RAJESH @ SARKARI & ANR

v.

STATE OF HARYANA

(Criminal Appeal No. 1648 of 2019)

NOVEMBER 03, 2020

[DR. DHANANJAYA Y CHANDRACHUD, INDU MALHOTRA AND INDIRA BANERJEE, JJ.]

Penal Code, 1860 – s.302 r/w. s.34 – Prosecution case that complainant's elder son was shot dead inside a University – Complainant-PW-4 and his younger son-PW-5 stated that they had seen the incident and they had taken victim to the hospital – Victim was declared dead – Three accused persons including both the appellants were apprehended and arraigned – All the three accused persons refused to undergo Test Identification Parade and pleaded not guilty – The Trial Court convicted all the three accused persons for having committed murder and sentenced them to imprisonment for life – All three accused persons filed appeals before the High Court which was dismissed – Two accused persons filed appeal before the Supreme Court – Held: There were clear improvements made by PW-4 and PW-5 in their statements – PW-4 had stated he, PW-5 along with 'one unknown person' had lifted victim from the spot to take him to hospital – Whereas, PW-5 does not mention presence of any third person – Further, ruqqa *indicated that the deceased was brought by one 'S' and the same is a significant circumstance which indicates that neither PW-4 nor PW-5 were present at the scene of offence – DW-4 and DW-5 stated that it was them who had taken victim to the hospital and neither PW-4 nor PW-5 were present at the scene of occurrence – Neither the author of first and second FSL reports in the context of the seizure and recovery of weapons W/1 and W/2 in FIR No.311; nor the author of the third FSL report in context of FIR No.781(FIR in present case) were examined by the prosecution in the course of the evidence – The discrepancies which were noticed in the FSL reports in both abovementioned FIRs could have been explained by the authors of the FSL reports and their examination being not done would entitle accused benefit of doubt – As far as Test Identification Parade is concerned, there is no specific provision either in the CrPC or the*

Indian Evidence Act, 1872 which lends statutory authority to an identification parade – The identification in the course of TIP is intended to lend assurance to the identity of the accused – The finding of guilt cannot be based purely on the refusal of the accused to undergo an identification parade – In the present case, the presence of the alleged eye-witnesses PW-4 and PW-5 at the scene of occurrence is seriously in doubt – The ballistics evidence connecting the empty cartridges and the bullets recovered from the body of the deceased with an alleged weapon of offence is contradictory and suffers from serious infirmities – Therefore, a refusal to undergo a TIP assumes secondary importance and cannot survive independently in the absence of it being a substantive piece of evidence – The prosecution failed to establish its case beyond reasonable doubt and thus, appellants are entitled to benefit of doubt.

Allowing the appeal, the Court

HELD: 1. <u>The presence of PW-4 and PW-5</u>

1.1 PW4, in the course of his cross-examination, stated that he, PW5 and "one unknown person" had lifted victim from the spot to take him to PGIMS. On the other hand, PW5, in the course of his deposition, does not mention the presence of any third person who took victim with them to the hospital. While PW4 states that the police reached the hospital at 4:00pm, PW5, on the other hand, is unaware of when the police had reached the hospital. Now, in this background, it is important to notice that there are clear improvements made by PW4 and PW5, which have a bearing on whether they were eyewitnesses to the alleged occurrence. Both PW4 and PW5 have made substantial improvements in the course of their examination in evidence. Both the witnesses attempted to bolster the case of the prosecution with regard to their presence at the scene of crime and of being eye-witnesses to the occurrence by stating that they had removed victim to the hospital after he had been gunned down. The absence of any reference to their taking victim to the hospital in the FIR has a bearing on whether they were eye-witnesses to the occurrence. The incident took place at the

University where the deceased was a student and, according to PW4, was preparing for his supplementary law exams. The theory that PW4 and PW5 were present at the scene of offence and had removed the deceased to the hospital must be tested with reference to two significant circumstances which have emerged from the record. First, the record of the trial before the Sessions Court, which has been produced before this Court, indicates that the deceased was brought dead to PGIMS, Rohtak at 3:00pm. The ruqqa was sent to the police at 3:35pm. The ruqqa indicates that the deceased was brought by "'SL' Resident of Kailash Colony, Rohtak". The reference to 'SL' is a significant circumstance which indicates that neither PW4 nor PW5 were present at the scene of offence which is why, after the incident, it was not PW4 or PW5, but a third person who had transported the deceased victim to the hospital. The Sessions Court while appreciating this aspect, explained away the argument of the defence that neither PW4 nor PW5 were present at the scene of offence, by holding that perhaps both of them were present, but had suffered a shock of having witnessed the murder of victim which is why the ruqqa was signed by DW4. In arriving at this conclusion, the Sessions Court had supplied an explanation which does not comport with the case of the prosecution. Second, the case of the prosecution, it must be noted, was not that victim was taken to the hospital by two other persons who eventually were produced by the defence in evidence as DW4 and DW5. The case of the prosecution was that as a matter of fact PW4 and PW5 had taken victim to PGIMS, Rohtak. As noted earlier, PW4 stated that he, PW5 and an unknown person had done so, while PW5 stated it was only PW4 and him who had removed the injured to hospital. The defence produced, among other witnesses, DW4 and DW5. In the course of his examination, DW4 stated that he and DW5 had taken victim to the hospital and that PW4 and PW5 had arrived at the hospital after they reached there. DW4 stated that he and DW5 removed victim to PGIMS, Rohtak and it was about 10 to 15 minutes after their arrival at the hospital that PW4 and other relatives reached the hospital. Though the ruqqa mentioned the name of the person who brought the deceased to

PGIMS as 'SL', resident of Kailash Colony Rohtak, the name of the person is evidently incorrect since it is 'P'(DW4) who is the resident of Kailash Colony, Rohtak. DW4 and DW5 stated that it was them who had taken victim to the hospital and neither PW4 nor PW5 were present at the scene of the occurrence. [Para 17][24-E-H; 25-A-H]

2. FSL Reports

2.1 There are two FSL reports pertaining to FIR No. 311 and The third FSL report is with reference to a forwarding memo of the Deputy Superintendent of Police (HO Rohtak) dated 31 December 2006 regarding five sealed parcels in connection with FIR No. 781. [Para 21][27-F; 30-E-F]

2.2 In evaluating the third FSL report, three crucial aspects need to be flagged at this stage: first, the FSL report contains a comparison and analysis of what is described in the result as a "country made pistol marked W/2 chambered for 7.62mm cartridges"; second, the FSL report contains no reference to the pistol which was marked as W/1 in the second FSL report dated 25 September 2007 in reference to FIR No. 311 and third, the above extract under the result section indicates that pistol W/2 (which is the only pistol analysed) was recovered from 'R' in the course of the investigation in FIR No. 311. The above aspects have a crucial bearing on the weight to be ascribed to the third FSL report. [Para 22][32-E-G]

2.3 The three aspects highlighted demonstrate that, out of the alleged two recoveries of the pistols which were marked as W/1 and W/2 in the course of the investigation into FIR No. 311, only one of the two pistols, namely W/2, has been analysed with reference to the cartridges and fired bullets stated to have been recovered from the scene of offence in the present case. Pistol W/1, as the second FSL report dated 25 September 2007 in relation to FIR No. 311 indicates, was alleged by the prosecution to have been recovered at the behest of accused 'R' while pistol W/2 was allegedly recovered from accused 'A'. The third FSL report in the present case contains a ballistics analysis of only

one of the two pistols namely W/2 and not W/1. Moreover, the third FSL report contains an erroneous statement that W/2 was recovered at the behest of 'R' when, as this Court has seen, W/2 is a recovery which the prosecution alleges to have been made from accused 'A' in the course of the investigation in the FIR No. 311. Pistol W/1 was, in other words, clearly not made available to the examiner for the purpose of a ballistic examination. [Para 23][32-G-H; 33-A-C]

2.4 Now in this background an important facet of the matter which requires to be noticed was that neither the author of the first and second FSL reports in the context of the seizure and recovery of weapons W/1 and W/2 in FIR No. 311; nor the author of the third FSL report in the context of FIR No.781 (the FIR in the 33 present case) have been examined by the prosecution in the course of the evidence. [Para 26][33-F-G]

2.5 There is no inflexible rule which requires the prosecution to examine a ballistics examiner in every case where a murder is alleged to have been caused with the use of a fire arm. The decision in Mohinder Singh (1953) has since been explained in Gurucharan Singh (1963) by a co-ordinate Bench. Thereafter, the principle which has emerged from the line of authority which we have noticed earlier, is that the failure of the prosecution in a given case, to examine a ballistics expert has to be assessed bearing in mind the overall context of the nature of the evidence which is available. When direct evidence of an unimpeachable character is available and the nature of injuries is consistent with the direct evidence, the examination of a ballistics expert need not be insisted upon as a condition to the prosecution proving its case. On the other hand, where direct evidence is not available or there is doubt in regard to the nature of that evidence, the failure to examine the ballistic examiner would assume significance. In the present case, the weapons of offence were alleged to have been recovered in the context of the investigation in another FIR (FIR No.311 dated 19 May 2006). The weapons were marked as W/1 and W/2 in that case. The third FSL report arising out of the investigation in FIR No. 781 in the present case does not deal with weapon W/1 at all. Moreover, as we have noted earlier, the third FSL report wrongly attributes weapon

W/2 to accused 'R'. Whether or not weapon W/2 had been made available to the ballistics examiner was a matter which could have been explained if the prosecution were to lead his evidence. The prosecution cited a ballistics examiner as a witness and yet, did not lead his evidence. This must be juxtaposed in light of the fact that the eye-witness account of PW4 and PW5 is not free from doubt. This Court has also analysed the evidence of PW4 and PW5 and have noted that there is a grave element of doubt as to whether they were witnesses at the scene of occurrence. In this context, the Court must therefore hold that the discrepancies which have been noticed in the FSL report could have best been explained by the authors of FSL reports both in FIR No. 311/2006 and FIR No. 781/2006. This not having been done, the accused would, in our view, be entitled to the benefit of doubt. [Para 34][38-H; 39-A-G]

