarly, it has failed to prove the use of the car in the commission of crime. (iii) Even the disclosure statement of Pala @Pal Singh, recorded under Section 27 of the Indian Evidence Act, wherein he claimed that the car used for the commission of crime was given to him by the appellant, the said part of the statement cannot be read against the appellant. Therefore, the learned Trial Court has mis-applied himself in reading the said portion of the statement of Pala @Pal Singh against the appellant. Relying on the case of ***Pulukuri Kotayya vs. King Emperor [AIR 1947 PC 67]***, the learned Senior Counsel had pleaded that the past use, or the past history of the object is inadmissible piece of evidence. He has further relied on the case of ***Asar Mohd. & others vs. State of U.P. [AIR 2018 SC 5264]*** in order to explain the scope and ambit of Section 27 of the Indian Evidence Act. The learned Senior Counsel has further relied on the case ***Salim Akhtar @Mota vs. State of U.P. [AIR 2003 SC 4076]*** in order to buttress his plea that the part of the statement which reveals that the car was given by the appellant cannot be used against the appellant. Therefore, the finding of the learned Trial Court, on the basis of the statement made by Pala @Pal Singh, under Section 27 of the

Indian Evidence Act, or the finding of the learned Trial Court on the basis of Narayan Yadav's statement (Ex. Ka. 114) given under Section 161 of Cr.P.C., is wholly erroneous.

K) The prosecution has miserably failed to establish the motive for the appellant to allegedly hire assailants for killing Mahendra Singh Bhati. For, the prosecution has failed to bring on record any animosity, or any conflict of interest, or any political rivalry between the two. In fact, the prosecution has miserably failed to establish that the deceased and the appellant had ever met. Although, the prosecution has relied upon a series of FIRs' and criminal cases wherein persons belonging to the gang of Mahendra Singh Fauji, and Satbir Gujjar were involved, but in all the cases, where the appellant was an accused, he has not even been charge-sheeted. Therefore, the lack of motive casts a shadow of doubt over the prosecution story.

L) The learned Trial Court has erred in culling out the motive from the complaint. For, an FIR cannot be read as a substantive piece of evidence. Further, the FIR can be used only for the limited purpose of contradicting or corroborating the complainant. In fact, Anil Kumar Bhati (P.W. 39) does not repeat the facts mentioned in the FIR. Moreover, even Sameer Bhati (P.W. 32), the son of the deceased, does not mention any animosity between his father and the appellant.

Furthermore, even Jagdish Singh Yadav (P.W. 36), the first I.O., does not mention about any animosity between the deceased and the appellant. Therefore, the learned Trial Court has erred in concluding that the appellant has a strong motive for getting rid of the deceased.

Even if for the sake of argument, it were accepted that the appellant did have a motive for getting rid of the deceased, even then motive does not necessarily prove the existence of a conspiracy. In order to support this plea, the learned Senior Counsel had relied upon the case of ***State of M.P. & others vs. Paltan Mahhal & others [(2005) 3 SCC 169]***. He has further relied upon the case of ***State vs. Nalini [(1999) 5 SCC 253]*** in order to delineate as to what evidence would prove the existence of conspiracy.

M) Relying on the case of ***Sampath Kumar vs. Inspector of Police, Krishnagiri [AIR 2012 SC 1249]***, the learned Senior Counsel has pleaded that, at best, motive raises a strong suspicion against the appellant. But a suspicion, no matter how strong, cannot take the place of proof. Hence, according to the learned Senior Counsel, the prosecution has miserably failed to prove its case to the hilt against the appellant. Thus, the appellant deserved to be acquitted.

N) The prosecution has intentionally withheld certain material witnesses from the trial court. Despite the fact that according to the prosecution, Dharmveer was an injured eye-witness, he has not been examined as a witness during the trial. Moreover, according to the complainant, there were large number of eyewitnesses whom he has named in the FIR; yet none of them have been examined as a prosecution witness. Further, even Dharamveer Singh, who was with the complainant at the time of the alleged incident, even he has not been produced as a witness. Therefore, an adverse inference should be drawn against the prosecution.

16. On the other hand, Sandeep Tandon, the learned counsel for the CBI, has raised the following counter-contentions:

Firstly, during the relevant time, there were two gangs working in the area, namely one belonging to Satbir Gujjar, and the other belonging to Mahendra Singh Fauji. While the deceased patronized the former gang, the appellant sided with the latter gang. Both the gangs were engaged in a series of gang warfare, as they wanted to eliminate the members of the other gang. The existence of gang warfare in the area is evident from the fact that a large number of criminal cases were registered for murder of members of each other gang: Crime Case No. 372/90 was registered at Police Station Loni

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

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

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

Similarly, Crime Case No. 38/93, was registered at Police Station Bisrakh, Ghaziabad, against D. P. Yadav, Maharaj Singh, Ram Pradhan, Jitendra, Karan Yadav and Pal Singh. In this case Prakash Pehlwan, Jaiveer, Gurmeet Singh, Ram Prakash, members of the Satbir Gujar's gang were

injured by D. P. Yadav and other co-accused persons in the present case.

