
A. Aggarwal

Before S.S. Saron & S.P. Bangarh, JJ.

SURAJAHLUWALIA—Appellant

versus

STATE OF PUNJAB—Respondent

CRA No. D- 1026 -DB of 2011

October 19, 2012

Code of Criminal Procedure, 1973 - Ss. 161, 173, 162, 313, 366(I)
- Indian Penal Code, 1860 - Ss. 34, 302, 303, 307 - Arms Act, 1959 - Ss.
7, 25, 27, 27(3), 54, 59 - An altercation ensued between Kanwaljit
Singh (deceased), Tejinder Bawa - Suraj Ahluwalia - Eye witness
stated that Tejinder Bawa fired from his .32 revolver and Suraj
Ahluwalia fired from a carbine after snatching it from his security
guard towards the head of the deceased - Medical evidence reveals
that only one shot from the carbine had hit the head of the deceased
- Trial Court convicted and sentenced Tejinder Bawa under Section

302 IPC with the aid of S. 34 IPC to life imprisonment - Suraj Ahluwalia sentenced to death under S.27(3) of the Arms Act for heaving caused death with a weapon of a prohibited bore - appeal against conviction- Held there was no common intention to cause the death of Kanwaljit Singh - There was no prior meeting of minds between the appellants Tejinder Bawa and Suraj Ahluwalia - Altercation happened on the spur of the moment - Each accused liable for his own act - Distinction drawn between "common intention" and "same or similar intention" - Conviction of appellant Tejinder Bawa under S.302 IPC set aside and High Court ordered his conviction under S. 307 IPC sentencing him to an imprisonment of 10 years - Conviction of appellant Suraj Ahluwalia maintained under S.302 of IPC but sentence reduced from death to life imprisonment because S.27(3) of the Arms Act which maintains sentence of death held ultra vires by the Supreme Court - Appeals partly allowed.

Held, that applying the ratio of said case to the present case, it may be noticed that during the skirmish between the appellants and Kamaljit Singh (deceased) the tempers had risen. The appellants were armed and in fact had come armed. Both of them fired at Kamaljit Singh on his head. The revolver shot fired by Tejinder Bawa alias Happy (appellant) missed. Suraj Ahluwalia (appellant) snatched the carbine of his gunman and also fired on the head of Kamaljit Singh, which hit him. In the circumstances there was an intention on the part of both to commit the murder of Kamaljit Singh but it was not a common intention although it was same or similar and this distinction is to be kept in view to prevent mis-carriage of justice. The appellants indeed did not share any common intention to murder Kamaljit Singh and there is no evidence of common intention to commit the act of murder in furtherance of such an intention. There is no evidence to show that the appellants ever entered into a premeditated concert to commit the murder of Kamaljit Singh though the intention may be same or similar but it was not common. Therefore, each of the appellant is to be held liable for their individual act, which is done by same or similar intention and not in furtherance of the common intention. Therefore, Suraj Ahluwalia (appellant) would be liable for committing the offence of murder in his individual capacity and since the fire arm from the revolver of the

Tejinder Bawa @ Happy (appellant) did not hit the deceased-Kamaljit Singh, although during the course of skirmish there was an intention to hit, it would be a case of attempt to murder in terms of Section 307 IPC as distinguished from murder. The act done by Tejinder Bawa @ Happy (appellant) by firing a shot towards the head of Kamaljit Singh-deceased was done with such intention and knowledge that if, he by that act caused the death, he would be guilty of murder. Therefore, the effect of contention Mr. Rai learned Senior counsel for Tejinder Bawa (appellant) that no role of actual firing has been attributed to Tejinder Bawa @ Happy-appellant would be that he (Tejinder Bawa @ Happy) is liable for attempt to murder while Suraj Ahluwalia (appellant) is liable for committing the offence of murder.

(Para 51)

Further held, that trial Court erred in imposing death sentence on the appellant - Suraj Ahluwalia for committing the offence under Section 27 (3) of the Arms Act. The said provision envisages that whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of Section 7 and such use or act results in the death of any other person, shall be punished with death. Suraj Ahluwalia (appellant) for the act of taking the carbine of his bodyguard and firing it on the head of Kamaljit Singh (deceased) which resulted in the death of the latter, has been convicted and sentenced to death in terms of Section 27 (3) of the Arms Act. The Hon'ble Supreme Court in **State of Punjab v. Dalbir Singh (2012) 3 SCC 346** has held that Section 27 (3) of the Arms Act to be ultra vires the Constitution and void. Earlier a Five Judges Bench of the Supreme Court in **Mithu v. State of Punjab, AIR 1983 SC 473** struck down as unconstitutional the provisions of Section 303 IPC being violative of Article 14 and 21 of the Constitution. Section 303 IPC provided mandatory punishment of death in respect of those committing murder while under sentence of imprisonment for life. It was held in Dalbir Singh's case (supra) that apart from the decision in Mithu's case (supra), it appears that in Section 27 (3) of the Arms Act the provision of mandatory death penalty is more unreasonable inasmuch as it provides that whoever uses any prohibited arms or prohibited ammunition or acts in contravention of Section 7 of the Arms Act and if such use or act results in the death of any other person then that person guilty of such use or acting in contravention of Section 7 shall be punishable with death. Therefore, Section 27 (3) of the Arms Act having been struck down to be

violative of the Constitution. The imposition of sentence of death for committing the said offence under Section 27 (3) of the Arms Act is not warranted and to the said extent the order of the learned trial Court is liable to be set aside.

(Para 54)

R.S. Rai, Senior Advocate with Mr. D.S. Brar, Advocate for the appellant (Tejinder Bawa alias Happy) in CRA No. D-1046-DB of 2011.

Anter Singh Brar, Senior Deputy Advocate General, Punjab for the respondent - State.

Vipul Dharmani, Advocate for the complainant - Baldev Singh.

S.S. SARON, J.

(1) This order will dispose of CRA No. D-1026-DB of 2011 filed by Suraj Ahluwalia and CRA No. D-1046-DB of 2011 filed by Tejinder Bawa @ Happy as also Murder Reference No. 6 of 2011 reference of which has been made by the learned Additional Sessions Judge, Ludhiana in terms of Section 366 (1) of the Code of Criminal Procedure ('Cr.P.C.' - for short) as they arise out of the same judgment of conviction dated 19.10.2011 and order of sentence dated 20.10.2011 passed by the learned Additional Sessions Judge, Ludhiana.

(2) The appellants Suraj Ahluwalia and Tejinder Bawa alias Happy have assailed the judgment of conviction dated 19.10.2011 and order of sentence dated 20.10.2011 passed by the learned Additional Sessions Judge, Ludhiana, in Sessions Case No. 120 dated 13.12.2008, which arises out of FIR No. 88 dated 05.09.2008 registered at Police Station, Division No.8, Ludhiana for the offences under Sections 302/34 Indian Penal Code ('IPC' - for short) and Sections 25 and 27 of the Arms Act, 1959 whereby, the appellant Suraj Ahluwalia has been convicted and sentenced to death for commission of an offence punishable under Section 27 (3) of the Arms Act. He has also been sentenced to undergo rigorous imprisonment for life, besides, pay a fine of Rs.10,000/- and in default thereof to further undergo rigorous imprisonment for six months for commission of offence punishable under Section 302 IPC. He has been further sentenced to undergo rigorous

imprisonment for three years, besides, pay a fine of Rs.500/- and in default thereof to further undergo rigorous imprisonment for two months for commission of offence punishable under Section 27 (1) of the Arms Act.

(3) The appellant Tejinder Bawa has been convicted and sentenced to undergo rigorous imprisonment for life, besides, pay a fine of Rs.10,000/- and in default thereof to further undergo rigorous imprisonment for six months for commission of offence punishable under Section 302 read with Section 34 IPC. He has also been sentenced to undergo rigorous imprisonment for three years, besides, pay a fine of Rs.500/- and in default thereof to further undergo rigorous imprisonment for two months for commission of offence punishable under Section 25 of the Arms Act.

(4) Gurpreem Singh (non-appellant), who was also an accused before the learned trial Court with the present appellants was acquitted vide impugned judgment dated 19.10.2011. No appeal has been filed against his acquittal.