3. Refusal to undergo Test Identification Parade

3.1 The State has sought to urge that out of all the three publications which were proved in the course of the evidence, only one contained the names of the accused. However, the central point in this case is whether on the basis of significant aspects which have emerged during the course of cross-examination of PW4 and PW5, an adverse inference should be drawn against the appellants for having refused to undergo a TIP. The evidence on the record indicates that not only did the deceased have several criminal cases against him, some of which had ended in acquittal on account of a compromise, but that one of the appellants, 'R', and the deceased were co-accused in a case arising out of FIR No. 341 dated 23 June 45 2001 under Sections 454 and 380 of the IPC. Evidently both of them had been arrested in connection with the case, which is why PW5 deposed that his father PW4 used to go to court when victim and 'R' were being produced on various dates of hearing. PW4 also stated that he has stood surety for his son in various criminal cases. In this backdrop, the contention of the appellants that the refusal to undergo a TIP is borne out by the fact that victim and 'R' were known to each other prior to the occurrence and that PW4, who is a prime eye-

witness, had seen 'R' when he would attend the court during the course of the hearings, cannot be brushed aside. Consequently, in a case, such as the present, the Court would be circumspect about drawing an adverse inference from the facts, as they have emerged. In any event, the identification in the course of a TIP is intended to lend assurance to the identity of the accused. The finding of guilt cannot be based purely on the refusal of the accused to undergo an identification parade. In the present case, the presence of the alleged eyewitnesses PW4 and PW5 at the scene of the occurrence is seriously in doubt. The ballistics evidence connecting the empty cartridges and the bullets recovered from the body of the deceased with an alleged weapon of offence is contradictory and suffers from serious infirmities. Hence, in this backdrop, a refusal to undergo a TIP assumes secondary importance, if at all, and cannot survive independently in the absence of it being a substantive piece of evidence. [Para 39][43-B-H; 44-A]

Mohinder Singh vs. State, **AIR 1953 SC 415;** *Sukhwant Singh vs. State of Punjab,* **(1995) 3 SCC 367 : [1995] 2 SCR 1190;** *State of Punjab vs. Jugraj Singh,* **(2002) 3 SCC 234 : [2002] 1 SCR 998;** *Vineet Kumar Chauhan vs. State of UP,* **(2007) 14 SCC 660 : [2007] 13 SCR 727;** *Govindaraju vs. State,* **(2012) 4 SCC 722: [2012] 5 SCR 67 – relied on.**

State of Rajasthan v. Daud Khan, **(2016) 2 SCC 607 : [2015] 13 SCR 1131;** *Mohan Suingh vs. State of M.P.* **(1999) 2 SCC 428 : [1999] 1 SCR 276;** *Gurucharan Singh vs. State of Punjab,* **[1963] 3 SCR 585;** *Matru v. State of U.P.* **(1971) 2 SCC 75 : 1971 SCC (Cri) 391] : [1971] 3 SCR 914;** *Santokh Singh v. Izhar Hussain* **(1973) 2 SCC 406 : 1973 SCC (Cri) 828;** *Malkhansingh v. State of M.P.* **(2003) 5 SCC 746:2003 SCC (Cri) 1247;** *Visveswaran v. State* **(2003) 6 SCC 73;** *Munshi Singh Gautam v. State of M.P.* **(2005) 9 SCC 631;** *Sidhartha Vashisht@ Manu Sharma v. State (NCT of Delhi)* **(2010) 6 SCC 1;** *Ashwani Kumar and Ors. v.*

A *State of Punjab* **(2015) 6 SCC 308;** *Mukesh and Ors. v. State for NCT of Delhi and Ors.* **AIR 2017 SC 2161 – referred to.**

Case Law Reference

B	**[2015] 13 SCR 1131**	**referred to**	**Para 8**
	[1999] 1 SCR 276	**referred to**	**Para 11**
	[1963] 3 SCR 585	**referred to**	**Para 29**
	[1995] 2 SCR 1190	**relied on**	**Para 30**
C	**[2002] 1 SCR 998**	**relied on**	**Para 31**
	[2007] 13 SCR 727	**relied on**	**Para 32**
	[2012] 5 SCR 67	**relied on**	**Para 33**
	[1971] 3 SCR 914	**referred to**	**Para 37**
D	**(1973) 2 SCC 406**	**referred to**	**Para 37**
	(2003) 5 SCC 746	**referred to**	**Para 37**
	(2003) 6 SCC 73	**referred to**	**Para 37**
	(2005) 9 SCC 631	**referred to**	**Para 37**
E	**(2010) 6 SCC 1**	**referred to**	**Para 37**
	(2015) 6 SCC 308	**referred to**	**Para 37**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1648 of 2019

F From the Judgment and Order dated 17.01.2019 of the High Court of Punjab and Haryana at Chandigarh in CRA-D No. 634-DB of 2012 (O&M)

Deepak Thukral, DAG, Rakesh Khanna, Sr. Adv., Anil Hooda, Ravinder Hooda, Jitendra Hooda, Ajay Sharma, Ms. Apsana Khatoon, Pramod Kumar, Yadav Narender Singh, and Dr. Monika Gusain, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J.

1. The appellants Rajesh alias Sarkari and Ajay Hooda have been convicted, together with a co-accused[1] for an offence under Section 302 read with Section 34 of the India Penal Code[2] and have been sentenced to imprisonment for life.

2. On 26 December 2006, a *ruqqa*[3] was received at the Police Post, PGIMS, Rohtak about Sandeep Hooda, son of Azad Singh Hooda, having been brought dead there. ASI, Meha Singh met Azad Singh, the complainant, at the emergency ward in PGIMS, Rohtak. Azad Singh made a statement which was reduced into writing upon which a First Information Report[4] being FIR No.781 was registered under Section 154 of the Criminal Procedure Code[5] at Police Station Sadar, Rohtak. The complainant stated that his elder son Sandeep was studying in the final year of the LLB degree course in Maharishi Dayanand University, Rohtak[6]. On 26 December 2006, Sandeep had gone to the law department in the University to prepare for the exams. The complainant's son-in- law had come to their house and was in a hurry to leave after meeting Sandeep. They tried to contact Sandeep on his cell phone but were unable to get through. The complainant and his younger son, Sunil, then proceeded on their motor-cycle to the University. At about 2:30pm when they reached the parking in proximity to the law department, they saw that 6 men standing under the tin sheds started firing shots at Sandeep who was standing there. Sandeep was alleged to have fallen down upon which the complainant and his son, Sunil, rushed towards the spot. The three young men fled towards the Delhi road on a silver coloured Pulsar make motor-cycle. The complainant stated that he had not noted the registration number of the motor-cycle but could identify the assailants, if they were brought before him. The complainant alleged that blood was oozing out from the right foot, abdomen, arm, left temple and thigh of Sandeep. The complainant also stated that Sandeep was taken to PGIMS, Rohtak by Parveen, son of Zile Singh Hooda, and "another person" in a Santro car belonging to Sandeep. However, he succumbed to the fire arm injuries before reaching the hospital. The complainant,

[1] Pehlad Singh alias Harpal
[2] IPC
[3] written intimation
[4] FIR
[5] CrPC
[6] University

A Azad Singh, stated that his son had strained relations with some persons and those persons had killed him.

3. As a result of the investigation, initially, accused Rajesh alias Sarkari and Ajay Hooda were apprehended and arraigned. Subsequently, accused Pehlad, was also arraigned to face trial. The offence under B Section 302 being triable exclusively by the Court of Sessions, the two appellants were committed for trial to the Sessions Judge, Rohtak by the Chief Judicial Magistrate, pursuant to an order dated 25 September 2007. Subsequently, on the basis of the supplementary charge-sheet presented against accused Pehlad, he was also committed to the Court of Sessions C Judge by the JMFC on 31 March 2008. The trials against all the three accused were consolidated by an order dated 12 April 2008. Charges were framed on 8 May 2008. All the accused pleaded that they were not guilty. The prosecution examined 24 witnesses at the trial, as noted by the judgment of the Sessions Court:

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> "9. The prosecution … examined as many as twenty four witnesses namely HC Karan Singh as PW1, Ram Singh as PW2, Ajit Singh as PW3, Azad Singh as PW4, Sunil as PW5, SI Wazir Singh as PW6, SI Jagram as PW7, HC Sat Narain as PW8, Constable Sumit Kumar as PW9, SI Mahender Singh as PW10, ASI Dharambir as PW11, E Constable Rajiv Godara as PW12, HC Vijay Pal as PW13, Dr. Sushma jain as PW14, retired Inspector Ram Mehar Singh as PW15, Ex. Head Constable Ranbir Singh as PW16, Constable Jitender Kumar as PW17, Inspector/SHO Rajender Singh as PW18, SI Ram Kishan as PW19, HC Jai Kishan as PW20, retired SI Maha Singh as PW21, retired F ASI Balwan Singh as PW22, SI Banarsi Dass as PW23 and EHC Ram Chander as PW24. Learned Public Prosecutor for the State also tendered reports of FSL Exhibits PD to PF in evidence. Thereafter, he closed the evidence of the prosecution."

G The reports of the Forensic Science Laboratory were marked as Exhibit PD-PF in evidence. The accused were examined after the conclusion of the evidence of the prosecution under Section 313 of the CrPC to explain the circumstances which appeared against them in the evidence of the prosecution. They claimed innocence and stated that H they have been falsely implicated. One of the appellants, Rajesh alias

Sarkari, stated that the victim was implicated with him as a co-accused in another case; that there was no dispute between them and that his photographs have been published in the newspaper. The accused examined 5 witnesses in support of their defence as noted by the judgment of the Sessions Court:

> "11. …the accused have examined as many as five witnesses namely Jiley Singh as DW1, Rajesh Jogpal, Record Keeper as DW2, Shamsher Singh as DW3, Parveen as DW4 and Sikander as DW5, in their defence evidence."