Moreover, FIR No. 134/96 was registered at Police Station Pahewa, for offence under Section 307 IPC, and for offences under Sections 25, 54, and 59 Arms Act, against Pal Singh, who is a co-accused in the present case.

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

Further, according to Udaiveer Singh (P.W. 13) in Crime No. 647/92, D. P. Yadav's brother-in-law was killed and D. P. Yadav's sister was injured. The crime was committed by members belonging to the Satbir Gujjar's gang. Therefore, the appellant had a strong motive for killing the deceased.

Secondly, in order to eliminate the deceased, Mahendra Singh Bhati, the appellant had bought a white Maruti Car, the getaway car in this case. This car was given by the appellant to the other co-accused, Karan Yadav. This white Maruti Car was used by the two assailants for escaping from the scene of the crime. The fact that the car was given by the appellant to

the assailant is clear from the statement (Ex. Ka. 114) of Narayan Yadav (P. W. 37), and from Pal Singh's disclosure statement (Ex. Ka 113), given to the police. In his supplementary statement given under S. 161 Cr. P. C. (Ex. Ka. 114), Narayan Yadav (P.W. 37), has stated that Karan Yadav told him that the car used in the commission of the crime was given by D. P. Yadav to him for a "big job".

Further, even Pala @ Pal Singh, a co-accused, in his disclosure statement, (Ex. Ka. 113) revealed that the white Maruti car was given to him by the appellant. Hence, it is crystal clear that the appellant was not only the mastermind of the murder, but was also the one who gave the getaway car to the assailants. Hence, the prosecution has succeeded in proving the existence of a criminal conspiracy for committing the murder of Mahendra Singh Bhati. Thus, his involvement in the alleged heinous crime is well established by the prosecution.

17. In rejoinder, Surendra Singh, the learned Senior Counsel, submits that the theory of gang war is not only a concocted story, but is also belied by the facts. For, in FIR No. 372 of 1990, the appellant is not even an accused. Therefore, the appellant is unconnected with the alleged crime committed in the said case.

Even the facts of FIR No. 251 of 1991 have been misread by the learned Trial Court. In that case, the name of the accused is "*Braham Pal Singh*", not "*Dharam Pal Singh*". Therefore, the conclusion drawn by the learned Trial Court that "*Dharam Pal Singh is an accused in the said case*" is belied by the record itself.

Similarly, in Crime No. 647 of 1992 again, the appellant is not named as an accused. Therefore, he is unconnected with the said case.

Interestingly, in FIR No. 38 of 1993, although the appellant was named, no charge-sheet was filed against him. Therefore, the appellant is again unconnected with this case.

Even in FIR No. 134 of 1996, where Pala alias Pal Singh was an accused, even he has been acquitted in the said case. The appellant has no connection with the said case.

Therefore, there is nothing to establish the fact that the appellant is patronizing, or is connected with the gang of Mahendra Singh Fauji. Hence, the story of the gang warfare is unsupported by the very evidence produced by the prosecution.

18. Heard the learned counsel for the parties, perused the impugned order, and examined the record of the case.

19. The complainant, Anil Bhati (P.W. 39), the nephew of the deceased, informs the Trial Court that on 13.09.1992, he was at the house of Mahendra Singh Bhati. Mahendra Singh's son informed him that there is a telephone call from CID Inspector, who would like him to go to Village Bhangel. Therefore, Mahendra Singh Bhati left in his car. On the way, the car stopped at the railway crossing gate. According to him, he also followed Mr. Bhati on his motorcycle immediately after he left the house. He also stopped the motorcycle at the railway crossing gate. According to him, only two persons shot at Mahendra Singh Bhati's car. While one was aged less than 30 to 35 years' old and was about six feet tall, the other was about 30 to 35 years' old, but was a short man, who was about 5 to 5 feet 5 inches tall. Both these persons got into "a Car" and drove away towards Dadri. According to him, after the incident, he went to the Police Station Dadri. He dictated the entire story to Narendra Bhati (P.W.10) and got the complaint (Ex.Ka.30) written through him. Thereafter, they gave it to the Police Station. In his examination-in-chief, he admits that he does not remember the assailants as it has been a long time.

20. In his cross-examination, he is confronted with his statement recorded under Section 161 Cr. P. C. For, in his statement recorded under Section 161 Cr. P. C., he had

claimed that Mr. Bhati was attacked by seven to eight persons, whereas in his examination-in-chief, he claims that only two persons attacked Mr. Bhati. Moreover, he admitted in his cross-examination that this is the first time that he has revealed the age and height of the two assailants.