(5) The FIR (Ex.PW5/A) in the case was recorded on the statement (Ex.PB) of Baldev Singh (complainant/PW-3). He has stated that he is resident of B-34-847, Chander Nagar, near Rashtriya Vidya Mandir School, Ludhiana and works as a driver at Sandhu Taxi Stand, Chander Nagar. His cousin (father's elder brother's son) namely Kamaljit Singh alias Sonu (deceased in the case) son of Amar Singh resident of House No. B-34-847 Chander Nagar, Ludhiana used to work as a driver at Neel Kanth Taxi Stand, Upkar Nagar, Dushera Ground. On the date of the incident, that is, on 05.09.2008 it must be about 8.45 p.m. that Happy (Tejinder Bawa – appellant in CRA No.1046 of 2011) and Suraj Ahluwalia (appellant in CRA No. D-1026-DB of 2011), President of Shiv Sena, Bal Thakre and his Gunman Shammi Kumar came on a black colour Bolero vehicle bearing registration No. PB-10BE-4979. After getting down from the said vehicle they came in the office and sat on the 'takhtposh' (a wooden platform bench). The office lights and the street lights were on and they were conversing. Happy (Tejinder Bawa-appellant) gave a Rs.20/- note to Baldev Singh (complainant/PW-3) and asked him to get cigarettes from outside. While, he (Baldev Singh-complainant/PW-3) was returning after purchasing cigarettes, he met Harjinder Singh @ Bobby son of Amar Singh. Both of them saw Happy (Tejinder Bawa-appellant) arguing with Kamaljit Singh

(deceased) inside the office and Suraj Ahluwalia (appellant) was abusing Kamaljit Singh (deceased). Within their sight Happy (appellant) who was carrying a pistol with him, fired a shot with it at the head of Kamaljit Singh and Suraj Ahluwalia (appellant) snatched the carbine of his gunman and fired at the head of Kamaljit Singh (deceased). The latter, on sustaining the said shot on his head fell on the floor. Then they both (appellants) came out of the office and fired in the air and also raised 'lalkaras' that they had killed him (Kamaljit Singh) by firing. The complainant (Baldev Singh) and Harjinder Singh, raised an alarm of 'mar-ditta'. They (appellants), however, asked them to run away to save their lives. Then the three of them (the appellants and their accomplice) fled away from the spot with their respective weapons in their Bolero vehicle towards Chander Nagar side. The motive for the occurrence was that Kamaljit Singh (deceased) was to take taxi fare from them. The entire occurrence was witnessed by Baldev Singh (complainant/PW-3) and Harjinder Singh alias Bobby. The complainant had left Harjinder Singh near the dead body for its safety and was coming to the police station that the police party met him and recorded his statement (Ex.PB).

(6) The statement of the complainant after it was recorded was signed by him in English and it was attested by Sub Inspector ('SI' - for short) Ravinder Singh SHO, P.S. Division No.8, Ludhiana (PW-5) on 05.09.2008 in the area of Mini Fountain Chowk, Guru Nanak Pura at 11.00 pm. Police proceedings were recorded to the effect that the statement had been read over to the complainant-Baldev Singh and he after admitting the correctness of the same signed the same. SI/SHO Ravinder Singh (PW-5) along with other police officials was present on a Govt. vehicle at Mini Fountain Chowk, Guru Nanak Pura in connection with patrol duty. At that time the statement (Ex.PB) of Baldev Singh, complainant (PW-3) was recorded. After recording the said statement it was read over to Baldev Singh (PW-3) who signed the same which was attested by SI/SHO Ravinder Singh (PW-5). From the said statement offences under Sections 302/34 and Sections 25 and 27 of the Arms Act were made out.

(7) The statement (Ex.PB) was sent to the Police Station by SI/SHO Ravinder Singh (PW-5) through Paramjit Singh Constable. On the basis of the same, formal FIR (Ex.PW5/A) was recorded by Jagjit Singh ASI at the Police Station. Original statement along with copy of FIR was sent to SI/SHO Ravinder Singh (PW-5) at the spot for investigation.

Besides, special reports were prepared and sent. Thereafter, SI/SHO Ravinder Singh (PW-5) along with other police officials went to the place of occurrence. He inspected the spot and prepared inquest report (Ex. PW5/B) in respect of the dead body of Kamaljit Singh (deceased). He also recorded statements of Pritam Singh and Dalbara Singh under Section 175 Cr.P.C. Besides, the site plan Ex.PW5/C was prepared and blood stained earth from the place of occurrence was lifted and put in a plastic box, which was converted into a parcel and sealed by him with his seal bearing impression 'RS'. The said parcel was taken in possession vide memo Ex.PW4/B, which was signed by Gurcharan Singh ASI and Tejinder Singh. Two empties of the cartridges of 9 mm were also recovered from the place of occurrence, which too were put in a parcel, which was also sealed by him with his seal bearing impression 'RS'. The said parcel was taken in possession vide memo Ex.PW4/A. One wooden bench ('takhtposh') and two chairs were also recovered from the place of occurrence. The same were also taken in possession vide memo Ex.PW4/C by SI/SHO Ravinder Singh (PW-5). He also recovered two mobile phones of Nokia make, which were lying near the dead body of Kamaljit Singh (deceased) and the same were taken in possession vide memo Ex.PW4/D. The dead body of Kamaljit Singh (deceased) with request Ex.PW5/D was sent to the Civil Hospital, Ludhiana for post mortem examination. On the said request, the doctor made his endorsement Ex.PW5/E. In terms of the same, the dead body was ordered to be kept in the mortuary at 3.00 a.m. On that very day, SI/SHO Ravinder Singh (PW-5) moved another request Ex.PW5/F for getting the post mortem conducted on the dead body of Kamaljit Singh (deceased). On his request, a Board of Doctors was constituted for conducting the post mortem. After the post mortem examination, Paramjit Singh Constable produced before SI/SHO Ravinder Singh (PW-5) a parcel containing clothes of the deceased (Kamaljit Singh) duly sealed with the seal bearing impression 'LMCH', one parcel of plastic box duly sealed with the seal 'LMCH' and four x-ray films, which were taken in possession vide memo Ex.PW5/G. SI/SHO Ravinder Singh (PW-5) recorded the statements of witnesses.

(8) On 08.09.2008, Ravinder Singh SI (PW-5) recorded the supplementary statement of Baldev Singh (complainant). The same was objected to by the appellants being hit by Section 162 CrPC. On 11.09.2008

SI/SHO Ravinder Singh (PW-5) along with other police officials and Baldev Singh (complainant) (PW-3) was present at Kailash Chowk, Ludhiana where Ashwani Bawa produced, Tejinder Bawa (appellant in CRA No. D-1046-DB of 2011) and Gurpreem Singh (non-appellant) and he arrested them vide memos Ex.PW5/H and Ex.PW5/I respectively. He also sent information of their arrest vide the aforesaid memos. On personal search of Tejinder Bawa (appellant), nothing valuable was recovered and his personal search memo Ex.PC to this effect was prepared. SI/SHO Ravinder Singh (PW-5) also conducted personal search of Gurpreem Singh (non-appellant), which resulted in recovery of an identity card, which was taken in possession vide memo Ex.PD. On return to the police station, on that day, the two accused were locked in the police lock up. On the next day, they were produced before the learned Ilaqa Magistrate.

(9) On 14.09.2008, Gurpreem Singh (non-appellant) (since acquitted), made a disclosure statement (Ex.PW5/J) that he had kept concealed one carbine, magazine along with cartridges in his residential room, which were in his exclusive possession and he could get those recovered. The said disclosure statement Ex.PW5/J was signed by Gurpreem Singh (non-appellant) and witnessed by Kishan Singh HC and Gurmail Singh HC. Pursuant to the said disclosure statement (Ex.PW5/J), Gurpreem Singh (non-appellant) got recovered one official carbine, one magazine along with 20 live cartridges of 9 mm from his residential room from a wooden almirah. SI/SHO Ravinder Singh (PW-5) prepared a parcel of the recovered carbine, which was sealed by him with his seal bearing impression 'RS'. The magazine and cartridges along with the parcel were taken in possession vide memo Ex.PW5/K, which was witnessed by Kishan Chand HC and Gurmail Singh HC. He also prepared the site plan Ex.PW5/L of the place of recovery of carbine, magazine and cartridges, besides, recorded the statement of witnesses.

(10) On 17.09.2008, SI/SHO Ravinder Singh (PW-5) arrested Suraj Ahluwalia (appellant) vide memo Ex.PW5/M. His personal search memo Ex.PA was prepared. On 19.09.2008, during interrogation, Suraj Ahluwalia (appellant) made a disclosure statement (Ex.PW5/N) to the effect that he had kept concealed a .32 bore revolver along with its cover, two live cartridges of the same bore, one empty magazine carbine and six boxes

of cartridges of carbine 9 mm, which were made of cardboard and the same were lying concealed under the clothes in an almirah of a room of his residential house, which were in his exclusive possession and he could get those recovered. He also disclosed that a Bolero vehicle bearing registration No. PB-10-BET-4979 was lying parked in front of New DMC near park which was also in his exclusive possession and he could get the same also recovered. The said disclosure statement (Ex.PW5/N) was signed by Suraj Ahluwalia (appellant) and was witnessed by Pritam Singh HC. Thereafter, Suraj Ahluwalia (appellant) got recovered one revolver .32 bore along with its cover, two cartridges of the same bore, one Arms Licence, which was issued in his name, magazine carbine, six boxes of cardboard containing cartridges of 9 mm out of which four boxes were containing 35/35 cartridges each. The fifth box contained 20 cartridges of 9 mm and the sixth box was empty. SI/SHO Ravinder Singh (PW-5) prepared separate parcels of revolver, cover of revolver and two cartridges, one magazine carbine and six boxes of cartridges. All the parcels were sealed with his seal bearing impression 'RS' and the parcels along with the arms licence were taken in possession vide memo Ex.PW5/O, which was signed by Suraj Ahluwalia (appellant in CRA No. D- 1026-DB of 2011) and witnessed by Pritam Singh HC and Gurnam Singh. Thereafter, Suraj Ahluwalia (appellant in CRA No. D-1026-DB of 2011) got recovered the Bolero vehicle bearing registration No. PB-10-BE-4979 from the place that he had disclosed in his disclosure statement Ex.PW5/N. The same was taken in possession vide memo Ex.PW5/P. He (Ravinder Singh SI/PW-5) also prepared site plans Exs.PW5/Q and PW5/R of the places of recovery of the aforementioned articles. Besides, the statements of the witnesses were recorded. On 18.10.2008, Pawan Kumar Constable produced six photographs along with six negatives of the place of occurrence before SI/SHO Ravinder Singh (PW-5), which were taken in possession vide memo Ex.PW5/S. SI/SHO Ravinder Singh (PW-5) also got prepared scaled site plan of the place of occurrence from Ram Saran HC on the demarcation of the complainant Baldev Singh. He also recorded the statements of witnesses. The blood stained articles were sent to the Forensic Science Laboratory and the latter vide reports Ex.PX dated 29.09.2008 and Ex. PY dated 17.11.2008 gave their opinion in respect of the same.