4. During the course of the trial, PW1, Head Constable Karan Singh, deposed that on 26 December 2006, he had joined the investigation of the case and together with ASI, Meha Singh and others, had reached the scene of offence at the University**.** He recovered seven empty cartridges, one lead and blood-stained earth which were packed into a parcel and sealed. Among the other recoveries, was a liquor bottle with some quantity of liquor. The principal eye witnesses whose evidence was relied upon by the prosecution were the complainant (PW4- Azad Singh) and his son (PW5-Sunil). PW4 stated that on 26 December 2006, he and PW5 had proceeded to the University where Sandeep had gone to prepare for his examinations, as Sandeep could not be contacted on his telephone. At 2:30 pm when they reached near the cycle-stand of the law department, they saw the car belonging to Sandeep parked there. Sandeep was standing under the cycle shed together with three persons. When PW4 and PW5 were at a distance of about 100 feet from Sandeep, they saw him being fired at with pistols or revolvers. PW4 identified the appellants in Court as the assailants at the scene of offence. All the three accused are stated to have departed from the scene after executing the crime. PW4, in the course of his evidence, stated that thereafter, he and PW5 took Sandeep to the Casualty Department of PGIMS, Rohtak in the Santro car, where he was declared to be brought dead. The police were stated to have reached the hospital and to have recorded his statement as Exhibit PB. The deposition of PW5 was in similar terms. Significantly, both PW4 and PW5 stated that they had removed Sandeep in his car to PGIMS, Rohtak which was at variance with the FIR which recorded that Sandeep had been removed to the hospital by "Parveen, son of Zile Singh Hooda, and by another person". PW7- Jagram, Sub-Inspector, deposed that ASI Meha Singh had deposited two sealed parcels, one containing blood-stained earth and the other containing 7 empty

A cartridges as well as one lead with him, which he subsequently forwarded to the FSL, Madhuban on 8 January 2007. PW9- Sumit Kumar, Constable, prepared a scaled site-plan marked as Exhibit PJ. PW10- Mahender Singh, SI, PW11- Dharambir, ASI, SIT Crime Branch, Rohini, PW12- Constable Rajeev Godara, DRK, SIT Crime Branch, Rohini, deposed to the disclosure statements of the accused, marked as Exhibits PQ and
B PR. The post mortem was conducted by PW14, Dr Sushma Jain, and was marked as Exhibit PS and PT. The post mortem report indicates the presence of 13 injuries which are described as follows:

> "Injuries:
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> C **1.** Entry wound: A wound of entry of size 1.5 cm, 0.5 cm with inverted margin was present on right occipital region of scalp situated 1 cm posterior to right external auditory meatus. Blackening, charring ecchymosed was present around the wound.
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> Track- Bullet was piercing through all layers of scalp causing
> D fracture of right occipital bone and passing through and through the brain matter causing laceration of brain matter and then causing communities fracture of petrous bone of left temporal bone and reaching just medial to left external auditory meatus. Bullet recovered just medial to left external auditory meatus. Track going downward medially and reaching on left side just medial to left
> E external auditory meatus.
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> Injury No.2:
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> An entry wound 0.5 cm x 0.5 cm size was situated on the lateral border of lower part of right arm 3 cm above the lateral epicondyle
> F of right forearm margins inverted and ecchymosed. Track going upward and medially piercing skin soft issue and muscles going just above the right humerus bone reaching upto a point situated 3 cm above the medial epicondyle of right forearm on the medial aspect of middle 1/3rd of right arm. Bullet was situated just beneath the skin at the point where the track was ending.
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> G Injuries No.3 and 4.
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> 3. An entry wound 1 cm x 0.5 cm was situated just above the left elbow joint on the anterior aspect of left arm 4 cm lateral to the medial epncondyle (left) margins inverted and ecchymosed.

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Track:

Track was going medially and slightly downward only skin and entanous tissue deep.

4. Exit wound 0.5 cm x 0.5 cm size wound with everted margins was situated on the medial aspect of lower 1/3rd of left arm and was 3.5 cm above the medial epicondyle (left).

Injury No.5:

An entry wound of size 1 cm x 0.5 cm with inverted + and ecchymosed margins and was situated on the medial aspect of middle 1/3rd of left forearm 13.5 cm below the medial epicondyle (left). Blackening of skin was present around the wound. Track was going downward and posterior-laterally piercing the skin, soft tissue and muscles and reaching just beneath the skin on posterior lateral aspect of left forearm 12 cm above the wrist joint and 2.5 cm medial and posterior to lateral border of left forearm and bullet was recovered from the end point of track just beneath the skin.

Injury No.6 and 7.

6. An entry wound was situated 33 cm from lateral end of right patellaon lateral aspect of upper 1/3rd of right thigh 1.5 cm x 0.5 cm size blackening, charring and echymosis was present at the margins. Margins inverted.

Track:

Track was passing through skin and subcutaneous tissue and was going upward and medially.

7. Exit wound: exit wound of size 2 cm x 0.5 cm with everted margins was situated 12 cm below the anterior aspect of upper 1 /3rd of right thigh and was 6.5 cm above the entry wound.

Injury No.8 and 9:

8. An entry wound of size 1.5 cm x 0.5 cm was situated 10 cm inferio lateral to anterior superior iliac spine (left) ecchymosis was present around the wound.

Track:

A Track was going downward and medially piercing skin, subcutaneous tissues, muscles and was causing fracture of femur (left) and reaching up to the exit wound.

9. Exit wound of size 0.5 cm x 0.5 cm was situated 32 cm above the medial side of left patella. Margins were everted.

B Injury No.10 & 11:

10. A wound of entry 1.5 cm x 0.5 cm size was situated 10.5 cm above the right anterior superior iliac spine on the anterior abdominal wall. Margins were inverted. Blackening and charring was present at margins.

C Track:

Track was going backward towards the left side piercing skin subcutaneous tissues abdominal muscles and was causing injury of small and large gut and reaching up the exit wound on the back.

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11. Exit wound of size 0.5 cm x 0.5 cm with everted margin was situated 9 cm above the anterior superior iliac spine and 5 cm lateral to midline on left side of back.

Injury No.12 and 13:

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12. An entry wound of size 2 cm x 1.5 cm with inverted margins was situated 6 cm superior medial to right anterior superior iliac spine and was surrounded by 0.3 cm to 0.5 cm size collar of abrasion all around the wound. Track was going upward and towards left side and was piercing skin subcutaneous tissue

F muscles and causing injury of small and large gut.

13. Exit wound: 0.5 cm x 0.5 cm size exit wound with everted margin was situated just below the left costal 2 cm lateral to the line of nipple.

G Heart right side contained blood. Stomach contained semi digested food. Rest of the organs were normal."

Both PW10-Mahender Singh, SI and PW15-Ram Mehar Singh, retired Inspector, stated that upon arrest, the appellants had refused to undergo a test identification parade. In pursuance of the disclosure made by the accused Rajesh alias Sarkari, the Pulsar motor-cycle bearing

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registration No. HR-10-H/2241 was recovered from his residence on 24 June 2007 in Sector IV Bhiwari, Rajasthan. PW19-Ram Kishan, SI, in the course of his deposition, stated that a pistol had been recovered from the rented house of accused Rajesh alias Sarkari at Palam Vihar, Gurgaon. PW19 also deposed to the recovery of a pistol from the rented house of accused Ajay Hooda at village Carterpuri, Gurgaon. The recovery of the fire arm at the behest of the accused was sought to be corroborated by the evidence of PW20-Head Constable Jai Kishan and PW21- Meha Singh. PW21- Meha Singh, a former Sub-Inspector, had received the *ruqqa* on 26 December 2006 from PGIMS, Rohtak. PW21 was a part of the police team which had reached the scene of offence and had lifted seven empty cartridges and one lead from the spot.

5. The FSL report dated 29 November 2007, marked as Exhibit PD, stated that seven 7.62mm mauser pistol fired cartridges and one 7.62mm mauser pistol fired bullet had been recovered from the place of occurrence; and two 7.62mm deformed and mutilated fired bullets had been recovered from the body of the deceased who had been fired at from a country made pistol. The pistol had been received in an earlier FIR, being FIR No. 311 at Police Station, Civil Lines, Rohtak and was stated to have been recovered from accused Rajesh alias Sarkari.

6. Five defence witnesses, during the course of their deposition, stated:

(i) DW1- Zile Singh denied that he had let-out his house to ccused Ajay Hooda and stated that the police had not visited the house in connection with any recovery. The witness stated that he had seen the accused Ajay Hooda for the first time in Court;

(ii) DW2- Rajesh Jogpal, Record Keeper stated that accused Rajesh and the deceased Sandeep had faced trial in a case arising out of the FIR No. 341 dated 23 June 2001 registered at Police Station, Civil Lines, Rohtak under Sections 454/ 380 of the IPC. The case had been decided on 20 September 2008. Azad Singh, the complainant/PW4 had stood surety for Sandeep in the said case;

(iii) DW3- Shamsher Singh, Executive Officer, Hari Bhumi Newspaper, Rohtak stated that three news items regarding

A the incident were published in the newspaper on 23 February 2007, 13 April 2007 and 1 July 2007;

(iv) DW4- Parveen, s/o Zile Singh, deposed that on the date of the occurrence he, together with Sikandar (DW5), was present along with Sandeep at the cycle-stand of the law B department at the University. Sandeep was consuming alcohol while sitting in his car and after some time parked his car inside the shed and sat down on the ground where he continued to drink. After sometime, 5-6 persons came there on two motor-cycles and fired indiscriminately upon Sandeep. Sandeep fell down in an injured condition and was C removed by DW4 and DW5 to PGIMS, Rohtak where he was declared dead by the doctors on duty. DW4 stated that the father and other relatives of Sandeep reached the mortuary about 10 to 15 minutes after their arrival. The police came there and recorded his statement. DW4 stated D that the father of the deceased (PW4) was not present at the scene of the occurrence and the accused presented in the Court were not the assailants who had fired shots at Sandeep; and

(v) DW5- Sikandar, s/o Ashok Rathi, deposed along similar lines E to DW4 and stated that he and DW4 had taken Sandeep to PGIMS, Rohtak and had informed the father and brother of Sandeep of the occurrence, who had accordingly reached PGIMS, Rohtak.

The FSL Reports, Exhibit DY, DY/1 and DY/2 were also tendered F in the course of the defence evidence.