21. Interestingly, this witness has changed his stand from what he had dictated in the complaint to what he has stated in the Court. In the FIR, he claims that seven to eight persons had attacked Mr. Bhati. But in his examination-in-chief, he claims that only two persons had attacked Mr. Bhati. Most interestingly, in both the FIR and in his examination-in-chief, he claims that both the persons fled from the scene of the crime in “a car”. He neither describes the make of the car, nor the color of the car, nor the registration number of the car. Moreover, in his complaint and in his statement under Section 161 Cr. P. C., he claims that the assailants had shouted “*try now to get Prakash Pehelwan to run an election.*” Thereby, he had given the motive for the alleged murder. Yet, in his testimony, he is silent about the motive. This is an omission amounting to contradiction. But the fact that he changes the number of assailants from seven to eight to only two, the fact that he is silent about what the assailants may have said at the time of commission of crime, casts a shadow of doubt on the veracity of his testimony. It

also makes it doubtful whether the complaint is actually an eye-witness, or not? For, in his testimony, he admits that he does not remember if the assailants fled towards Dadri, or Surajpur. Curiously, considering the fact that this witness claims to be a stranger to the assailants, the accused persons have never been subjected to the Test Identification Parade. The complainant, in fact, fails to recognize the assailants even in the Court. Most importantly, this witness does not utter a single word about the involvement of the appellant in the alleged crime. Thus, this witness does not help the prosecution in linking the appellant to the alleged crime.

22. Sameer Bhati (P.W. 32) is the son of the deceased. In his examination-in-chief, he states that *"Mahendra Singh Bhati was his father. He was killed on 13.09.1992. At the time of his death, his father was the MLA from Dadri constituency. At that time, he was a member of Janta Dal."* He further claims that on 13.09.1992, Ajit Singh Tomar, who was the Pradhan of Village Rohilapur, called his father on the telephone. He informed his father that the C. B. CID Inspector would like to speak to him. Therefore, his father left for Bhangel village. According to him, his father left in his car, along with his driver and the gunman. But as he himself was unwell, he went to his family doctor. His sister informed him about the fact that their father has been killed at Dadri

Railway Station Crossing, while he was at the doctor. He immediately rushed to the scene of the crime, where he noticed that his father and Udai Prakash Arya were lying in the back seat. He also noticed that his father's gunman was injured, and was lying outside the car. Therefore, Mr. Bhati, Udai Prakash Arya, and the injured gunman were immediately rushed to the Bhagwati Nursing Home. He further claims that his father was threatened by few people also, against whom his father had written to the police.

23. Interestingly, even this witness, who happens to be the son of the deceased, does not mention anything about any animosity, or political rivalry between the deceased, his father, and the appellant. Even when he claims that his father was threatened by "a few persons", even then, he does not mention the appellant.

24. Since the eye-witnesses, namely, Raj Kumar (P.W.7), Head Constable Vedram Kaushik (P.W. 31), D.N. Singhaniya (P.W.33), Om Prakash Kayal (P.W.35), and Anil Bhati (P.W.39), have not stated anything about the involvement of the appellant in the alleged crime, this Court need not reproduce their testimonies. Moreover, since it is an admitted fact that Mahendra Singh Bhati died a homicidal death, this point is not being discussed. The main issue

before this Court is whether the appellant was involved in the alleged murder of Mahendra Singh Bhati or not?

25. The Prosecution has given three reasons for animosity to exist between the appellant and the deceased: firstly, both the appellant and the deceased patronized two different and warring gangs, as mentioned above. Secondly, there was political rivalry between the two, both being sitting MLAs belonging to different political parties. Thirdly, the members of the Satbir Gujjar's gang had killed the appellant's brother-in-law and had injured his sister, for which Case No. 647/92 was registered.

26. In order to prove the gang warfare between the two gangs, the prosecution has produced Udaiveer Singh (P.W.13). In his examination-in-chief, he states that between 1982 and 1995, he was an Inspector with the CBI at Meerut. He further states that Crime No. 372 of 1990 dealt with the death of six persons, namely, Shakir Ali, Sajan Sah, Mehar Seen, Ajmeri, Braham Singh and Faiju. According to him, the accused persons were Satvir, Kalu Ram Rana, Mehar Gujjar, Ashok, Anil, Madan Mohan alias Pappu, Neeraj, Onkar Singh, Vikray Ran Pal, Lokesh and Benga Nai. According to him, a charge-sheet was filed against all these accused persons. However, in this case, the appellant was never named as an

accused. Therefore, this case is totally unrelated to the appellant.

27. This witness has also stated about Crime Case No. 647 of 1992, which was registered at Police Station Kavi Nagar. According to this witness, in this case, Kamal Ram Yadav was killed, and his wife, Mrs. Satyawati, who happens to be the sister of the appellant, was injured. In this case, Prakash Pehalwan, Prakash Gujjar, Satyavir Gujjar, Maan Singh and Satyapal were the accused. A charge-sheet had been filed against all these persons. However, admittedly, this crime was registered after the deceased in the present case was killed. Therefore, even this case does not form the basis of any motive for killing the deceased, Mahendra Singh Bhati. The prosecution has emphasized on this case in order to stress-upon the fact that in this case, the appellant's sister Satyawati had gotten injured. Moreover, in this case the accused persons allegedly belonged to Satbir Gujjar's gang. However, admittedly, this case was registered after the alleged murder of Mahendra Singh Bhati. Therefore, the injury caused to the appellant's sister cannot form the basis for the killing of the deceased, Mahendra Singh Bhati.