(11) After completion of investigation, SI/SHO Ravinder Singh (PW-5) filed police report (challan) under Section 173 Cr.P.C before the learned Ilaqa Magistrate to the effect that it appeared that the appellants and Gurprem Singh (non-appellant) (since acquitted) had committed an offence punishable under Section 302/34 IPC and Sections 25 and 27 of the Arms Act. On presentation of police report, copies of documents as required under Section 207 Cr.P.C. were furnished to the appellants and Gurprem Singh (non-appellant) (since acquitted). In terms of order dated 29.5.2008, the learned Judicial Magistrate Ist Class, Ludhiana from the papers that were submitted prima facie found the case for the offence under Section 302 read with Section 34 IPC, besides, Sections 25 and 27 of the Arms Act to be made out against the accused. The offence under Section 302 IPC was exclusively triable by the Court of Sessions. Accordingly, the case was committed to the Court of learned Session Judge, Ludhiana and it was assigned to the Court of learned Additional Session Judge, Ludhiana. The said Court vide order dated 14.5.2009 framed charges against the appellants and Gurprem Singh (non-appellant) (since acquitted) on the allegations that on 05.09.2008 at about 8.45 p.m. in the area of Upkar Nagar, Ludhiana, Tejinder Bawa alias Happy (appellant) and Suraj Ahluwalia (appellant) committed murder of Kamaljit Singh alias Sonu son of Amar Singh, resident of Chander Nagar, Ludhiana while firing from their pistol and carbine (prohibited bore) of gunman respectively and thereby, they committed an offence under Section 302 IPC while their co-accused Gurprem Singh (since acquitted) committed an offence punishable under Section 302 read with Section 34 IPC. Secondly, on the same date, time and place Tejinder Bawa alias Happy (appellant) was found in possession of one pistol which was used for committing an offence of murder without any permit or licence and thereby committed an offence under Section 25 of the Arms Act. Thirdly, on the same date, time and place Suraj Ahluwalia (appellant) handed over his licenced pistol to Tejinder Bawa alias Happy (appellant) who used the same for committing the murder of Kamaljit Singh alias Sonu and thereby committed an offence under Section 27 of the Arms Act. Fourthly, on the same date, time and place Suraj Ahluwalia (appellant) after taking over carbine (prohibited bore) from his gunman co-accused Gurprem Singh (since acquitted) used the same for committing the murder of Kamaljit Singh and thereby committed an offence under Section 27 of the Arms Act. The appellants pleaded not guilty to the charge-sheet and claimed trial. Consequently, the prosecution evidence was summoned.

(12) At the trial, the prosecution examined Jagtar Singh as PW-1, Dr. R.K. Sharma as PW-2, Baldev Singh, complainant as PW-3, Harjinder Singh (sic. Rajinder Singh) as PW-4, Ravinder Singh SI/SIO as PW-5, Gurnam Singh as PW-6, Pritam Singh HC as PW-7, Ram Saran HC as PW-8, Gurmail Singh HC as PW-9, Paramjit Singh IIC as PW-10, Kashmir Singh HC as PW-11, Pawan Kumar HC as PW-12, Balbir Singh ASI as PW-13, Balram Rai HC as PW-14, Chaman Singh ASI as PW-15, besides, tendered documents in evidence including the reports of the Forensic Science Laboratory (FSL) Ex.PX and Ex.PY dated 29.09.2008 and 17.11.2008 respectively and closed its evidence.

(13) After close of the prosecution evidence, the appellants and Gurprem Singh (non-appellant) (since acquitted) were examined under Section 313 Cr.P.C, wherein, they denied the allegations of the prosecution and pleaded innocence and false implication in this case.

(14) Tejinder Bawa (appellant) gave his version wherein, he stated that Kamaljit Singh alias Sonu died at Neelkanth Taxi stand owned by him and that he (Tejinder Bawa) was not present at the time of occurrence. He, further stated that the complainant Baldev Singh (PW-3) and Harjinder Singh (sic. Rajinder Singh) (PW-4) were also not present at the spot at the time of occurrence. The police reached the spot at about 7.30 p.m. On the day of occurrence and after preliminary investigation, they concocted a false story in connivance with the complainant Baldev Singh (PW-3) who was called at the spot afterwards. Harjinder Singh (sic. Rajinder Singh) (PW-4) had been introduced later on at the instance of the complainant Baldev Singh. He himself surrendered before the police on 08.09.2008. Kamaljit Singh alias Sonu (deceased) might have died with an accidental shot while fiddling with the carbine.

(15) Suraj Ahluwalia (appellant in CRA No. D-1026-DB of 2011) also gave his own version that he had been implicated in the present case at the instance of his political opponents and the witnesses were under their influence and in order to black mail him and to destroy his future political prospects, he had been falsely involved in this case.

(16) The appellants though stated that they wanted to lead evidence in defence but they closed their evidence without examining any witness in defence.

(17) After hearing both the sides, the learned trial Court convicted and sentenced the appellants in the manner as detailed above and acquitted Gurprem Singh. Aggrieved against the same, the appellants have filed this appeal with a prayer for its acceptance and for their acquittal of the charges framed against them.

(18) The learned trial Court has also made murder reference No. 6 of 2011 for confirmation of the sentence of death imposed on Suraj Ahluwalia (appellant in CRA No. D-1026-DB of 2011) for commission of an offence punishable under Section 27 (3) of the Arms Act.

(19) Jagtar Singh (PW-1) deposed that on 17.09.2008, he met the police party headed by Ravinder Singh SI/SHO, Police Station Division No. 8, Ludhiana (PW5) and they were present near the bridge of Chander Nagar, Ludhiana. The latter received secret information that Suraj Ahluwalia (appellant) was standing near Iqbal Nursing Home and he could be apprehended, if a raid was conducted. Jagtar Singh (PW-1) accompanied the police party went to Iqbal Nursing Home. Suraj Ahluwalia (appellant) was standing near the wall of Iqbal Nursing Home and he (PW-1) disclosed to the SHO (PW-5) about him. At his (PW-1's) instance Suraj Ahluwalia (appellant) was arrested by Ravinder Singh SI/SHO (PW-5) and after arrest, his personal search was conducted and memo Ex.PA was prepared, which was attested by him (PW-1). In cross-examination it is stated that his statement was not recorded by the police under Section 161 CrPC. Besides, it was wrong to suggest that Suraj Ahluwalia (appellant) surrendered in the Police Station and it was wrong to suggest that he deposed falsely.

(20) Dr. R.K. Sharma, Medical Officer, Civil Hospital, Ludhiana (PW-2) along with other doctors namely Dr. Manjit Singh and Dr. Sangeeta Singh conducted post-mortem examination on the dead body of Kamaljit Singh (deceased). He deposed that he found the following two injuries on the dead body of Kamaljit Singh (deceased):

1. Perforating wound on the right side of the head 2" above the right ear 1 x ½ inch margin inverted the margins were burnt.
2. Lacerated wound on the left side on the scalp behind the left ear 1" away from the left ear. The margins were everted.

(21) On exploration the track of the wound was traced and found that it was passing in between the brain tissue tearing the blood vessels and the brain tissue. The cranial cavity was full of blood. The cause of death in this case was due to shock and haemorrhage as a result of penetrating wound. All the injuries were ante-mortem. The wound appeared to be gun shot injuries. He also proved the post mortem report (Ex.PA) and the pictorial diagram (Ex.PA/1) showing the seats of injuries. In cross-examination, he stated that on exploration of the wound he found that there was one track of both the wounds. Wound No.1 indicates the point of entry whereas the wound No.2 indicates the point of exit. In this regard he had given his opinion Ex.DA/1 and he made this report on police inquiry. Only one bullet had hit the deceased and there was no other bullet injury on the person of the deceased. It was a close range fire. It was difficult to specify the distance between the shot and the deceased but it does indicate that it was close range fire arm injury. The edges of the wound were not irregular. There was no bullet found in the skull.