7. The Sessions Court, by its judgment dated 12 June 2012, concluded that there was a ring of truth to the case of the prosecution and that the appellants were guilty of the offence of having committed the murder of Sandeep. The appellants and the co-accused Pehlad were, G following their conviction under Section 302 read with Section 34 of the IPC, sentenced to imprisonment for life. Aggrieved by the judgment of the Sessions Court, all the three accused filed appeals in the High Court of Punjab and Haryana. By a judgment dated 17 January 2019, the High Court dismissed the appeals.

H

8. Leading the submission on behalf of the appellants, Mr Rakesh Khanna, learned Senior Counsel urged the following submissions:

A. PW4 and PW5 are not eye-witnesses

(i) PW4 and PW5 were not present at the scene of the offence and their depositions stating that they were eye-witnesses to the occurrence are untrustworthy;

(ii) The FIR which was lodged in close proximity to the occurrence of the crime on the statement of PW4 clearly states that Sandeep was removed to the hospital by Parveen, son of Zile Singh Hooda, and another person. In the depositions of PW4 and PW5, there is a marked improvement when they stated that both of them have accompanied the deceased who was in an injured condition to PGIMS, Rohtak;

(iii) Parveen, son of Zile Singh Hooda, deposed as DW4 and confirmed that it was he and Sikandar (DW5) who had taken Sandeep to the hospital. Both DW4 and DW5 stated that PW4 and other relatives of the deceased reached the mortuary after 10 to 15 minutes and neither PW4 nor PW5 were present at the scene of offence;

(iv) The information(*ruqqa*) sent by the Causalty Medical Officer on 26 December 2006 records that the deceased Sandeep was brought to PGIMS, Rohtak by "Sandeep Lehri, son of Zile Singh Hooda resident of Kailash Colony, Rohtak". The name 'Sandeep' Lehri is an inadvertent error in place of 'Parveen' who is also described as the son of Zile Singh Hooda, resident of Kailash Colony, Rohtak;

(v) The post-mortem report and the statement of PW14 indicates that injury nos. 1, 5, 6, 10 and 11 showed blackening, charring and ecchymosis at the margins. PW4 in his deposition has stated that the accused fired at Sandeep from a distance of 4-5 feet. However, as explained in the decision of this Court in **State of Rajasthan** v. **Daud Khan**[7], blackening of injuries can only be observed if the pistol is fired from a very close range, i.e., 2 feet or less. This

[7] (2016) 2 SCC 607

A indicates that PW4 and PW5 were not present at the site; and

(vi) On the above grounds, it has been submitted that neither PW4 nor PW5 are eye-witnesses to the occurrence.

B The Forensic Science Laboratory[8] report

B

(i) There are three FSL reports on the record – two relate to FIR No. 311 of 2006 and one pertaining to the present case which arises out of FIR No. 781 of 2006;

(ii) The first FSL report dated 12 March 2007 pertains to FIR No. 311 where three parcels containing the clothes of injured persons, one 7.65mm fired bullet taken from the body of an injured person by the name of Kuldeep, four 7.65 mm fired pistol cartridge cases and one 7.65mm live pistol cartridge were collected from the place of occurrence. After the FSL report was prepared, the samples were resealed with the seal of L.S.Y (BALL) FSL (H);

C

D

(iii) The second FSL report is dated 25 September 2007 in FIR No. 311. In the description of parcels and the condition of seals, it has been stated that four parcels were received: two with the seal of R.K. and two with the seal of L.S.Y SOS (Ball) FSL (H). The first parcel contained a pistol chambered for 7.65mm cartridges along with the magazine, one 7.65mm fired cartridge case and one 7.65mm live cartridge stated to have been recovered from the accused Rajesh. The pistol was marked W/1 and the cartridge case was marked C/5. The second parcel contained one pistol chambered for 7.62mm/0.30" cartridges along with magazine and one 7.62mm misfired cartridge stated to have been recovered from accused Ajay. The pistol was marked W/2 and the misfired cartridge as MC/1. The third parcel with the seal of L.S.Y SOS (Ball) FSL (H) contained one 7.65 mm fired bullet already marked as BC/1 in the earlier first FSL report dated 12 March 2007. The fourth parcel had a number and seal impression L.S.Y SOS (Ball) FLS (H) and contained four 7.65mm fired cartridge cases and one 7.65mm live cartridge (the fired cartridge cases were

E

F

G

H [8] FSL

already marked as C/1 to C/4 in the earlier first FSL report dated 12 March 2007);

(iv) In the laboratory examination, it was stated that both the pistols were test fired and that their firing mechanisms were found in working order. The class as well as individual characteristic marks present on the 7.65mm fired cartridge cases C/1 to C/5, 7.62mm / 0.30" misfired cartridge marked MC/1, 7.65mm fired bullet BC/1 and those on the test fired cartridge cases and bullets fired from pistols marked W/1 and W/2 were examined. In the result, it was stated that pistols W/1 and W/2 were in working order. The 7.65mm cartridge case marked C/5 was found fired from pistol W/2. However, the 7.65mm fired cases C/1 to C/4 and 7.65mm fired bullet marked BC/1 were not fired from the pistol marked as W/1. In so far as the 7.62mm misfired cartridge MC/1 is concerned, it was found to be misfired from pistol W/2. All the exhibits were resealed along with their original wrappers with the seal of L.S.Y SSO (Ball) FSL (H). One 7.65mm cartridge received in parcel No. 4 has been used in test firing in the laboratory; and

(v) The third FSL report dated 29 November 2007 pertains to FIR No. 781 lodged in the present case. In the description of articles, five parcels were stated to have been received on 8 January 2007. According to the submission, the receipt or description of parcels sealed by the ballistic expert is not mentioned, as per his report dated 25 September 2007. The first parcel *inter alia* contained blood stained earth, lifted from the place of occurrence and sent for serological examination. The second parcel is stated to contain seven 7.62mm mauser pistol fired cartridge cases and one 7.62mm pistol fired bullet recovered from the place of occurrence which were marked as C/1 to C/7 and BC/1 respectively. The third and fourth parcels contained blood stained clothes. The fifth parcel contain two 7.62mm deformed and mutilated fired bullets and two lead pieces stated to have been recovered from the body of the deceased, marked as BC/2, BC/3, BC/4 and BC/5. In the laboratory examination, it has been stated that the individual characteristic marks

present on the 7.62mm mauser pistol fired cartridge cases marked as C/1 to C/7 and 7.62mm mauser pistol fired bullets marks BC/1 to BC/3 and those on test cartridges and test bullets fired from country made pistol W/2 (chambered for 7.62mm cartridges), received in the second FSL report in connection with the FIR No. 311 were examined. The lead pieces marked BC/4 and BC/5 in parcel 5 were also examined. The lead piece BC/4 was found to be a 0.455" revolver bullet. No regular rifling marks were observed.

9. On the basis of the above narration, it has been submitted that:

(i) The parcel containing the pistol marked as W/2 and the test fired bullet, sealed by the ballistic examiner as per the second FSL report dated 25 September 2007, admittedly had not been received and described in the description of articles contained in the third FSL report dated 29 November 2007, arising from FIR No. 781 (present case);

(ii) There is no material on record to establish that it was brought to the notice of the Assistant Director, RK Koshal, who examined the articles contained in the parcels, about any connection of the parcels received for examination, with the parcels examined in the second FSL report dated 25 September 2007;

(iii) The description of the pistol in the second FSL report dated 25 September 2007 indicates that it is chambered for 7.62mm/0.30" cartridges. However, the description of the cartridges received in the third FSL report in this case is 7.62mm mauser pistol fired cartridge cases. The recovery memo in regard to the place of occurrence refers to seven empties and one cartridge bearing the description of S and B 7.62 X 25, whereas in the second FSL report dated 25 September 2007 the description is 7.62mm / 0.30" cartridge; and

(iv) Though the author of the third FSL report dated 29 November 2007 states that the cartridge cases marked C/1 to C/7 and the bullet marked BC/1 to BC/3 had been fired from the country made pistol marked W/2, the said pistol was never produced before the author of this report

nor was any information placed before him about the interconnection of pistol W/2 and the cartridge cases to C/1 to C/7 or the fired bullets BC/1 to BC/3. The IO of the present case, PW21, has, in the course of his cross-examination, admitted that on the empty shells Exhibits P4 to P10, there was an inscription 7.62K 25, which does not tally with the description recorded in the second FSL report dated 25 September 2007 or the third FSL report dated 29 November 2007.

10. On the basis of the above discrepancies, it has been urged on behalf of the appellants that the prosecution has failed to establish that PW4 and PW5 were eye-witnesses at the scene of occurrence. Moreover, the prosecution has failed to establish the correctness of the FSL report. The ballistics examiners have not been examined in the course of the evidence tendered by the prosecution. The discrepancies in the FSL reports could have been explained in the course of the examination by the FSL examiners. Their non-examination cuts at the root of the case of the prosecution and would entitle the appellants to an acquittal.