28. Similarly, Manoj Kumar Kaushik (P.W.12), has been examined to testify about FIR No. 251 of 1991, which was registered at Police Station Bhopa, Muzaffarnagar. According

to him, in this case, Shobha Ram Yadav and Shahda Hassan were killed. In this case, the accused were Bhrampal Singh, Doctor Prem Pal, Sahendra, Jaipal, Ajit, and Teetu. According to him, the accused persons belonged to the Mahendra Fauji gang. Moreover, during the investigation, it was discovered that Shobha Ram Yadav was related to Satbir Gujjar's gang. According to this witness, there is a rivalry between Satbir Gujjar's gang and Mahendra Fauji's gang.

29. However, even the testimony of this witness does not connect the appellant to the alleged crime in the present case. For, this witness nowhere states that the appellant has any connection with Mahendra Singh Fauji's gang. Moreover, the appellant's name is nowhere revealed in FIR No. 251 of 1991. Instead, it is the name of "Bhraham Pal Singh", which has incorrectly been read by the learned Trial Court as "Dharam Pal Singh". Therefore, the learned Trial Court has misread the evidence readily available on record. Furthermore, the learned Trial Court has failed to notice that even this FIR does not relate to the appellant.

30. Lastly, Mamchand, Inspector (P.W. 27), has been examined by the prosecution to testify about FIR No. 134 of 1996, which was recorded at Police Station-Pehwa against Pala alias Pala Singh, a co-accused in the present case. In his examination-in-chief, he states that on 18.06.1996, he

was posted as SHO, Sub-Inspector of Police Station Pehwa. On that day, they received a secret information about the presence of Pala Singh, and Jaipal Singh sleeping outside the house of Jassa Singh in Village-Pehwa. He further claims that after the police surrounded the said house, they recovered an AK-47 from Pala Singh. He further claims that FIR No. 134 of 1996 was registered against Pala Singh. However, even this FIR is unconnected to the appellant. For, the appellant is not accused in this case.

31. A bare perusal of these facts clearly reveals that although the prosecution has tried to weave a story of a gang warfare, and has tried to project the appellant as supporting the gang of Mahendra Singh Fauji, but there is not an iota of convincing evidence to establish this fact. For, none of the police witnesses, Manoj Kumar Kaushik (P.W.12), or Udaiveer Singh (P.W.13), mention the fact that the appellant is supporting Mahendra Singh Fauji's gang. Manoj Kumar Kaushik (P.W.12) merely states that there is a great rivalry between Satbir Gujjar's gang and Mahendra Singh Fauji's gang. Hence, there is lack of linking evidence to connect the appellant with the Mahendra Singh Fauji's gang.

32. Moreover, neither Sameer Bhati (P.W. 32), the son of the deceased, nor Anil Bhati (P.W. 39), the complainant, claims that there was any political rivalry between the

deceased and the appellant. If there were any rivalry or any animosity, surely Sameer Bhati (P.W.32), the son of the deceased, would have deposed about this fact. His silence on this aspect speaks volumes about the fact that there was no rivalry that existed between the deceased and the appellant. Furthermore, although Sameer Bhati (P.W.32), claims in his testimony that his father was threatened by “some people”, even then he does not name the appellant. Furthermore, he nowhere states that his father is being threatened by the gang members of Mahendra Singh Fauji. Therefore, all these evidences, impressive as they may appear in the first glance, after a critical analysis fall apart. Hence, the learned Trial Court is legally unjustified in concluding that the appellant had any motive for getting rid of the deceased, Mahendra Singh Bhati.

33. Narain Yadav (P.W. 37) is the owner of Shiv Farm House. His statement under Section 161 Cr. P. C. were recorded by the CBI on two occasions: firstly, on 26.08.1994, and secondly on 16.08.1996. Thus, there is a long gap of almost two years. Narain Yadav (P. W. 37) was examined by the prosecution in order to establish the fact that there is an intimate connection between the appellant, and the other co-accused persons, namely Karan Yadav, Pala alias Pal Singh, Jaipal Gujar and Maharaj Singh. However, this witness

turned hostile during the trial. Nonetheless, the learned Trial Court has read the second statement (Ex. Ka. 114) given by Narain Yadav (P.W. 37) under Section 161 Cr. P. C. on 16.08.1996 in order to convict the appellant.

34. Mr. Surendra Singh, the learned Senior Counsel, has vehemently challenged the use of the statement (Ex. Ka. 114) of Narain Yadav (P.W.37) given under Section 161 Cr. P. C. for convicting the appellant. Therefore, the issue before this Court is whether a statement given under Section 161 Cr. P. C. can be used for convicting an accused, or not?