(22) Baldev Singh (complainant) (PW-3) deposed in accordance with his statement made before the investigating officer that formed the basis of formal FIR. He deposed on the line on his statement Ex.PB. He deposed that he was working as a driver at Sandhu Taxi Stand, Chander Nagar, Ludhiana, Kamaljit Singh @ Sonu (deceased) was his cousin brother (father's elder brother's son), who was working as a driver at Neel Kanth Taxi Stand. On 05.09.2008 at about 8.45 p.m. he (Baldev Singh-PW-3/complainant) was present at Neel Kanth Taxi stand where accused Tejinder Bawa @ Happy (appellant) and Suraj Ahluwalia (appellant), besides, gunman Gurprem Singh (since acquitted) came there on a black colour Bolero vehicle. After getting down from the said vehicle they came to the taxi stand and sat on a 'takhatposh' (a wooden platform bench) as he (PW-3) was perplexed, so he had got written the name of Constable Gurprem Singh as Constable Shammi Kumar in his statement. On 08.09.2008, he went to the police station and his supplementary statement was recorded. In the supplementary statement, he got corrected the name of Constable Gurprem Singh, which he got recorded in his earlier statement as Constable Shammi Kumar as he was puzzled at that time. The supplementary statement that was recorded was objected to by the defence on the ground that it was hit by Section 162 Cr.P.C. being a signed

statement. The question was kept open to be decided at the time of arguments. It is further stated by Baldev Singh (PW-3) that Happy (Tejinder Bawa – appellant) handed over to him a currency note of denomination of Rs.20/- for bringing a packet of cigarettes. When he was coming back after purchasing a packet of cigarettes, his cousin brother namely Harjinder Singh @ Bobby (sic. Rajinder Singh) son of Amar Singh met him on the way. They both then came to Neel Kanth Taxi stand. There they saw that Tejinder Bawa @ Happy (appellant) owner of the taxi stand was arguing with Kamaljit Singh @ Sonu (deceased) and Suraj Ahluwalia (appellant) was abusing Kamaljit Singh @ Sonu (deceased). Tejinder Bawa @ Happy (appellant) had a revolver with him and he fired towards the head of Kamaljit Singh @ Sonu (deceased). Thereafter, Suraj Ahluwalia (appellant) snatched the gun of his gunman namely Constable Gurprem Singh (since acquitted) and fired at the head of Kamaljit Singh @ Sonu. Again said, Suraj Ahluwalia (appellant) had snatched the carbine of Constable Gurprem Singh (since acquitted) and fired at the head of Kamaljit Singh @ Sonu (deceased). Due to this fire arm injury, Kamaljit Singh @ Sonu (deceased) fell on the ground and died at the spot. Thereafter, Suraj Ahluwalia (appellant) and Tejinder Bawa @ Happy (appellant), owner of the taxi stand came out of the office and fired in the air. They raised 'lalkaras' and Happy (Tejinder Bawa – appellant) stated to him (PW-3) that they had killed his brother. If he (PW-3) wanted to save his life, then he (PW-3) should run away. Thereafter, all the accused with their respective weapons ran away from the spot in their 'Bolero' vehicle towards Chander Nagar. The motive of the occurrence was dispute regarding the rent of taxi between Kamaljit Singh @ Sonu (deceased) and Happy (Tejinder Bawa – appellant) of the taxi stand. Thereafter, Baldev Singh (PW-3) left Harjinder Singh @ Bobby (sic. Rajinder Singh) near the dead body and then proceeded towards the police station to give information to the police. The police party met him near Mini Fountain Chowk and he narrated the whole occurrence to the police. His statement (Ex.PB) was recorded, which was read over and explained to him. He signed the same in token of its correctness. Then he accompanied the police to the place of occurrence and the police inspected the spot in his presence. On 11.09.2008, Baldev Singh (PW-3) was present at Kailash Chowk along with the police where a person came who disclosed that he was maternal uncle of Happy (Tejinder Bawa – appellant). He (PW-3) informed the police that he could produce the accused before the

police party. This was objected to by the defence. Accordingly, he produced accused Happy (Tejinder Bawa – appellant) and Constable Gurpreem Singh (since acquitted) before the police party. He (PW-3) identified both the accused in the presence of the police party and also stated to the police that they were the same persons who were involved in the present case. This was objected to by the defence being inadmissible. Police party arrested both the accused and also conducted their personal search. Personal search memo Ex.PC of Tejinder Bawa alias Happy (appellant) and Ex.PD of Constable Gurpreem Singh were prepared. Both the memos were attested by him as witness. Police also recorded his statement. This was objected to being inadmissible in evidence. Apart from that he also proved personal search memo Ex.PC of Tejinder Bawa (appellant) and Ex.PD of Gurpreem Singh (non-appellant) (since acquitted).

(23) Harjinder Singh @ Bobby (PW-4) also corroborated the testimony of Baldev Singh (PW-3). He also proved the recovery memo Ex.PW4/A in pursuance of which two empty cartridges and two deformed jacketted bullets (lead) from the spot were recovered. He also proved recovery memo Ex.PW4/B, whereby, blood stained earth from the spot was lifted and taken in possession. Besides, recovery memo Ex.PW4/C, whereby, two chairs and a 'takhatposh' (wooden platform bench) were taken in possession was proved. He also proved recovery memo Ex.PW4/D, whereby, two mobile phones make Nokia were recovered. He (PW4) signed the said recovery memos. These were signed as Rajinder Singh. After opening the parcels, he (PW-4) saw the two empty cartridges, which were marked P-1 and mark P-2; two deformed jacketted (lead) bullets, mark P-3 and mark P-4; two mobile phones, mark P-5 and mark P-6. He (PW-4) also saw the blood stained clothes of the deceased i.e. shirt, underwear, 'banian' (vest) and pant which were Ex.MO/1 to Ex.MO/4. Belt of the deceased was Ex.MO/5. The 'dabbi' (small box) containing blood-stained earth was Ex.MO/6, two chairs were Ex.MO/7 and Ex.MO/8. The 'takhatposh' (wooden platform bench) was Ex.MO/9 and the locket was Ex.MO/10.

(24) Ravinder Singh SI/SHO (PW-5) also deposed on the lines of the investigations conducted by him.

(25) Gurnam Singh (PW-6) who deals in property business deposed that on 19.09.2008, when he was going towards DMC with respect to domestic work and reached near Chander Nagar Pulli (small bridge), Pritam Singh HC signalled him to stop and asked him to make an enquiry with respect to Suraj Ahluwalia (appellant). Thereafter, the police took him (PW-6) to Gali No.4, Mohalla Durga Puri, Haibowal and the vehicle was stopped in front of the Kothi of Suraj Ahluwalia (appellant). All of them entered in his kothi. An iron almirah was lying in the back room and Suraj Ahluwalia (appellant) opened that almirah and took out a revolver .32 bore along with its cover, empty magazine, two live cartridges of the same bore, which were placed underneath the clothes. Suraj Ahluwalia (appellant) also produced his Arms Licence on which his photo was affixed. He also took out six small cartons of cardboard containing cartridges. Four boxes each contained 35 cartridges and one box contained 20 cartridges and one box was empty. These were recovered vide recovery memo Ex.PW5/O, after sealing the said recovered articles and put separate parcels. He (PW-6) further testified that Suraj Ahluwalia (appellant) got recovered the black colour Bolero vehicle No. 4979 parked near the park of New DMC, which was taken in possession vide memo Ex.PW5/P.

(26) Pritam Singh HC (PW-7) testified that on 19.09.2008, Ravinder Singh SI/SHO (PW-5) interrogated Suraj Ahluwalia (appellant) and the latter made a disclosure statement Ex.PW5/N. In pursuance of the same he got recovered a .32 bore revolver along with its cover, two live cartridges of the said bore, one Arms Licence issued in his name, magazine carbine, six boxes of cardboard containing cartridges of 9 mm out of which four boxes were containing 35 cartridges each and the fifth box was contained 20 cartridges of 9 mm and sixth box was empty. He also testified that investigating officer prepared the site plan of places of recoveries Ex.PW5/Q and Ex.PW5/R respectively.

(27) Ram Saran HC (PW-8) deposed that he prepared the scaled site plan Ex.PW8/A at the pointing of the complainant (Baldev Singh) after visiting the place of occurrence.

(28) Gurmail Singh HC (PW-9) deposed about the disclosure statement of Gurprem Singh (non-appellant) (since acquitted).