11. On the other hand, Mr Deepak Thukral, learned Standing Counsel appearing on behalf of the Haryana, has opposed the submissions of the appellants and submitted:

(i) As regards the presence of PW4 and PW5, the Sessions Court noted that the deceased had sustained 13 injuries as a result of the fire arm attack. PW4 and PW5 who had come to the scene of the offence on their motor-cycle could not possibly have removed the deceased on a two-wheeler to the hospital and hence it was DW4- Parveen who took him in the car belonging to the deceased;

(ii) Corroboration of the presence of PW4 and PW5 at the scene of offence is established by the fact that the track suit of the deceased was handed over by PW5 to the police. One of the articles that has been examined in the course of the third FSL report is the track suit of the deceased. This would indicate the presence of PW4 and PW5;

(iii) PW4 and PW5 were cross-examined at length on their presence at the scene of occurrence. Their testimony is

corroborated by the medical evidence which suggests that the death occurred due to extensive fire arm injuries;

(iv) As regards the FSL reports, the test cartridges were fired from pistol W/2 and the test firing was carried out in the lab. The test cartridges and test bullets were again compared. However, the third FSL report inadvertently mentions that pistol W/2 was recovered from Rajesh though it was actually recovered from Ajay;

(v) Though the third FSL report does not refer to pistol W/1 which was recovered from Rajesh, his conviction can be sustained under the provisions of Section 34 of the IPC having regard to the extensive nature of the fire arm injuries and the recovery of fire arms;

(vi) Both the appellants refused the test identification parade and an adverse inference ought to be drawn. The explanation of the appellants that they did so because their photographs were published in the newspapers is belied by the fact that out of the three newspaper publications, only one had mentioned their names and none of them had published their photographs;

(vii) The FSL reports were filed by the defence after the statements of the appellants under Section 313 of the CrPC were recorded, and the failure to examine the ballistics examiner must be construed from that perspective;

(viii) The eye-witness account of PW4 and PW5 finds corroboration in the medical evidence and the FSL report; and

(ix) Though the appellants have sought to discredit the prosecution version by adverting to the blackening of the injury, blackening is not always due to the close range of the firing, as noticed in the judgment of this Court in **Mohan Singh** vs. **State of M.P.**[9]

12. The rival submissions will now be considered. Broadly speaking the submissions in the present case traverse three areas:

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[9] (1999) 2 SCC 428

(i) Whether PWs 4 and 5 were eye-witnesses at the scene of occurrence on 26 December 2006;

(ii) The weight to be ascribed to the third FSL report; and

(iii) The refusal of the accused appellants to undergo a test identification parade.

13. Each of the above aspects needs to be analyzed.

The presence of PW4-Azad Singh and PW5-Sunil Singh

14. PW4 is the complainant, the father of the deceased. PW5-Sunil is the brother of the deceased. The FIR records that the information was received at the Police Station Sadar, Rohtak at 5:20 pm on 26 December 2006. General diary reference entry 22/2012 is at 6:20 pm. The FIR which was registered on the statement of PW4 states that the son-in-law of the complainant had come to visit and wanted to meet the deceased Sandeep. Since Sandeep was not reachable at his cell phone, PW4 and PW5 are stated to have gone to the University and when they arrived near the law department they noticed "six boys under the tin sheds", who started firing at Sandeep. The incident is stated to have taken place at 2:30 pm and following the gun shots which were fired at him, Sandeep is stated to have fallen on the ground. According to the FIR, the accused escaped from the spot. The complainant stated that he and his son Sunil could identify the three young boys if they were brought before them. The FIR contains a specific statement that Sandeep was removed to PGIMS, Rohtak by Parveen, son of Zile Singh Hooda, a resident of Kailash Colony, Rohtak and by one other boy in a Santro car which was standing at the spot.

15. The principal line of attack to doubt whether PW4 and PW5 are eye- witnesses to the occurrence is based on the improvements made in the course of their deposition. In the course of his examination-in-chief, PW4 stated that when he and PW5 were at a distance of 100 feet from Sandeep, they saw "three boys firing shots". He purported to identify the three accused who were present in the Court as the persons who had fired on his son "with weapons which were like pistols and revolvers". PW4 then stated that "we [meaning thereby PW4 and PW5] took our son Sandeep in Santro car to the Casualty Department of PGIMS, Rohtak as my son was having bullet injuries on his chest, thighs, arm and temple". PW4 states that Sandeep was declared as brought

A dead by the doctors and then the police reached the hospital and recorded his statement, marked as Exhibit PB. During the course of the cross-examination, PW4 denied that at the time of occurrence, Sikandar Rathi (DW5) and 'Lehri' (potentially referring to DW4) were standing with his son. In the course of the cross-examination, it was suggested to PW4 that Sandeep was not removed by him and PW5 to the hospital B and that as a matter of fact, it was Sikandar Rathi (DW5) and 'Lehri'(DW4) who had taken him to the hospital. PW4 denied this suggestion as well as the suggestion that neither he nor PW5 were present at the scene of occurrence. PW4 also stated that the clothes worn by him and by PW5 were smeared with blood but they had not been collected C by the police. According to PW4, he and PW5 reached PGIMS, Rohtak at about 2.45pm and the police had arrived at 4:00 pm.

16. In the course of his examination-in-chief, PW5 similarly stated that Sandeep had been removed to the hospital by him and his father PW4 and that he gave the shirt of the track suit of Sandeep to the police, D which was removed by him while they were shifting him to hospital. PW5, in the course of his cross-examination stated that when he and PW4 took Sandeep to hospital their clothes were smeared with blood but that neither he nor PW4 handed over their clothes to the police.

17. PW4, in the course of his cross-examination, stated that he, E PW5 and "one unknown person" had lifted Sandeep from the spot to take him to PGIMS, Rohtak. On the other hand, PW5, in the course of his deposition, does not mention the presence of any third person who took Sandeep with them to the hospital. While PW4 states that the police reached the hospital at 4:00pm, PW5, on the other hand, is unaware of when the police had reached the hospital. Now, in this background, it is F important to notice that there are clear improvements made by PW4 and PW5, which have a bearing on whether they were eye-witnesses to the alleged occurrence. Both PW4 and PW5 have made substantial improvements in the course of their examination in evidence. Both the witnesses attempted to bolster the case of the prosecution with regard G to their presence at the scene of crime and of being eye-witnesses to the occurrence by stating that they had removed Sandeep to the hospital after he had been gunned down. The absence of any reference to their taking Sandeep to the hospital in the FIR has a bearing on whether they were eye-witnesses to the occurrence. The incident took place at the University where the deceased was a student and, according to PW4, H

was preparing for his supplementary law exams. The theory that PW4 and PW5 were present at the scene of offence and had removed the deceased to the hospital must be tested with reference to two significant circumstances which have emerged from the record. *First*, the record of the trial before the Sessions Court, which has been produced before this Court, indicates that the deceased was brought dead to PGIMS, Rohtak at 3:00pm. The *ruqqa* was sent to the police at 3:35 pm. The *ruqqa* indicates that the deceased was brought by "Sandeep Lehri son of Shri Zile Singh Hooda, Resident of Kailash Colony, Rohtak". The reference to 'Sandeep Lehri' is a significant circumstance which indicates that neither PW4 nor PW5 were present at the scene of offence which is why, after the incident, it was not PW4 or PW5, but a third person who had transported the deceased Sandeep to the hospital. The Sessions Court while appreciating this aspect, explained away the argument of the defence that neither PW4 nor PW5 were present at the scene of offence, by holding that perhaps both of them were present, but had suffered a shock of having witnessed the murder of Sandeep which is why the *ruqqa* was signed by DW4. In arriving at this conclusion, the Sessions Court had supplied an explanation which does not comport with the case of the prosecution. *Second*, the case of the prosecution, it must be noted, was not that Sandeep was taken to the hospital by two other persons who eventually were produced by the defence in evidence as DW4 (Parveen) and DW5 (Sikandar Rathi). The case of the prosecution was that as a matter of fact PW4 and PW5 had taken Sandeep to PGIMS, Rohtak. As we have noted earlier, PW4 stated that he, PW5 and an unknown person had done so, while PW5 stated it was only PW4 and him who had removed the injured to hospital. The defence produced, among other witnesses, DW4 and DW5. In the course of his examination, DW4 stated that he and DW5 had taken Sandeep to the hospital and that PW4 and PW5 had arrived at the hospital after they reached there. DW4 stated that he and DW5 removed Sandeep to PGIMS, Rohtak and it was about 10 to 15 minutes after their arrival at the hospital that PW4 and other relatives reached the hospital. Though the *ruqqa* mentioned the name of the person who brought the deceased to PGIMS as Sandeep Lehri, son of Zile Singh Hooda, resident of Kailash Colony Rohtak, the name of the person is evidently incorrect since it is Parveen (DW4) who is the son of Zile Singh Hooda and resident of Kailash Colony, Rohtak. DW4 and DW5 stated that it was them who had taken Sandeep to the hospital and neither PW4 nor PW5 were present at the scene of the occurrence.

A 18. Learned Counsel appearing on behalf of the respondent sought to submit that the presence of PW5 at the scene of occurrence is corroborated by the fact that the shirt of the track suit of the deceased was handed over by PW5 to the police and it had been examined in the third FSL report. The handing over of the track suit of the deceased Sandeep to the police at the hospital by PW5 would indicate his presence B at PGIMS, Rohtak but does not establish that PW4 or PW5 were eye-witnesses to the incident which took place near the law department at the University. As a matter of fact, DW5 in the course of his examination stated that he and DW4 had informed the father and brother of the deceased and that the police had also recorded their statements. The C presence of DW4 is a reasonable inference which emerges from the *ruqqa*. For reasons best known to the prosecution, neither DW4 (Parveen) nor DW5 (Sikandar) were produced as witnesses and the failure of the prosecution to lead the evidence of DW4 (Parveen) is a matter which has a bearing on the issue as to whether PW4 and PW5 were genuine eye-witnesses at the scene of occurrence. The material D and evidence which has emerged on the record is sufficient to cast doubt on their presence at the scene of occurrence. Additionally, the Sessions Court did not deal with the depositions of DW4 and DW5, save and except for stating that their deposition on the age of the assailants being around 30-35 years, did not inspire confidence. The discussion in E the judgment of the Sessions Court on this crucial aspect lacks proper evaluation of the evidence at hand.

19. In this background, it is necessary to notice that according to the FIR which was lodged on a complaint by PW4, there was a previous enmity/quarrel between the deceased and the accused. PW4, in the F course of his cross-examination stated that the deceased was facing trial in 2-3 cases, in some of which he had been acquitted. However, PW4 expressed ignorance about whether the deceased was a co-accused with accused Rajesh alias Sarkari. Moreover, he stated that he did not know the accused Rajesh on account of his being co-accused with Sandeep in a case bearing FIR No. 341 dated 23 June 2001 under G Sections 454/380 of the IPC at Police Station, Civil Lines, Rohtak or whether they were arrested in the case. He denied the suggestion that Sandeep and Rajesh appeared together in the case and that PW4 had visited the court on each and every date of hearing of that case, in spite of PW4 being a surety in that case for the deceased Sandeep. Contrary H to what was stated in the FIR, PW4 in course of his cross examination

stated that the deceased had no previous enmity with any of the accused before the occurrence. PW5, in the course of his cross- examination, was confronted with the fact that the deceased had been facing trial in criminal cases and specifically admitted that the deceased was facing criminal trial in 2-3 matters, where he was acquitted on account of a compromise. PW5 also stated that he was unaware as to whether Sandeep was a co-accused together with Rajesh in a case bearing FIR No. 341 under Sections 454 and 380 of the IPC. However, he stated:

> "It is correct to suggest that I and my father used to come to the court when my brother Sandeep alias Bhander and present accused Rajesh alias Sarkari were being produced in the court on various dates of hearings. I do not know as to who had the engaged the counsel for my brother in that case and who stood surety for him".