35. In the locus classicus case of **Tahsildar Singh and another** (supra), the Constitution Bench of the Hon'ble Apex Court had elaborately discussed the scope, ambit and use of a statement given under Section 161 Cr. P. C.

The Apex Court had finally concluded as under:-

From the foregoing discussion the following propositions emerge: (1) A statement in writing made by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness-box and for no other purpose; (2) statements not reduced to writing by the police officer cannot be used for contradiction; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases: (i) when a recital is necessarily implied from the recital or recitals found in the statement ; illustration: in the recorded statement before the police the witness states that he

saw A stabbing B at a particular point of time, but in the witness-box he says that he saw A and C stabbing B at the same point of time; in the statement before the police the word " only " can be implied, i.e., the witness saw A only stabbing B; (ii) a negative aspect of a positive recital in a statement; illustration: in the recorded statement before the police the witness says that a dark man stabbed B, but in the witness-box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion; and (iii) when the statement before the police and that before the Court cannot stand together; illustration: the witness says in the recorded statement before the police that A after stabbing B ran away by a northern lane, but in the Court he says that immediately after stabbing he ran away towards the southern lane; as he could not have run away immediately after the stabbing, i.e., at the same point of time, towards the northern lane as well as towards the southern lane, if one statement is true, the other must necessarily be false.

According to the Hon'ble Apex Court, the said statement can be used "*only to contradict the witness and for no other purpose*".

36. In the case of **V.K. Mishra and Another** (supra), the Hon'ble Supreme Court has elaborately discussed the interrelation between Section 161 Cr. P. C. and Section 162 Cr. P. C. as under:-

14. Section 161 Cr. P. C. titled "*Examination of witnesses by police*" provides for oral examination of a person by any investigating officer when such person is supposed to be acquainted with the facts and circumstances of the case. The purpose for and the manner in which the police statement recorded under Section 161 Cr.P.C can be used at any trial are

indicated in Section 162 Cr. P. C. Section 162 Cr. P. C. reads as under:

162. Statements to police not to be signed—Use of statements in evidence.—(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act.

Explanation.- An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

15. Section 162 Cr. P. C. bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police under Section 161(1) Cr. P. C. can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso

to Section 162 (1) Cr. P. C. The statements under Section 161 Cr. P. C. recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose:- (i) of contradicting such witness by an accused under Section 145 of Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court and (iii) the re-examination of the witness if necessary.

16. Court cannot suo moto make use of statements to police not proved and ask question with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 Cr. P. C. "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. Statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of Evidence Act that is by drawing attention to the parts intended for contradiction.

17. Section 145 of the Evidence Act reads as under:

145. Cross-examination as to previous statements in writing.- A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

18. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect

in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo moto make use of statements to police not proved in compliance with Section 145 of Evidence Act that is, by drawing attention to the parts intended for contradiction.

37. Thus, Section 162 Cr. P. C. permits the use of a statement made under Section 161 Cr. P. C. for an extremely limited purpose, namely for contradicting the maker of the statement on what he has stated during the investigation as laid down in the proviso to Section 162 (1) Cr. P. C. read with Section 145 of the Evidence Act. Therefore, the said statement can be used by the accused to contradict the witness; secondly, with the permission of the Court by the prosecution to contradict the witness provided by Section 145 of the Indian Evidence Act. Thirdly, the said statement can also be used for re-examination of such witness in order to explain any matter referred to in his cross-examination.

However, the statement made under Section 161 Cr. P. C. cannot be used to convict an accused.

38. In fact, in the case of **Virendra Singh** (supra) the Hon'ble Supreme Court has further opined that "*PW-12, having been discredited by the prosecution and she having been contradicted with reference to her previous statements recorded under Section 161 Cr. P. C, as required under Section 145 of the Evidence Act, no part of the testimony of PW-12 can be taken into account for determining the culpability of the accused-appellant. The statements made by her in the course of her investigation and recorded under Section 161 Cr.P.C. do not constitute evidence that can be relied upon by a Court to convict an accused.*"

(Emphasis added)

39. The learned Judge has relied on the case of **Bhagwan Das vs. State of Delhi [(2011) 6 SCC 396]** in order to cull out the principle that because the witness turned hostile during the trial, and the said witness was confronted by her / his statement recorded under Section 161 Cr. P. C., the statement can be used as an evidence. Therefore, an accused can be convicted on the basis of the statement recorded under Section 161 Cr.P.C. Having extracted this principle from the said judgment, the learned trial Court has proceeded to read the second statement (Ex. Ka. 114) of

Narain Yadav (P.W. 37) given under Section 161 Cr. P. C. However, while doing so, the learned Trial Court has committed three errors: firstly, it has ignored the proviso to Section 162 Cr. P. C. which clearly prescribes the limited purpose for which a statement recorded under Section 161 Cr. P. C. can be used. Secondly it has ignored the settled principles of law as annunciated by the Hon'ble Supreme Court in catena of cases—some of which have been mentioned above. Thirdly, it has ignored the rules of precedent.