(29) Paramjit Singh HC (PW-10) deposed that on 05.09.2008, he was posted at Police Station Division No.8, Ludhiana. On that day, he (PW-10) along with Ravinder Singh SI/SHO (PW-5) and other police officials was present near Mini Fountain Chowk, Guru Nanak Pura, where, Baldev Singh (complainant) (PW-3) got his statement recorded, which was reduced into writing and sent to the police station through him (PW-10) for registration of FIR. He (PW-10) handed over the ruqa (memo) to ASI Jagjit Singh at Police Station Division No.8, Ludhiana. On the basis of the same, formal FIR was registered. After getting the FIR recorded, he (PW-10) returned to Mini Fountain Chowk and handed over the original ruqa (memo) to SI Ravinder Singh (PW-5). After inquest proceedings, the dead body of Kamaljit Singh (deceased) was handed over to him (PW-10) for getting the post-mortem conducted from Civil Hospital, Ludhiana. He (PW-10) due to night got kept the dead body of Kamaljit Singh in the dead house. He (PW-10) remained there during the night and on the next day after getting the post-mortem examination conducted, he (PW-10) was handed over one parcel of clothes of the deceased (Kamaljit Singh) and one parcel containing plastic box; both the parcels were sealed with the seal bearing impression 'LMCH'. He (PW-10) was also given four x-ray films and post mortem report. On return to the police station, he (PW-10) produced the above said parcels and x-ray films before SI/SHO Ravinder Singh (PW-5), which were taken in possession vide recovery memo Ex. PW5/G. He (PW-10) further testified that on 07.10.2008, Chaman Singh MHC, handed over to him one parcel containing .32 bore revolver, one parcel containing carbine, one parcel containing ten cartridges 9mm live and these parcels were sealed with the seal bearing impression 'RS' for depositing them with the Forensic Science Laboratory, Chandigarh. The articles, however, could not be deposited in the Forensic Science Laboratory due to objections raised by its office and on return to the police station, he (PW-10) deposited the said parcels in an intact condition with MHC Chaman Singh. On 08.10.2008 MHC Chaman Singh again handed over to him (PW-10) the said parcels i.e. one parcel containing revolver, one parcel containing carbine duly sealed with seal 'RS', along with five 9 mm live cartridges and five live cartridges of .32 bore and after compliance with the objection to deposit them with the Forensic Science Laboratory, Chandigarh and he (PW-10) deposited the said parcels and the cartridges in an intact condition with the above said office and on return to the police

station, he handed over the receipt to MHC Chaman Singh which he placed on the record. He testified that, so long as, the abovesaid parcels remained with him (PW-10), no one tampered with them and his statement under Section 161 Cr.P.C was recorded by Ravinder Singh SI/SIIO (PW-5).

(30) Kashmir Singh HC (PW-11) proved the correct photocopy of original record Ex.PW11/A, whereby, arms and ammunition were allotted to Gurprem Singh (non-appellant) (since acquitted).

(31) Pawan Kumar HC (PW-12) deposed that on the intervening night of 5/6.09.2008, he was called by Ravinder Singh SI/SHO (PW-5) at the place of occurrence i.e. Neelkanth Taxi Stand opposite Dusschra ground, Upkar Nagar and he clicked photographs Ex.P1 to Ex.P6 at the spot and handed them over to the Investigating Officer (PW-5) along with their negatives Ex.P7 to Ex.P12. These were taken in possession vide memo Ex.PW5/S.

(32) Balbir Singh ASI (PW-13) stated that Gurprem Singh (nonappellant) (since acquitted) was posted as gunman with Suraj Ahluwalia (appellant in CRA No. D-1026-DB of 2011), General Secretary, Punjab Shiv Sena, Hindustan, Ludhiana and he proved the photocopy of the order Ex.PW13/A.

(33) Balram Rai HC (PW-14) tendered in evidence his affidavit Ex.PW14/A. The same was regarding the belongings of the deceased Kamaljit Singh being handed over to him for depositing the same in the office of the Forensic Science Laboratory, Chandigarh. Out of the articles given to him (PW-14), he deposited a parcel of two empty cartridges 9 mm and two lead deformed jacketed bullet of cartridges. The parcel of belongings of the deceased and parcel of 'dabbi' (small box) of blood-stained earth was handed over to MHC Chaman Singh for depositing in the Malkhana as objection had been raised. On 12.09.2008 MHC Chaman Singh took out a sealed parcel of Kamaljit Singh (deceased) sealed with seal bearing impression 'LMCH' and a parcel of blood-stained earth sealed with seal bearing impression 'RS' and a parcel of 'dabbi' (small box) plastic having a locket and coin of Rs.2/- sealed with seal bearing impression 'LMCH'. He (PW-14) got a docket prepared and on the same day deposited the articles in the office of Forensic Science Laboratory and obtained its receipt which was handed over to Chaman Singh MHC.

(34) Chaman Singh ASI (PW-15), tendered in evidence his affidavit Ex.PW15/A. He (PW-15) is the MHC of the Police Station. He has proved regarding handing over the articles for depositing them with the Forensic Science Laboratory, Chandigarh and when they were not deposited, these were handed over to him. Later these were got deposited through various police officials which are mentioned in the said affidavit.

(35) Mr. Baldev Singh, Senior Advocate for the appellant-Suraj Ahluwalia has vehemently contended that the entire prosecution case is false and in any case cannot be said to be established beyond reasonable shadow of doubt. It is submitted that there is no statement of Rajinder Singh son of Amar Singh that was recorded by the Police under Section 161 Cr.P.C. In fact statement of Harjinder Singh alias Bobby son of Tarlok Singh was recorded by the Investigating Officer SI/SIO Ravinder Singh (PW-5) and he stated that his father's elder brother's (Taya's) son Kamaljit Singh @ Sonu had died in the incident that occurred on 05.09.2008 at 11.10 p.m. Harjinder Singh or Rajinder Singh son of Amar Singh who appeared as PW-4 was examined in Court and there is no statement of said Harjinder Singh or Rajinder Singh son of Amar Singh recorded under Section 161 Cr.P.C. Therefore, it is submitted that the defence of the appellant-Suraj Ahluwalia was seriously prejudiced and the deposition of PW-4 could not be got confronted with his previous statement recorded under Section 161 Cr.P.C. A reference has been made to the cross-examination of Rajinder Singh son of Amar Singh, wherein, he has stated that from the very beginning his name is Rajinder Singh and he was not known by any other name and his father's name was Amar Singh and not Tarlok Singh. Therefore, it is submitted that the statement of Rajinder Singh (PW-4) is liable to be ruled out of consideration for want of his previous statement under Section 161 Cr.P.C. and the prosecution has failed to produce Harjinder Singh son of Tarlok Singh whose statement under Section 161 Cr.P.C. was recorded. In the absence of the statement of Rajinder Singh (PW-4) under Section 161 Cr.P.C., it is submitted that the deposition of Baldev Singh (PW-3/complainant) is absolutely inconsequential. In any case, it would be unsafe to base a conviction on the sole testimony of Baldev Singh (PW-3/complainant). It is submitted that Baldev Singh (PW-3/complainant) is merely a chance witness and a close relative of the deceased and it is not stated as to why and in what connection he was present at the time of the incident. Therefore, conviction is not liable to be based on the

statement of a chance witness. It is, further, submitted that Baldev Singh (PW-3) is unclear as to whether Suraj Ahluwalia (appellant) snatched the gun from Constable Shammi Kumar or Constable Gurpreem Singh. Therefore, conviction is not liable to be based on such vague evidence. It is further submitted that the investigations conducted by SI/SIO Ravinder Singh (PW-5) are a one side investigation inasmuch as he states that on 05.09.2008, he made entry in the rapat at 10.10 p.m. that he was in his official Bolero and Baldev Singh (complainant/PW-3) met him at Fountain Chowk at 10.15 p.m. He (PW-5) started recording his statement at 10.25 p.m. and concluded it at 11.00 p.m. It is further stated by him that place of occurrence is about half kilometer from the Police Station Division No.8. Same is the distance of Fountain Chowk to the place of occurrence. They reached the place of occurrence at about 11.30 p.m. However, information was received at the police at 11.10 p.m. and the special report reached the Ilqa Magistrate at 6.00 a.m. On 06.09.2008. Jagjit Singh ASI recorded the FIR on 06.09.2008 at 12.45 a.m. Therefore, the FIR was recorded subsequently. It is also submitted that Baldev Singh (complainant/PW-3) in his cross examination has stated that Kamaljit Singh (deceased) was employed with Tejinder Bawa @ Happy (appellant) for the last about 6-7 years. Besides, Juggal Kishore, Manager of the taxi stand used to sit at the shop where the incident had occurred and he has not been examined. It is further submitted that the motive in respect of the occurrence is attributed to Tejinder Bawa @ Happy (appellant) and not to Suraj Ahluwalia (appellant). Besides, it is submitted that there has been 'padding' in the prosecution case inasmuch as the incident had occurred on 05.09.2008 and the supplementary statement of Baldev Singh (PW-3/complainant) was recorded at the police station on 08.09.2008. According to the deposition of Baldev Singh (PW-3) it has been deposed by him that when he went to the Police Station on 08.09.2008 at about 11.00/11.10 a.m. for getting his supplementary statement recorded, at that time Gurpreem Singh (since acquitted) was in the Police lockup and he had seen him. However, according to the prosecution, Tejinder Bawa @ Happy (appellant) and Gurpreem Singh (since acquitted) were arrested on 11.09.2008. Therefore, it is submitted that in case Gurpreem Singh (since acquitted) was in police custody on 08.09.2008 when Baldev Singh (PW-3/complainant) went to the police station to get his supplementary statement recorded then he could not have been arrested on 11.09.2008 and the subsequent recoveries effected on 14.09.2008 are a request of result of 'padding'.