20. The fact that the deceased was facing trial in other cases was also stated in the course of DW4's examination-in-chief. This aspect of the case would be of particular relevance to determine whether an adverse inference should be drawn, as the State has suggested, to the refusal of the appellants to submit themselves to a test identification parade. This aspect will be dealt with in a subsequent part of the judgment.

FSL Reports

21. Now while considering this aspect of the record, it must be noticed that the weapons which are alleged to have been used by the two appellants in the course of the crime were, according the prosecution, seized in connection with another FIR No. 311 under Section 307 read with Section 34 of the IPC and Sections 25, 54, 59 of the Arms Act, registered on 19 May 2006 at Police Station Civil Lines, Rohtak, against both the appellants. There are two FSL reports pertaining to FIR No. 311:

1) The first FSL report dated 12 March 2007 pertains to three parcels containing:

(i) clothes of the one injured Kuldeep in that case; and

(ii) One 7.65mm fired bullet stated to have been taken from the body of the injured marked BC/1; and four 7.65mm fired pistol cartridges cases and one 7.65 live pistol cartridges collected at the place of occurrence (marked C/1 to C/4 and L/1).

A The first FSL report is to the following effect:

" **LABORATORY EXAMINATION**

The class as well as individual characteristic marks present on 7.65mm fired cartridge cases marked C/1 to C/4 were examined and inter-compared under stereo and comparison microscope. 7.65mm fired bullet marked BC/1 was also examined under stereo microscope.

The holes on the clothes contained in parcel No. 1 were examined for firearm discharge residues. Lead was detected from the margins of the holes on T-shirts and paints. The margins of the holes on the T-shirt and paints contained in parcel No. 1 were also examined under stereo microscope.

Based on the examination carried out in the laboratory, the result of analysis is as under:

RESULT

1. 7.65mm fired cartridge cases marked C/1 to C/4 have been fired from the one and same fire arm.
2. 7.65mm fired bullet marked BC/1 has been fired from a Country made firearm.
3. Holes on the T-shirt and the paints contained in parcel No. 1 have been caused by bullet projectiles.
4. Report in original from Serology division is enclosed herewith.

Note: After examination exhibits examined in the Ballistics division were resealed along with the original wrappers with the seals of L.S.Y. (BALL) FSL (H)."

The FSL report has been prepared by LS Yadav, Senior Scientific Officer (Ballistics) at the Forensic Science Laboratory, Madhuban, Karnal.

2) The second FSL report dated 25 September 2007 (described as a part report in connection with FIR No. 311) deals with 4 parcels containing:

(i) one pistol chambered for 7.65mm cartridges along with a magazine bearing No. 7111, one 7.65mm fired cartridge case and one 7.65mm live cartridge stated to have been recovered from accused Rajesh. The pistol was marked W/1 and the cartridge case C/5;

(ii) one pistol chambered for 7.62mm/0.30" cartridges and magazine and one 7.62mm misfired cartridge stated to have been recovered from accused Ajay. The pistol was marked W/2 and the misfired cartridge MC/1;

(iii) one 7.65mm fired bullet (already market BC/1 in FSL No. F-06/2193) referred to in the first FSL report; and

(iv) four 7.65mm fired cartridge cases and one 7.65mm live cartridge (the fired cartridges marked C/1 to C/4 in the first FSL report).

The second FSL report contains the following:

"**LABORATORY EXAMINATION**

Products of combustion of smokeless powder were detected from the barrels of pistols marked W/1 (chambered for 7.65mm cartridges), w/2 (Chambered for 7.62mm/.30." cartridges). Test firings were done in the laboratory from pistols marked W/1 & W/2. Their firing mechanism were found in working order.

The class as well as individual characteristic marks present on 7.65mm fired cartridge cases C/1 to C/5, 7.62mm/.30" misfired cartridge marked MC/1, 7.65mm fired bullet BC/1 and those on test fired cartridge cases and bullets fired from pistols marked W/1 (chambered for 7.65mm cartridges), W/2 (chambered for 7.62mm/30" cartridges) were examined and compared with their respective caliber/bore under stereo and comparison microscope.

Based on the examination carried out in the laboratory, the result of analysis Is as under.

RESULT

1. Pistols marked W/1 (chambered for ·7.65mm cartridges), W/2 (chambered for 7.62mm/.30" cartridges) are firearms as defined in the Arms Act 54 of 1959. Their firing

A mechanism were found in working order. Pistols W/1 & W/2 had been fired through.

2. 7.65mm fired cartridge case marked C/5 has been fired from pistol marked W/1 (chambered for 7.65mm cartridges) and not from any other firearm even of the same make and
B bore/calibre, because every firearm has got its own individual characteristic marks.

3. 7.62mm misfired cartridge marked MC/1 has missed- fire from pistol marked W/2 (chambered for 7.62mm/.30" cartridges)

C 4. 7.65mm fired cartridge cases marked C/1 to C/4 and 7.65mm fired bullet BC/1 have not been fired from pistol marked W/1 (chambered for 7.65mm cartridges)

Note :- i) After examination, exhibits were resealed alongwith their original wrappers with the seal of L.S.Y, SSO (BALL)
D FSL.(H).

ii) One number of 7.65mm live cartridge received in parcel No. IV has been used in test firings in the laboratory."

The second FSL report has also been prepared again by LS Yadav,
E Senior Scientific Officer (Ballistic) at the FSL, Madhuban Karnal.

3) The third FSL report dated 29 November 2007 in the present case is marked as Exhibit PD. The third FSL report is with reference to a forwarding memo of the Deputy Superintendent of Police (HO Rohtak) dated 31 December 2006 regarding five sealed parcels in connection with FIR No. 781 dated 26 December 2006 under Section 302 read with
F 34 of the IPC and Sections 25, 54 and 55 of the Arms Act at Police Station Civil Lines, Rohtak. The forwarding memo is stated to have been received by the FSL on 8 January 2007. The FSL report contains a description of five articles in the parcels as follows:

G (i) blood stained earth lifted from the place of occurrence;

(ii) seven 7.62mm mauser pistol fired cartridge cases and one 7.62mm mauser pistol fired bullet stated to have been recovered from the place of occurrence. The cartridge cases marked as C/1 to C/3 and the bullet BC/1;

H

(iii) blood-stained cloth recovered from the car by the witness and blood- stained clothes of the deceased; and

(iv) two 7.62mm deformed and mutilated fired bullets, two lead pieces stated to have been recovered from the body of the deceased (the bullets are BC/2, BC/3, and the lead pieces are BC/4 and BC/5).

The third FSL report contains the following:

"**LABORATORY EXAMINATION**

The class as well as the individual characteristic marks present on 7.62mm mauser pistol fired cartridge cases marked C/1 to C/7 and 7.62mm mauser pistol fired bullets marked BC/1 to BC/3 and those on test carriages and test bullets fired from country made pistol marked W/2 (chambered for 7.62mm cartridges) [Received in case FSL No. 07/F-3937 FIR No. 311 dated 19.05.06 U/S 307/34 IPC & 25/54/59 A.Act P.S Civil Line Rohtak recovered on 25.06.07) were examined and compared under stereo and comparison microscope.

The clothes contained in parcel No. III & IV were examined for the presence of gunshot discharge residues. Copper and lead in traces were detected from the margins of the holes on the clothes contained in parcels No III & IV. The holes on the clothes were also examined under stereo microscope.

The lead pieces marked BC/4 & BC/5 contained in parcel No. V were examined. Lead piece marked BC/4 was found to be a 455" revolved bullet. No regular rifling marks were observed on BC/4 when examined under stereomicroscope.

Based on the examination carried out in the laboratory, the result of analysis is as under:

RESULT

1. The 7.62mm fired cartridge cases marked C/1 to C/7 and 7.62 mm fired bullets marked BC/1 to BC/3 have been fired a country made pistol marked W/2 chambered for 7.62mm cartridges) [Received in case FSL No. 07/F-3937 FIR No. 311 dated 19.05.06 U/S 307/34 IPC & 25/54/59 A.Act PS Civil Line Rohtak recovered on 25.6.07 Rajesh @ Sarkare)

A and not from any other firearm even of same make and bore, because every firearm has got its own individual characteristics marks.

2. The holes on the clothes contained in parcel No. III & IV have been caused by bullet projectiles.

B 3. The lead piece marked BC/5 contained in parcel No. V could form part of core of a bullet.

4. The lead piece marked BC/4 was found to be deformed and mutilated .455" revolver bullet. No regular rifling marks were observed on BC/4.

C 5. Report in original from Serology division is enclosed herewith.

Note:- i) Exhibits examined in the Ballistics Division were resealed alongwith their original wrappers with the seal of A.D.(BALL)/ FSL (H)."

D The third FSL report has been prepared by RK Koshal, Assistant Director (Ballistics) at the Forensic Science Laboratory, Madhuban, Karnal.

22. In evaluating the third FSL report, three crucial aspects need E to be flagged at this stage: *first*, the FSL report contains a comparison and analysis of what is described in the result as a "country made pistol marked W/2 chambered for 7.62mm cartridges"; *second*, the FSL report contains no reference to the pistol which was marked as W/1 in the second FSL report dated 25 September 2007 in reference to FIR No. 311 and *third*, the above extract under the result section indicates that F pistol W/2 (which is the only pistol analysed) was recovered from Rajesh alias Sarkari in the course of the investigation in FIR No. 311. The above aspects have a crucial bearing on the weight to be ascribed to the third FSL report.