Rules of precedent play a pivotal role in maintaining consistency and certainty in the development of law. There has to be harmony in the interpretation and development of law. If rules of precedent were to be ignored, it would unnecessarily lead to cacophony in law. Thus, judicial discipline demands and dictates that rules of precedent should be adhered to both in spirit and in letter. **[Ref. to Shah Faesal v Union of India, (2020) 4 SCC 1]**

While relying on the case of **Bhagwan Das** (supra), the learned Trial Court should have kept in mind the principle annunciated in the case of **Tahsildaar Singh** (supra). For the latter decision was not only one of the earliest decision on the scope and use of statement recorded under Section 161 Cr. P. C., but was also a decision by a learned Constitution

Bench. Thus, the said decision was binding on the learned Division Bench which decided the case of Bhagwan Das (supra). Further, while the case of Bhagwan Das (supra) was decided by a learned Division Bench, the case of V. K. Mishra (supra) was decided by a learned Full Bench of the Hon'ble Supreme Court. Hence, the learned Trial Court should have adhered to the principles of law as annunciated by the learned Constitution Bench in the case of **Tahasildar Singh** (supra) and by the learned Full Bench in the case of **V. K. Mishra and Ano** (supra).

Thus, the learned Trial Court has mis-applied the law while using the second statement (Ex. Ka. 114) given by Narayan Yadav (P. W. 37) in order to convict the appellant.

40. The third piece of evidence used by the learned Trial Court for convicting the appellant is the disclosure statement (Ex. Ka.113) made by Pala @ Pal Singh @ Lakkad alias Harpal Singh. His statement (Ex. Ka. 113) is as under:-

The white Maruti car, which was given by D.P. Yadav, MLA Bulandshahr, and his relative Karan Yadav, was given to me, Jaipal Gujjar and Maharaj Singh in June, 1992. In order to use this car to commit the murder, I had gotten this car serviced at Gurgaon at the Maruti Car Service Station near the Court prior to the murder and I had gotten this car serviced in the name of Harpal Singh. The car was serviced in the first week of September, 1992. I can take you to Gurgaon and identify the Service Station near the Court.

The said disclosure statement (Ex. Ka. 113) was given by Pala Singh on 15.07.1996.

41. The learned Trial Court has relied upon the said disclosure statement (Ex. Ka. 113) in order to conclude that the white Maruti car, which was used as a get-away car, was given by the appellant to the alleged assailants. Hence, the appellant and the other co-accused persons had entered into a criminal conspiracy to commit the murder of Mahendra Singh Bhati. Therefore, the appellant has been convicted for offences under Section 302 read with Section 120B IPC.

42. However, the issue before this Court is whether the disclosure statement (Ex. Ka. 113) given by Pala Singh that the car was provided by the appellant and was used for commission of the crime can be read against the appellant or not?

43. It is, indeed, trite to state that Sections 24 to 27 of the Evidence Act deal with the statement made by an accused before the police. While Section 24 of the Evidence Act states that *“a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, as having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give*

the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”

Section 25 of the Evidence Act places a blanket ban on the use of any statement made by the accused before the police against the said accused. Section 26 of the Evidence Act permits the use of a statement provided it is made before a Magistrate, even if at the moment, the accused may be in the police custody.

Section 27 of the Evidence Act is as under:-

27. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

44. In the famous case of **Pulukuri Kottaya and others** (supra), the Hon'ble Privy Council had elaborately dealt with the scope and ambit of Section 27 of the Evidence Act. It had opined as under:-

9. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any

offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to Section 26, added by Section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the

discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

45. In the case of **Mohd. Inayat vs. State of Maharashtra, (1976) 1 SCC 828**, the Hon'ble Apex Court opined that "*the expression 'provided that' together with the phrase 'whether it amounts to a confession or not' show that the Section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this Section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only 'so much of the information' as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded."* (Emphasis added)

46. In the case of **Salim Akhtar alias Mota** (supra), the Apex Court has clearly opined as under:-

So far as the disclosure statement of the appellant is concerned, the same was admittedly made to police personnel and only that part of the statement would be admissible which is permissible under Section 27 of the Evidence Act. The scope of this provision was explained by the Privy Council in the well known case of Pulukuri Kottaya and Ors. v. Emperor, AIR (1947) PC 67, wherein it was held that it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to this fact. Information as to the past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Therefore, what is admissible is the place from where the polythene bag containing pistol and other articles was allegedly recovered. The fact that some terrorist organisation had given the pistol and other articles to the appellant or its use would not be admissible.

47. Therefore, only the part of statement of Pal Singh given under Section 27 of the Evidence Act, where he claims that he had taken the car for service in the first week of September, 1992 to the Service Station located near the Court in Ghaziabad, and the fact that he can identify the said Service Station can be used against Pal Singh. However, the previous history of the car, or its usage in the alleged offence, cannot be read against the appellant. Therefore, the learned Trial Court has mis-applied the law while reading a part of Pal Singh's disclosure statement as convincing evidence against the appellant.