(36) Mr. Randip Singh Rai, Senior Advocate appearing for the appellant- Tejinder Bawa @ Happy has reiterated the stand taken by Mr. Baldev Singh, Senior Advocate for the appellant-Suraj Ahluwalia. He has, however, submitted that the fatal shot is not attributed to Tejinder Bawa @ Happy (appellant) but is attributed to Suraj Ahluwalia (appellant). Therefore, the case against the appellant-Tejinder Bawa @ Happy is patently false. He has not been attributed any injury on the person of Kamaljit Singh @ Sonu (deceased). It is also submitted that Baldev Singh (complainant/PW-3) in his statement (Ex.PB) before the Police on the basis of which FIR has been registered has stated that Happy (Tejinder Bawa-appellant) who had a pistol with him fired on the head of Kamaljit Singh (deceased). However, while appearing in Court he (PW-3) submits that Tejinder Bawa (appellant) pointed his gun towards the head of Kamaljit Singh and fired. It is also submitted that in the statement (Ex.PB) Baldev Singh (complainant/PW3) submits that the motive behind the occurrence was that Kamaljit Singh (deceased) was to take taxi fare from them (appellants), whereas Baldev Singh (complainant/PW-3) has submitted that motive behind the occurrence was some dispute regarding fare of taxi between Kamaljit Singh (deceased) and Happy (Tejinder Bawa-appellant) owner of the taxi stand. Therefore, the motive has been changed from both the appellants to that against Tejinder Bawa @ Happy (appellant) alone while deposing in Court. It is also submitted that Tejinder Bawa @ Happy (appellant) was the owner of the taxi stand and there was no occasion for him to have any dispute with Kamaljit Singh (deceased) with regard to taxi fare and thereafter commit the murder of Kamaljit Singh. In any case, it is submitted that there was no common intention on the part of Tejinder Bawa @ Happy (appellant) to commit the alleged murder of Kamaljit Singh @ Sonu (deceased) and the learned trial Court has erred in convicting him with the aid of Section 34 IPC.

(37) In response, Mr. Anter Singh Brar, Senior DAG, Punjab for the respondent-State and Mr. Vipul Dharmani, Advocate for the complainant have submitted that the prosecution has established its case against the appellants beyond shadow of reasonable doubt and there is no reason, whatsoever, for acquitting them on any ground. It is submitted that Harjinder Singh son of Tarlok Singh (PW-4) was inadvertently written by the Investigating Officer, Ravinder Singh (PW-5) while recording his statement

under Section 161 CrPC whereas, it should have been written as Rajinder Singh son of Amar Singh. It is submitted that recovery memos were witnessed by Rajinder Singh (PW-4) in which he has signed all the recovery memos of empty cartridges (Ex.PW4/A), blood-stained earth (Ex.PW4/B), Takhat posh and two chairs (Ex.PW4/C) and of Nokia Mobile (Ex. PW4/D) were signed as Rajinder Singh and copies of these were supplied to the accused. Therefore, the accused were well aware that it was Rajinder Singh whose statement under Section 161 Cr.P.C. had been recorded and mere clerical error in mentioning the name as Harjinder Singh son of Tarlok Singh in the statement recorded under Section 161 Cr.P.C is inconsequential and does not in any manner affect the prosecution case.

(38) It is, further, submitted that discrepancies pointed out by the learned Senior Advocate appearing for the respective appellants (Suraj Ahluwalia and Tejinder Bawa @ Happy) are absolutely inconsequential and do not affect the merits of the case. It is submitted that recovery of weapon, cartridges and Revolver .32 bore clearly establish the involvement of the appellants (Suraj Ahluwalia and Tejinder Bawa @ Happy) in the commission of murder of Kamaljit Singh @ Sonu (deceased).

(39) We have given our thoughtful consideration to the contentions raised by learned counsel for the parties and with their assistance gone through the records of the case. It may be noticed that Baldev Singh (PW- 3/complainant) is the son of Tarlok Singh, Rajinder Singh @ Bobby (PW-4) and Kamaljit Singh @ Sonu (deceased) are brothers and they are the sons of Amar Singh. Tarlok Singh and Amar Singh were real brothers. Therefore, Baldev Singh (PW-3/complainant) is the first cousin of Rajinder Singh (PW-4) and Kamaljit Singh @ Sonu (deceased). In the statement (Ex.PB) recorded by Ravinder Singh SI (PW-5), Investigating Officer, it is recorded as Harjinder Singh son of Tarlok Singh and it is, further stated by the said Harjinder Singh son of Tarlok Singh that Kamaljit Singh @ Sonu (deceased) is his father's elder brother's son (Taya's son) and Baldev Singh (PW-3/complainant) is his brother. On the face of it, this appears to be a material discrepancy and in case the same is to be taken as it is then no statement of Rajinder Singh son of Amar Singh (PW-4) can be said to be recorded under Section 161 Cr.P.C.

(40) Sh. Baldev Singh, learned Senior Counsel for the appellant Suraj Ahluwalia has laid considerable emphasis on the fact that Rajinder Singh (PW-4) while appearing in the witness box is quite categorical in his stand that he has been known only by the name of Rajinder Singh and by no other name. Therefore, it is submitted that there is no statement of Rajinder Singh (PW-4) recorded under Section 161 Cr.P.C. It may, however, be noticed that Baldev Singh (PW-3/complainant) stated that he had two sisters and no brother and that Kamaljit Singh @ Sonu (deceased) was his father's elder brother's (Taya's) son; besides, Rajinder Singh (PW-4) has stated that he identifies his signatures on all the recovery memos. Rajinder Singh (PW-4) has signed the recovery memo of empty cartridges Ex.PW4/A, blood stained earth Ex.PW4/B, recovery of wooden bench (takhatposh), two chairs Ex.PW4/C as also Nokia Mobile 1200 Ex. PW4/D, the copies of the said recovery memos were supplied to the accused. Therefore, in fact, it was Rajinder Singh (PW-4) son of Amar Singh whose statement had been recorded under Section 161 Cr.P.C. The statement of Rajinder Singh (PW-4) would not in any manner prejudice the defence of the appellants inasmuch as they were quite well aware of the recovery memos that were signed by him. As such, it cannot be said that they were unable to confront Rajinder Singh (PW-4) with his statement under Section 161 Cr.P.C. Rajinder Singh (PW-4) in fact also stated that he was the same person who got his statement recorded under Section 161 Cr.P.C before the police on the night of occurrence and which was signed by him. Besides, it is stated that from the very beginning his name is Rajinder Singh and he is not known by any other name. It is, further, stated by Rajinder Singh (PW-4) that the Investigating Officer, Ravinder Singh SI (PW-5) started recording his statement at 10.30 p.m. and his signatures were obtained beneath his statement. It is also stated that there is no statement of Rajinder Singh son of Amar Singh under Section 161 Cr.P.C. on the judicial file. The contention of the learned Senior counsel for the appellant Suraj Ahluwalia is that there is in fact no statement of Rajinder Singh son of Amar Singh recorded under Section 161 Cr.P.C and the statement, which the Investigating Officer Ravinder Singh SI (PW-5) recorded and which contains his signatures below it has not been produced on the record. This in fact indeed shows that there has been carelessness on the part of the Investigating Officer Ravinder Singh SI (PW-5) in recording the statement of Rajinder Singh (PW-4). However, a close examination of the evidence and material on

record shows that in fact the statement of Harjinder Singh son of Tarlok Singh, which has been recorded under Section 161 Cr.P.C. is in fact that of Rajinder Singh son of Amar Singh (PW-4) only. It may be a lapse on the part of the Investigating Officer Ravinder Singh SI (PW-5). The same, however, does not affect the case of the prosecution. The fact that Baldev Singh (PW-3/complainant) states that he has no brother would mean that Rajinder Singh (PW-4) is not his real brother but is his first cousin being the son of his father's elder brother namely Amar Singh. Besides, Baldev Singh (PW-3/complainant) also states that Kamaljit Singh @ Sonu (deceased) was also the son of his (Baldev Singh-PW3/complainant) father's elder brother (taya). It is not shown by the defence and neither has it been put to any of the prosecution witness that Baldev Singh (PW-3/complainant) also had another brother who may be known by the name of Harjinder Singh son of Tarlok Singh. Therefore, the identity of Rajinder Singh (PW-4) is quite clear. There is no other person by the name of Harjinder Singh @ Bobby son of Tarlok Singh except Rajinder Singh son of Amar Singh (PW-4). There has been a lapse on the part of the Investigating Officer Ravinder Singh (PW-5). In fact, in the recovery memos of empty cartridges (Ex.PW4/A), of taking in possession blood stained earth (Ex.PW4/B), of taking in possession (Takhatposh) wooden platform bench and two chairs (Ex.PW4/C) and Mobile Nokia 1200 (Ex.PW4/D), the name of PW-4 is recorded as Harjinder Singh @ Bobby son of Amar Singh, however, in the said memos, he has signed as Rajinder Singh. Therefore, even though the Investigating Officer had mentioned the name of PW-4 Harjinder Singh alias Bobby but it was quite clear that it was Rajinder Singh (PW-4) whose statement had been recorded under Section 161 Cr.P.C and the recovery memos aforementioned were signed by him as Rajinder Singh. When the statement of PW-4 was initially recorded in the Court, it was mentioned as Harjinder Singh @ Bobby son of Amar Singh and then it was mentioned as Harjinder Singh @ Rajinder Singh @ Bobby son of Amar Singh and thereafter, as only, Rajinder Singh son of Amar Singh. This all goes to show that the prosecution and the defence were quite clear that the statement of Rajinder Singh son of Amar Singh alone had been recorded as PW-4. In fact it is not the stand of the appellants during trial that they had mistaken that Rajinder Singh (PW-4) was any one other than whose statement under Section 161 Cr.P.C. was recorded and that too as Harjinder Singh @ Bobby. It may in fact be noticed that statement under Section 161 CrPC