G 23. The three aspects which have been highlighted above demonstrate that, out of the alleged two recoveries of the pistols which were marked as W/1 and W/2 in the course of the investigation into FIR No. 311, only one of the two pistols, namely W/2, has been analysed with reference to the cartridges and fired bullets stated to have been recovered from the scene of offence in the present case. Pistol W/1, as H the second FSL report dated 25 September 2007 in relation to FIR No.

311 indicates, was alleged by the prosecution to have been recovered at the behest of accused Rajesh while pistol W/2 was allegedly recovered from accused Ajay. The third FSL report in the present case contains a ballistics analysis of only one of the two pistols namely W/2 and not W/1. Moreover, the third FSL report contains an erroneous statement that W/2 was recovered at the behest of Rajesh when, as we have seen, W/2 is a recovery which the prosecution alleges to have been made from accused Ajay in the course of the investigation in the FIR No. 311. Pistol W/1 was, in other words, clearly not made available to the examiner for the purpose of a ballistic examination.

24. Learned Senior Counsel appearing on behalf of the appellants also highlights the following discrepancies:

(i) While the recoveries which were made at site are described as 7.62/25mm cartridges, the FSL report in the context of FIR No. 311 contains a reference to 7.62/30mm cartridges;

(ii) What was test fired for the purposes of the ballistic examination in FIR No.311 were the 7.62/30mm bullets; and

(iii) While the third FSL report dated 29 November 2007 in the present case refers to mauser pistol fired bullets, the conclusion is at variance in that it refers to a country made pistol.

25. The submission of the appellants is that the weapon which was seized in the context of the earlier investigation was not made available to the examiner in the present case at all. This submission was sought to be refuted by reason of the fact that a test firing of weapon W/2 did take place.

26. Now in this background an important facet of the matter which requires to be noticed was that neither the author of the first and second FSL reports in the context of the seizure and recovery of weapons W/1 and W/2 in FIR No. 311; nor the author of the third FSL report in the context of FIR No.781 (the FIR in the present case) have been examined by the prosecution in the course of the evidence.

27. The learned Counsel appearing on behalf of the State sought to explain the failure of the prosecution to examine the ballistics examiners in evidence by submitting that the FSL reports were, as a

A matter of fact, filed by the defence after the statements of the appellants under Section 313 of the CrPC were recorded. This submission was, in particular, urged in response to the grievance of the appellants that in the statements under Section 313, only Exhibits PD and PF were drawn to the attention of the accused. Learned Counsel for the State urged that since the FSL reports have been produced by the defence, the failure of
B the prosecution to examine the ballistics examiner stands explained.

28. In this context, it would now be necessary to advert briefly to the legal position. In **Mohinder Singh** vs **State**[10] (**"Mohinder Singh"**), a three judge Bench of this Court observed:

C "12. **In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is**
D **elementary that where the prosecution has a definite or positive case, it must prove the whole of that case. In the present case, it is doubtful whether the injuries which are attributed to the appellant were caused by a gun or by a rifle.** Indeed, it seems more likely that they were caused by a
E rifle than by a gun, and yet the case for the prosecution is that the appellant was armed with a gun and, in his examination, it was definitely put to him that he was armed with the gun P-16. **It is only by the evidence of a duly qualified expert that it could have been ascertained whether the injuries attributed to the**
F **appellant were caused by a gun or by a rifle and such evidence alone could settle the controversy as to whether they could possibly have been caused by a firearm being used at such a close range as is suggested in the evidence. It is clear, and it is also the prosecution case, that only 2 shots were fired at Dalip Singh and one of the crucial points**
G **which the prosecution had to prove was that these shots were fired by two persons and not by one man, and both the shots were fired in such manner and from such distance as is alleged by the eyewitnesses**."

(emphasis supplied)

H [10] AIR 1953 SC 415

29. The decision in **Mohinder Singh** was considered by a co-ordinate Bench of this Court also consisting of three judges in **Gurucharan Singh vs State of Punjab**[11] **("Gurucharan Singh")**. In **Gurucharan Singh**, the Court noted that in the earlier decision, the case of the prosecution was that the accused had shot the deceased with a gun but it appeared likely that the injury on the deceased had been inflicted by a rifle and there was no evidence of a duly qualified expert to prove that the injuries had been caused by a gun. Moreover, the nature of the injuries was such that the shots must have been fired by more than one person and there was no evidence to show that another person had also engaged in the shooting. The oral evidence was not of disinterested witnesses. Hence, it was held that in that backdrop, the failure to examine an expert was a serious infirmity in the prosecution case. Explaining the facts as they emerged in the earlier decision in **Mohinder Singh**, the three judge Bench in **Gurucharan Singh** held:

> "41. […] It would be noticed that these observations were made in a case where the prosecution evidence suffered from serious infirmities and in determining the effect of these observations, it would not be fair or reasonable to forget the facts in respect of which they came to be made. These observations do not purport to lay down an inflexible Rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. In what cases the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case. Therefore, we do not think that Mr Purushottam is right in contending as a general proposition that in

[11] (1963) 3 SCR 585

A every case where a firearm is alleged to have been used by an accused person, in addition to the direct evidence, prosecution must lead the evidence of a ballistic expert, however good the direct evidence may be and though on the record there may be no reason to doubt the said direct evidence."

B Hence, in **Gurucharan Singh**, this Court held that there is no inflexible rule to the effect that the prosecution could succeed in proving the charge of murder alleged to have been caused with a lethal weapon only if an expert is examined. Where the direct evidence is of an unimpeachable character and the nature of the injuries disclosed by the post-mortem reports is clearly consistent with the direct evidence, the C examination of a ballistics expert may not be essential. Contrarily, the evidence of a ballistics expert would assume significance where direct evidence is not satisfactory, or is of interested witnesses or where the nature of the injuries requires expert corroboration. In other words, whether the examination of a ballistics expert is necessary is dependent D upon the factual context as it emerges in each case.

30. In **Sukhwant Singh** vs **State of Punjab**[12] **("Sukhwant Singh")**, a two judge Bench of this Court held that the omission of the investigating officer to send a recovered empty and sealed pistol to the ballistics expert for examination was a significant omission. In that context, E the bench observed:

"21. […] It hardly needs to be emphasised that in cases where injuries are caused by firearms, the opinion of the ballistic expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect F an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent."

31. In **State of Punjab** vs **Jugraj Singh**[13] **("Jugraj Singh")**, a two judge Bench of this Court distinguished the decision in **Sukhwant** G **Singh** and noted that in that case the evidence of two eye-witnesses was held to be inadmissible since they were not examined in terms of Section 138 of the Evidence Act and the court did not rely on the sole testimony of PW3. Hence, the failure to produce an expert opinion was

[12] (1995) 3 SCC 367

H [13] (2002) 3 SCC 234

held to have affected the credit worthiness of the prosecution case. In **Jugraj Singh**, the Court held that: "nowhere it was held [in **Sukhwant Singh**] that on account of failure to produce the expert opinion the prosecution version in all cases should be disbelieved". Accordingly, in **Jugraj Singh**, the Court noted:

> "18. In the instant case the investigating officer has categorically stated that guns seized were not in a working condition and he, in his discretion, found that no purpose would be served by sending the same to the ballistic expert for his opinion. No further question was put to the investigating officer in cross-examination to find out whether despite the guns being defective the fire pin was in order or not. In the presence of convincing evidence of two eyewitnesses and other attending circumstances we do not find that the non-examination of the expert in this case has, in any way, affected the creditworthiness of the version put forth by the eyewitnesses."

32. In **Vineet Kumar Chauhan** vs **State of UP**[14], a two judge Bench of this Court has held:

> "11. It cannot be laid down as a general proposition that in every case where a firearm is allegedly used by an accused person, the prosecution must lead the evidence of a ballistic expert to prove the charge, irrespective of the quality of the direct evidence available on record. It needs little emphasis that where direct evidence is of such an unimpeachable character, and the nature of injuries, disclosed by the post- mortem notes is consistent with the direct evidence, the examination of ballistic expert may not be regarded as essential. However, where direct evidence is not available or that there is some doubt as to whether the injuries could or could not have been caused by a particular weapon, examination of an expert would be desirable to cure an apparent inconsistency or for the purpose of corroboration of oral evidence."

33. In **Govindaraju** vs **State**[15], a two judge Bench of this Court drew an adverse inference where no person from the FSL had been examined. In drawing this conclusion, the Court referred to the non-production of material witnesses like the doctor, who performed the post-

[14] (2007) 14 SCC 660
[15] (2012) 4 SCC 722

A mortem and examined the victims, and the head constable and constable, who reached the site upon occurrence. Since the other witnesses produced by the prosecution had also turned hostile, the Court drew an adverse inference against the prosecution for not examining these material witnesses. The Court noted:

B "63. There is certainly some content in the submissions made before us that non-production of material witnesses like the doctor, who performed the post-mortem and examined the victim before he was declared dead as well as of the Head Constable and the constable who reached the site immediately upon the occurrence and the other two witnesses turning hostile, creates a reasonable
C doubt in the case of the prosecution and the court should also draw adverse inference against the prosecution for not examining the material witnesses. We have already dwelled upon appreciation of evidence at some length in the facts and circumstances of the present case. There is deficiency in the case of the prosecution
D as it should have proved its case beyond reasonable doubt with the help of these witnesses, which it chose not to produce before the court, despite their availability.

[…]

E 66. This Court in *Takhaji Hiraji* [(2001) 6 SCC 145 : 2001 SCC (Cri) 1070] clearly stated that material witness is one who would unfold the genesis of the incident or an essential part of the prosecution case and by examining such witnesses the gaps or infirmities in the case of the prosecution could be supplied. If such a witness, without justification, is not examined, inference
F against the prosecution can be drawn by the court. The fact that the witnesses who were necessary to unfold the narrative of the incident and though not examined, but were cited by the prosecution, certainly raises a suspicion. When the principal witnesses of the prosecution become hostile, greater is the requirement of the prosecution to examine all other material
G witnesses who could depose in completing the chain by proven facts. This view was reiterated by this Court in *Yakub Ismailbhai Patel* v. *State of Gujarat* [(2004) 12 SCC 229 : 2004 SCC (Cri) 196]."