48. The last issue before this Court is whether the prosecution has succeeded in establishing the offence under Section 120-B of IPC against the appellant or not?

49. Section 120-B of the IPC reads as under:

120B. Punishment of criminal conspiracy.—

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 2[imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

50. The essential ingredients of criminal conspiracy as per judicial dicta are: i) an agreement between two or more persons, ii) agreement must relate to doing or causing to be done either (a) an illegal act, or (b) an act which is not illegal in itself but is done by illegal means.

51. In the case of **State v Nalini [(1999) 5 SCC 253]** the Hon'ble Supreme Court has laid down the principles governing a case of criminal conspiracy in the following terms:

Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.

1. Under [Section 120A](#) IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be

done an illegal act or legal act by illegal means. When it is legal act by illegal means overt act is necessary. Offence of criminal conspiracy is exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused had the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever, horrendous it may be, that offence be committed.

2. Acts subsequent to the achieving of object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.

3. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

4. Conspirators may, for example, be enrolled in a chain A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrollment, where a single person at the centre doing the enrolling and all the other members being unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell whether the conspiracy in a particular case falls into which category. It may, however, even overlap. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse role to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended

objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

7. A charge of conspiracy may prejudice the accused because it is forced them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of object of conspiracy but also of the agreement. In the charge of conspiracy court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand that "this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders".

8. As stated above it is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement, which is the gravamen of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

9. It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incident to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform

different tasks to a common end does not split up a conspiracy into several different conspiracies.

10. A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.

52. The entire prosecution case against the appellant with regard to the existence of a criminal conspiracy between the appellant and the other co-accused persons hinges on the peg of the white Maruti car. According to the prosecution case, the said car was bought by the appellant, and given to Karan Yadav and Pal Singh for committing the alleged murder of Mahendra Singh Bhati.

53. However, but for the second statement (Ex. Ka. 114) of Narayan Yadav (P. W. 37), and the disclosure statement (Ex. Ka-113) of Pal Singh, one of the co-accused persons, there is not an iota of evidence produced by the prosecution for establishing any link between the appellant and the white Maruti car. But as discussed above, neither the second statement (Ex. Ka. 114) of Narayan Yadav (P. W. 37), nor the disclosure statement (Ex. Ka-113) of Pal Singh can be read against the appellant.

54. In fact, as far as the car is concerned, the Prosecution has produced a half-baked dish. For, Anil Kumar

Bhati (P. W. 39) in his complaint claims that the seven to eight assailants escaped in "Maruti car". But he neither gives the color of the car, nor its registration number. The other eyewitnesses merely tell the court that the two assailants escaped in "a car". Even they neither reveal the make of the car, nor the color of the car, nor its registration number. Further, according to Meenakshi Saini (P. W. 17), the car was originally owned by one Kunal Kapoor. But the prosecution has not examined Kunal Kapoor as a witness. It is only in the second statement (Ex. Ka. 114) of Narayan Yadav (P. W. 37) that for the first time both the color, and the registration number of the car are revealed. According to him, the car was a white Maruti, bearing registration number DL 4CB 3597. However, for the reasons stated hereinabove, the said statement (Ex. Ka. 114) cannot be read against the appellant. Even Pal Singh's disclosure statement (Ex. Ka-113) wherein he claims that the white Maruti car was given by the appellant, even this statement cannot be read against the appellant.

55. The prosecution has examined two witnesses with regard to the seizure of the Car, namely Jagdish Singh Yadav (P.W. 36), and Naveen Chandra Jha (P.W. 41). Even their testimonies lead to an utter confusion. For, according to Jagdish Singh Yadav (P.W. 36), he had recovered a car

bearing Registration No. UEU 5004 and had prepared the recovery memo marked as Exhibit Ka-97. However, according to the prosecution, the white Maruti car bore Registration No. DL 4CB 3597. Hence, the recovery of a white Maruti car, bearing registration No. UEU 5004 is irrelevant.

56. According to Navin Chandra Jha (P.W. 41), he had recovered a Car, bearing Registration No. DL 4CB 3597. However, no recovery memo was ever made with regard to the said recovery. Moreover, according to this witness, on 16.07.1996, he had seized the car from Gurdeep Singh. However, in his cross-examination, this witness claims that “he never seized the car”. He is, in fact, *“not in a position to disclose as to who was the CBI Officer, who had actually seized the car”*. Furthermore, there is no recovery memo of the said car produced by the prosecution during the course of the trial before the learned Trial Court. Interestingly, the said car has never ever been produced as a material object. Moreover, neither Kunal Kapoor, the original owner of the car, nor Gurdeep Singh, the last owner of the car from whom the car is allegedly seized, have been examined as prosecution witnesses. Most importantly, the prosecution has miserably failed to produce an iota of evidence to prove the fact that the car was ever bought by the appellant, or was in his possession prior to the alleged incident. Therefore, there

is not a single shred of evidence connecting the car to the appellant.