made by Rajinder Singh (PW-4) during the police investigation is not a substantive evidence. Accused persons are entitled to challenge the testimony of witnesses examined in Court with reference to their statements made by them before the investigating police officers. However, where the record made by an Investigating Officer is shown to have resulted in a lapse on his part or it becomes suspect on the premise that it was perfunctory or dishonest it would lose its value and the Court while judging the case of an accused is to weigh the evidence as adduced against him in Court by taking into account the fact that the earlier statement of witness as recorded by the Police had become suspect or is tainted and therefore, has lost much of its value. Therefore, there is no prejudice which can be said to have been caused to the appellants with respect to the statement of Rajinder Singh (PW-4) which was recorded by the police under Section 161 CrPC and as deposed by him in court and neither has any failure of justice been occasioned thereby to them.

(41) The question that the signed statement of Rajinder Singh (PW-4) was recorded by a police is also inconsequential as Rajinder Singh (PW-4) had signed various recovery memos and since he had signed the same, he had taken it that the police must have got his statement under Section 161 Cr.P.C signed as well; whereas, this was not the position and only a statement under Section 161 Cr.P.C. of Harjinder Singh was recorded and the same is not a signed statement. On the record there is an unsigned statement under Section 161 CrPC of Harjinder Singh son of Tarlok Singh. In fact as already discussed above, this was to be Rajinder Singh son of Amar Singh which is only a lapse on the part of the Investigating Officer and the same did not occasion any failure of justice to the appellants. Therefore the mere fact that a signed statement of Rajinder Singh (PW-4) has not been supplied which he though states he had signed is inconsequential. The fact that it is stated by Rajinder Singh (PW-4) that there is no statement of Rajinder Singh son of Amar Singh under Section 161 Cr.P.C. is also inconsequential as the Investigating Officer, Ravinder Singh SI (PW-5) had inadvertently and as a result of lapse or casualness recorded that statement of Rajinder Singh (PW-4) as that of Harjinder Singh son of Tarlok Singh. SI Ravinder Singh (PW-5) in his deposition in Court has denied the suggestion as in correct that the statement of Harjinder Singh son of Tarlok Singh was recorded on 08.09.2008 and it was ante dated as 06.09.2008. Thereafter, he voluntarily stated that the name was wrongly

mentioned as Harjinder Singh instead of Rajinder Singh and the father's name of Harjinder Singh had been wrongly mentioned as Tarlok Singh instead of Amar Singh. Therefore, this aspect is clarified by SI Ravinder Singh (PW-5) even in his deposition. He, further denies as incorrect the suggestion that he recorded the statement of Rajinder Singh son of Amar Singh only or that there was no statement of Rajinder Singh son of Amar Singh under Section 161 Cr.P.C. Thereafter, he further states that the statement of Harjinder Singh son of Tarlok Singh was recorded at the spot. This in fact would connect with his earlier statement and would mean that the statement of Harjinder Singh son of Tarlok Singh was incorrectly mentioned and in fact the statement of Rajinder Singh son of Amar Singh was recorded.

(42) The other contention, which is forcefully urged by Mr. Baldev Singh, Senior Advocate for the appellant (Suraj Ahluwalia) is that Ravinder Singh SI (PW-5) has shown his presence at two places at the same time. It is submitted that statement Ex.PB of Baldev Singh (PW-3/complainant) was recorded at Phuwara Chowk (Fountain Chowk) at 11.00 p.m. and FIR as claimed was recorded at 11.10 p.m. A reference has been made to the cross-examination of SI Ravinder Singh (PW-5), wherein, he states that he made an entry in the rapat at 10.10 p.m. and he was in his official Bolero. It is, further, stated that only Baldev Singh (PW-3/complainant) met him at Fountain Chowk and he met him at 10.15 p.m. He started recording his statement at 10.25 p.m. and he concluded it at 11.00 p.m. The same is in the handwriting of ASI Gurcharan Singh. The statement of ASI Gurcharan Singh was recorded on 06.09.2008. It is stated that Police Station Divn. No. 8 is 1000 yards from the Fountain Chowk. The place of occurrence was about 1 1/2 km from the Police Station Divn. No. 8 and same is the distance between Fountain Chowk to the place of occurrence. They reached the place of occurrence at about 11.30 p.m. Therefore, it is submitted that in case the Investigating Officer Ravinder Singh SI (PW-5) reached the place of occurrence at 11.30 p.m., he could not have been present at the place of occurrence and at the place where Baldev Singh (PW-3/complainant) met him at the same time.

(43) This also in our view is not of much significance as there can be certain discrepancies in the timings, which are mentioned by the prosecution witnesses after a period of time. The same in any case are about the same

night i.e. 05.09.2008 when the incident had occurred. According to Ravinder Singh SI (PW-5), he started recording the statement of Baldev Singh (PW-3/complainant) at 10.25 p.m. and concluded it at 11.00 p.m. According to Baldev Singh (PW-3/complainant), his statement was recorded at Mini Fountain Chowk at 11.00 p.m. on the date of occurrence. The difference in point of time is not of much consequence as such discrepancies do occur during the deposition of witnesses in Court and even otherwise the same are not so glaring so as to hold that the entire prosecution case is false or creates a doubt of any kind.

(44) Baldev Singh (PW-3/complainant) and Rajinder Singh (PW-4) have deposed in the manner in which the incident had occurred. In the statement Ex.PB, on the basis of which FIR has been registered, it has been stated by Baldev Singh (PW-3/complainant) that when he was returning after buying cigarettes then Rajinder Singh @ Bobby (PW-4) son of Amar Singh met him. Then both of them saw inside the office that Happy (Tejinder Bawa/appellant) was arguing with Kamaljit Singh @ Sonu (deceased) and Suraj Ahluwalia (appellant) was abusing Kamaljit Singh @ Sonu (deceased). In the meantime, Happy who had a revolver with him, fired a shot at the head of Kamaljit Singh (deceased); whereas, Suraj Ahluwalia (appellant) snatched the carbine of his gunman and fired a shot on the head of Kamaljit Singh (deceased). Kamaljit Singh (deceased) after receiving the shot on his head fell on the ground. Thereafter, both of them i.e. Suraj Ahluwalia (appellant) and Tejinder Bawa @ Happy (appellant) came out of the office and fired shots in the air and raised 'lalkaras' that they had killed Kamaljit Singh with fire shots. Baldev Singh (PW-3/complainant) and Harjinder Singh (PW-4) raised an alarm of 'Marta.... Marta'. Then the accused directed them to run away from the spot in order to save their lives. Thereafter, all the three accused also fled away from the spot with their respective weapons. The said position is reiterated by Baldev Singh (PW-3/complainant) in his deposition in Court with regard to the manner in which the incident had occurred. It is stated by Baldev Singh (PW-3/complainant) that he was working as a driver at Sandhu Taxi Stand, Chander Nagar, Ludhiana. Kamaljit Singh @ Sonu (deceased) was his cousin brother (father's elder brother's son), who was working as a driver at Neel Kanth Taxi Stand. On 05.09.2008 at about 8.45 p.m. he (Baldev Singh-PW-3/complainant) was present at Neel Kanth Taxi stand, where