H 34. The precedent which we have reviewed above would thus indicate that there is no inflexible rule which requires the prosecution to

examine a ballistics examiner in every case where a murder is alleged to have been caused with the use of a fire arm. The decision in **Mohinder Singh** (1953) has since been explained in **Gurucharan Singh** (1963) by a co-ordinate Bench. Thereafter, the principle which has emerged from the line of authority which we have noticed earlier, is that the failure of the prosecution in a given case, to examine a ballistics expert has to be assessed bearing in mind the overall context of the nature of the evidence which is available. When direct evidence of an unimpeachable character is available and the nature of injuries is consistent with the direct evidence, the examination of a ballistics expert need not be insisted upon as a condition to the prosecution proving its case. On the other hand, where direct evidence is not available or there is doubt in regard to the nature of that evidence, the failure to examine the ballistic examiner would assume significance. In the present case, the weapons of offence were alleged to have been recovered in the context of the investigation in another FIR (FIR No.311 dated 19 May 2006). The weapons were marked as W/1 and W/2 in that case. The third FSL report arising out of the investigation in FIR No. 781 in the present case does not deal with weapon W/1 at all. Moreover, as we have noted earlier, the third FSL report wrongly attributes weapon W/2 to accused Rajesh alias Sarkari. Whether or not weapon W/2 had been made available to the ballistics examiner was a matter which could have been explained if the prosecution were to lead his evidence. The prosecution cited a ballistics examiner as a witness and yet, did not lead his evidence. This must be juxtaposed in light of the fact that the eye-witness account of PW4 and PW5 is not free from doubt. We have also analysed the evidence of PW4 and PW5 and have noted that there is a grave element of doubt as to whether they were witnesses at the scene of occurrence. In this context, the Court must therefore hold that the discrepancies which have been noticed in the FSL report could have best been explained by the authors of FSL reports both in FIR No. 311/2006 and FIR No. 781/2006. This not having been done, the accused would, in our view, be entitled to the benefit of doubt.

35. The appellants have urged that PW4 was not an eye-witness as he had deposed that Sandeep was fired at from a distance of 4-5 feet which is not supported by the medical evidence. They urge that the blackening of a few firearm injuries on the deceased's body is conclusive proof that the firing must have been done from a closer distance, which

could be less than 2 feet.[16] Since the depositions of PW4 and PW5 suffer from several material contradictions and improvements; and the non-examination of the ballistics expert in light of serious controversies in the FSL reports has cast a shadow on the prosecution's story, we need not deal with the additional argument on blackening of injuries.

Refusal to undergo Test Identification Parade[17]

36. The prosecution has submitted that an adverse inference should be drawn against the appellants for refusing to submit themselves to a TIP. Before we deal with the circumstances in which the appellants declined a TIP, it becomes essential to scrutinize the precedent from this Court bearing on the subject. A line of precedent of this Court has dwelt on the purpose of conducting a TIP, the source of the authority of the investigator to do so, the manner in which these proceedings should be conducted, the weight to be ascribed to identification in the course of a TIP and the circumstances in which an adverse inference can be drawn against the accused who refuses to undergo the process. The principles which have emerged from the precedents of this Court can be summarized as follows:

(i) The purpose of conducting a TIP is that persons who claim to have seen the offender at the time of the occurrence identify them from amongst the other individuals without tutoring or aid from any source. An identification parade, in other words, tests the memory of the witnesses, in order for the prosecution to determine whether any or all of them can be cited as eye-witness to the crime;

(ii) There is no specific provision either in the CrPC or the Indian Evidence Act, 1872[18] which lends statutory authority to an identification parade. Identification parades belong to the stage of the investigation of crime and there is no provision which compels the investigating agency to hold or confers a right on the accused to claim a TIP;

(iii) Identification parades are governed in that context by the provision of Section 162 of the CrPC;

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[16] Relies on (2016) 2 SCC 607

[17] TIP

[18] Evidence Act

(iv) A TIP should ordinarily be conducted soon after the arrest of the accused, so as to preclude a possibility of the accused being shown to the witnesses before it is held;

(v) The identification of the accused in court constitutes substantive evidence;

(vi) Facts which establish the identity of the accused person are treated to be relevant under Section 9 of the Evidence Act;

(vii) A TIP may lend corroboration to the identification of the witness in court, if so required;

(viii) As a rule of prudence, the court would, generally speaking, look for corroboration of the witness' identification of the accused in court, in the form of earlier identification proceedings. The rule of prudence is subject to the exception when the court considers it safe to rely upon the evidence of a particular witness without such, or other corroboration;

(ix) Since a TIP does not constitute substantive evidence, the failure to hold it does not *ipso facto* make the evidence of identification inadmissible;

(x) The weight that is attached to such identification is a matter to be determined by the court in the circumstances of that particular case;

(xi) Identification of the accused in a TIP or in court is not essential in every case where guilt is established on the basis of circumstances which lend assurance to the nature and the quality of the evidence; and

(xii) The court of fact may, in the context and circumstances of each case, determine whether an adverse inference should be drawn against the accused for refusing to participate in a TIP. However, the court would look for corroborating material of a substantial nature before it enters a finding in regard to the guilt of the accused.

37. These principles have evolved over a period of time and emanate from the following decisions:

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1. **Matru** v. **State of U.P. [(1971) 2 SCC 75 : 1971 SCC (Cri) 391]**
2. **Santokh Singh** v. **Izhar Hussain [(1973) 2 SCC 406 : 1973 SCC (Cri) 828]**

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3. **Malkhansingh** v. **State of M.P. [(2003) 5 SCC 746 : 2003 SCC (Cri) 1247]**
4. **Visveswaran** v. **State [(2003) 6 SCC 73]**
5. **Munshi Singh Gautam** v. **State of M.P. [(2005) 9 SCC 631]**

C

6. **Sidhartha Vashisht @ Manu Sharma** v. **State (NCT of Delhi) [(2010) 6 SCC 1],**
7. **Ashwani Kumar and Ors.** v. **State of Punjab (2015) 6 SCC 308.**

D

8. **Mukesh and Ors.** v. **State for NCT of Delhi and Ors. AIR 2017 SC 2161.**

38. In the backdrop of these principles, it would be necessary to scrutinize the evidence in the present case. PW4 in the course of his cross examination stated that the deceased had been facing trial in 2-3 cases and that he was a surety for his son. He claimed to be ignorant of the fact that the deceased was a co- accused with Rajesh alias Sarkari in a criminal case arising out of FIR No. 341/2001, under Sections 454 and 380 of the IPC at Police Station Civil Lines, Rohtak, inspite of being the deceased's surety in the same. Nor did he know whether both of them had been arrested in the case arising out of FIR No. 341 on 24 June 2001. Similarly, PW5, during the course of his cross-examination, professed that he did not know whether the deceased was the co-accused with Rajesh alias Sarkari in the case arising out of FIR No. 341. But immediately thereafter a suggestion was put to him, which he accepted, that he and his father (PW4) used to go to the court when his brother– the deceased Sandeep – and the present accused Rajesh alias Sarkari were being produced in the court on various dates of hearings. He denied the suggestion that PW4 would visit on every date of hearing in court. When PW5 was questioned during the course of cross- examination on whether he had seen the photographs of the accused Rajesh in the newspapers, he said:

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"I have never seen the photographs of accused Rajesh alias Sarkari in the newspapers. The photos of this accused must have been published in the newspapers so many times but I have never seen his photographs in the newspaper. I hate the face of Rajesh alias Sarkari and due to this reason, I did not see his photograph in the newspaper".

39. Learned Counsel appearing on behalf of the State has sought to urge that out of all the three publications which were proved in the course of the evidence, only one contained the names of the accused. However, the central point in this case is whether on the basis of significant aspects which have emerged during the course of cross-examination of PW4 and PW5, an adverse inference should be drawn against the appellants for having refused to undergo a TIP. The evidence on the record indicates that not only did the deceased have several criminal cases against him, some of which had ended in acquittal on account of a compromise, but that one of the appellants, Rajesh alias Sarkari, and the deceased were co-accused in a case arising out of FIR No. 341 dated 23 June 2001 under Sections 454 and 380 of the IPC at Police Station Civil Lines, Rohtak. Evidently both of them had been arrested in connection with the case, which is why PW5 deposed that his father PW4 used to go to court when Sandeep and Rajesh were being produced on various dates of hearing. PW4 also stated that he has stood surety for his son in various criminal cases. In this backdrop, the contention of the appellants that the refusal to undergo a TIP is borne out by the fact that Sandeep and Rajesh were known to each other prior to the occurrence and that PW4, who is a prime eye-witness, had seen Rajesh when he would attend the court during the course of the hearings, cannot be brushed aside. Consequently, in a case, such as the present, the Court would be circumspect about drawing an adverse inference from the facts, as they have emerged. In any event, as we have noticed, the identification in the course of a TIP is intended to lend assurance to the identity of the accused. The finding of guilt cannot be based purely on the refusal of the accused to undergo an identification parade. In the present case, we have already indicated the presence of the alleged eye- witnesses PW4 and PW5 at the scene of the occurrence is seriously in doubt. The ballistics evidence connecting the empty cartridges and the bullets recovered from the body of the deceased with an alleged weapon of offence is contradictory and suffers from serious infirmities.

A Hence, in this backdrop, a refusal to undergo a TIP assumes secondary importance, if at all, and cannot survive independently in the absence of it being a substantive piece of evidence.

40. For the above reasons, we have arrived at the conclusion that the prosecution has failed to establish its case beyond reasonable doubt. B The appellants are, hence, entitled to the benefit of doubt and are acquitted of the offence with which they have been charged. The Court is apprised of the fact that the appellants have undergone over 12 years of imprisonment. Consequent on the present judgment acquitting the appellants, they shall be released and their bail bonds be cancelled unless they are wanted in connection with any other case. The appeal is allowed C in the above terms.

41. Pending application(s), if any, shall stand disposed of.

Ankit Gyan Appeal allowed.