57. Once the main peg of the prosecution falls apart, the prosecution has failed to prove that there was any agreement between the appellant and the other co-accused persons for doing an illegal act. Furthermore, the prosecution has failed to establish that there was any intention amongst the co-conspirators to commit a crime, for which they had joined their hands. Hence, the prosecution has failed to establish the offence of criminal conspiracy against the appellant and the alleged assailants, and other co-accused persons. Hence, the offence under Section 302 read with Section 120B IPC, Section 307 read with Section 120B IPC, and Section 326 read with Section 120B IPC is not made out against the appellant.

58. Sensational as the case may be, or gruesome as the case may be, the Trial Court is expected to critically and objectively examine the evidence before reaching its conclusion about the guilt or innocence of an accused person. The entire relationship between facts and evidence cannot be imagined by the learned Trial Court merely for the sake of convicting an accused. At the first instance, the evidence produced by the prosecution may appear to be convincing, but a detailed critical analysis may prove otherwise. Thus, it

is the duty of the Trial Court to systematically and critically analyze each layer of the evidence produced by the prosecution in order to answer the ultimate question whether on the basis of the evidence produced by the prosecution, the accused can be convicted, or not?

59. In the present case from the very beginning, the appellant has not been named in the FIR by the complainant, Anil Bhati (P.W. 39). In fact, according to the complainant, initially, he had claimed that there were seven to eight persons, who had attacked the deceased. Yet, in his testimony before the Court, he claimed that only two persons had attacked the deceased, Mahendra Singh Bhati. In his complaint and in his statement made under Section 161 Cr.P.C., he had claimed that the assailants had shouted that *“now try to have Prakash Pehalwan run for an election.”* thereby, indicating the motive for the alleged murder; yet, in his testimony before the Court, he does not utter a single word about the motive behind the alleged conspiracy to kill the deceased, Mahendra Singh Bhati. Moreover, despite the fact that the prosecution has harped consistently about a gang warfare existing between the gangs of Satbir Gujjar and Mahendra Singh Fauji, in spite of the fact that many criminal cases have been referred to, but in none of these FIRs is the appellant ever involved. Even in a FIR, where he was named

in a case, the charge-sheet was not even filed against him. Even in the FIR, in which the appellant's sister was injured victim, even the said case had occurred only after the alleged murder of Mahendra Singh Bhati. Thus, even the said FIR cannot form the basis of a motive for the appellant to get rid of the deceased, Mahendra Singh Bhati.

60. Though it is true that in a case of direct evidence, motive loses its significance, but when a criminal conspiracy is alleged to be hatched, motive is a relevant factor to be looked into. After all a criminal conspiracy is not hatched till people have a common intention, which propels them to formulate a motive for the crime. In the present case, the ultimate motive is conspicuously missing.

61. The learned Trial Court has mis-applied law both with regard to the use of statement recorded under Section 161 Cr.P.C. and with regard to the use of the statement given by the accused under Section 27 of the Evidence Act. The learned Trial Court seems to have used these pieces of evidence merely to knit a story about the involvement of the appellant in the alleged crime. But by the use of these statements, the learned Trial Court seems to be more loyal than the King of England himself. For, the Trial Court is not expected to accept the prosecution case as a gospel truth. As mentioned hereinabove, instead the learned Trial Court is

expected to dissect and critically analyze the prosecution case with a fine toothcomb.

62. The learned Trial Court has also failed to notice that motive, no matter how strong, cannot take place of proof. Furthermore, the Trial Court has failed to notice that even the material witnesses, like Dharamveer, the driver of the ill-fated car, and another Dharamveer Singh, who was on his bicycle who was also injured during the alleged firing on the deceased persons, have not been produced by the prosecution. Moreover, the eyewitnesses named by the complainant have not been examined as witnesses. Most importantly, the original owner, Kunal Kapoor, and the last owner, Gurdeep Singh, also have not been examined as a witness. Since the prosecution has withheld material witnesses, an adverse inference should have been drawn against the prosecution. Yet, the learned Trial Court has failed to do so. Lastly, the entire conviction against the appellant is based on surmises and conjectures. It is devoid of any foundational basis which can be established from cogent and convincing evidence. It is, indeed, trite to state that a conviction has to be based on cogent and convincing evidence. Otherwise, the conviction is not a legal one, but a moral one. The rule of law does not permit a moral conviction.

63. For the reasons stated above, the appeal is, hereby, allowed. The judgment, dated 10.03.2015, passed by the IIIrd Additional Sessions Judge / Special Judge (C.B.I.), Dehradun, *qua* the appellant is set aside. Hence, the appellant is acquitted of offences under Section 302 read with Section 120-B IPC, Section 307 read with Section 120-B IPC, and Section 326 read with Section 120-B IPC. Since the appellant is on bail, his bail bonds stand discharged.

(Alok Kumar Verma, J.) (Raghvendra Singh Chauhan, C.J.)
10.11.2021

Rathour