accused Tejinder Bawa @ Happy (appellant) and Suraj Ahluwalia (appellant) and his gunman Gurprem Singh (since acquitted) came there on a black colour Bolero vehicle with registration No. PB-10-BE-4979. After getting down from the said vehicle they came to the taxi stand and sat on a wooden bench (takhtposh). As he was perplexed, he had got written the name of Constable Gurprem Singh as Constable Shammi Kumar in his statement. On 08.09.2008, he went to the police station and his supplementary statement was recorded. In the supplementary statement, he got corrected the name of Constable Gurprem Singh, which he had wrongly got recorded in his earlier statement as Constable Shammi Kumar as he was puzzled at that time. The supplementary statement that was recorded has been objected to by the appellants on the ground that it was hit by Section 162 Cr.P.C. inasmuch as it was got signed from Baldev Singh (PW-3/complainant). In any case, it is further deposed by Baldev Singh (PW-3/complainant) that he was given Rs.20/- for bringing a packet of cigarettes. When he was returning after purchasing a packet of cigarettes, his cousin brother Harjinder Singh @ Bobby (sic. Rajinder Singh) son of Amar Singh met him on the way. They both then came to Neel Kanth Taxi stand and there they saw that Tejinder Bawa @ Happy (appellant) was arguing with Kamaljit Singh @ Sonu (deceased) and Suraj Ahluwalia (appellant) was abusing Kamaljit Singh @ Sonu (deceased). Tejinder Bawa @ Happy had a revolver with him and he fired towards the head of Kamaljit Singh @ Sonu. Thereafter, Suraj Ahluwalia (appellant) had snatched the gun of his gunman namely Constable Gurprem Singh (since acquitted) and fired at the head of Kamaljit Singh @ Sonu. Due to fire arm injuries, Kamaljit Singh @ Sonu (deceased) fell on the ground and died at the spot. Suraj Ahluwalia (appellant) and Tejinder Bawa @ Happy (appellant), owner of the taxi stand came out of the office and fired in the air. The motive of the occurrence was a dispute regarding the rent of taxi between Kamaljit Singh @ Sonu (deceased) and Happy (appellant). Thereafter, Baldev Singh (PW-3/complainant) left Harjinder Singh @ Bobby (sic. Rajinder Singh) near the dead body and proceeded towards the police station to give information to the police. Police party met him near Mini Fountain Chowk and he narrated the entire occurrence to the police. His statement Ex.PB was recorded, which was read over and explained to him. Therefore, there is consistency as regards the actual incident that had occurred, which is recorded on the statement Ex.PB of Baldev Singh (PW-3/complainant) and also while he was deposing

in Court as PW-3. Besides, this is corroborated by the deposition of Rajinder Singh son of Amar Singh (PW-4) who has clearly stated the manner in which the occurrence had taken place, which is on the same lines that has been deposed by Baldev Singh (PW-3/complainant). The only reason, which is pointed out by the learned counsel for the appellants for discarding the statement of PW-4 is that his statement under Section 161 Cr.P.C. was not recorded. Even, if that be so, we are satisfied that there is no infirmity in the statement of Baldev Singh (PW-3/complainant). Besides, as already noticed statement of Rajinder Singh (PW-4) was recorded under Section 161 Cr.P.C but it was erroneously mentioned as statement of Harjinder Singh alias Bobby.

(45) The contention of the learned Senior Counsel for the appellant that Baldev Singh (PW-3/complainant) is a chance witness may be considered. The learned Senior Counsel for the appellant has referred to the case of *Devinder Singh versus Ram Dutta and another (1)*, wherein, it was observed that it was indeed a curious coincidence that both of them were present exactly at the time when the so-called assault took place. They are both interested and chance witnesses. Their evidence must be examined with care. Therefore, the requirement of a chance witness is that his evidence is to be examined with care. In fact as held in *Ismail Ahmed Peepadi versus Momin Bibi and others (2)*, a chance witness is not necessarily a false witness although it has been held to be proverbially rash to rely on his testimony. In the present case, it may be noticed that Baldev Singh (PW 3/complainant) was a driver working at Sandhu Taxi Stand. Kamaljit Singh @ Sonu (deceased) was also a driver and he was working at Neel Kanth Taxi Stand. They were first cousins. The distance between the place of working of the two was about 1 to 1/2 km. Being drivers and with vehicles being available with them it is not uncommon for them to be meeting each other while passing through the area of each other. In fact drivers do meet each other several times due to easy availability of transport. Besides, there is no reason for Baldev Singh (PW-3/complainant) and Rajinder Singh (PW-4) to falsely implicate Suraj Ahluwalia (appellant) and Tejinder Bawa @ Happy (appellant). There is no previous enmity between them and neither has any been brought on record. Therefore, it is quite apparent that they

(1) 1991 SCC (Cr.) 152

(2) AIR 1941 PC 11

would rather be an endeavour on their part that the actual culprits who are responsible for the death of Kamaljit Singh @ Sonu (deceased) are inculpated rather than any innocent person being falsely implicated. In the circumstances, it is not a case from which it can be said that Rajinder Singh (PW-4) was a chance witness and therefore, unreliable. Being a driver, there was every possibility of his being present with his brother at the time of the incident and there is nothing on record to dislodge his testimony which is otherwise cogent and convincing.

(46) The contention that the supplementary statement of Baldev Singh (PW-3/complainant) has been got signed from him and therefore, hit by Section 162 Cr.P.C is also devoid of merit. It may be noticed that the said statement was primarily with respect to substitution of Gurpreem Singh. The latter, has been acquitted. Therefore, the supplementary statement would lose its significance in respect of the present appellants. Besides, in *Zahiruddin versus Emperor (3)*, it has been held that; "the effect of a contravention of the Section (i.e. Section 162 (1) Cr.P.C). depends on the prohibition which has been contravened. If the contravention consists in the signing of a statement made to the police and reduced into writing, the evidence of the witness who signed it does not become inadmissible. There are no words either in the section or elsewhere in the statute which express or imply such a consequence. Still less can it be said that the statute has the effect of vitiating the whole proceedings when evidence is given by a witness who has signed such a statement. But the value of his evidence may be seriously impaired as a consequence of the contravention of this statutory safeguard against improper practices. The use by a witness while he is giving evidence of a statement made by him to the police raises different considerations. The categorical prohibition of such use would be merely disregarded if reliance were to be placed on the evidence of a witness who had made material use of the statement when he was giving evidence at the trial. When, therefore, the Magistrate or presiding Judge discovers that a witness has made material use of such a statement it is his duty under the section to disregard the evidence of that witness as inadmissible." In the said case the witness who had signed his statement had made use of the statement while deposing in Court. A note was added by the Magistrate that the witness while deposing refreshed his memory from time to time by

consulting his written statement to the police during investigation. It was held that his evidence was inadmissible. Therefore, where a witness makes use of his signed statement before the police during his examination, his evidence would be inadmissible. In case no use is made, it would be inconsequential. In the present case, Baldev Singh (PW-3) who made supplementary statement and signed the same did not use it during his examination in Court. Therefore, the signing of the supplementary statement by him is of no consequence and his evidence is not to be discarded on this account. In *Tahsildar Singh and another versus State of U.P. (4)*, it was held by a Six Judges Bench of the Supreme Court that the intention of the legislature in framing Section 162 in the manner it did in 1923, was to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence. Both the Section and the proviso intended to serve primarily the same purpose i.e., the interest of the accused. It was further held that the section was conceived in an attempt to find a happy via media, namely, while it enacts an absolute bar against the statement made before a police officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by Section 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar. These statements, it was held, are therefore, only a summary of what a witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is a correct statement. Therefore, the mere fact that the supplementary statement has been signed by Rajinder Singh (PW-4) would not make it inadmissible merely on the ground that it has been signed as it has a limited purpose of contradicting witnesses in the manner provided by Section 145 of the Evidence Act.

(47) Another contention, which has been urged by Mr. Baldev Singh, Sr. Advocate appearing for the appellant-Suraj Ahluwalia (in CRA No. D-1026-DB of 2011) is that Baldev Singh (PW-3/complainant) made a supplementary statement Ex.DA on 08.09.2008 and that he in his cross-examination states that when he went to the police station at about 11/11.10 a.m. on 08.09.2008 he at that time saw Gurpreem Singh (since acquitted) was in the lock up and that he had seen him in the police lock up. He denied the suggestion as incorrect that the SHO there told him that the assailant was Gurpreem Singh and he wrongly mentioned the name as Shammi. Therefore, according to the learned Senior Counsel, Gurpreem Singh was in police custody on 08.09.2008, however, his arrest was shown to have been made on 11.09.2008. On the said day i.e. 11.09.2008, Gurpreem Singh and Tejinder Bawa accused were arrested. A reference has been made to the deposition of SI Ravinder Singh (PW-5), wherein, he has stated that on 11.09.2008, he along with police officials and Baldev Singh (complainant/PW-3) were present at Kailash Chowk, Ludhiana, where, Ashwani Bawa produced Tejinder Bawa @ Happy (appellant) and Gurpreem Singh (since acquitted) and he arrested them vide arrest memos Ex.PW5/H and Ex.PW5/I. Information of their arrest was given vide the said memos. Therefore, according to learned Senior Counsel there has been padding in the case. In support of his said contention reliance has been placed on the case; *State of Haryana versus Jagbir Singh* (5). In the said case it was inter-alia observed that the High Court found that Sukhbir Singh-PW18 (a witness in the said case) had admitted that the accused, therein, were arrested on 16.03.1975, that is the very day the dead body of his son was found at the Ramlila ground. If the arrest of the accused on 16th March is true, as stated by Sukhbir Singh, not only the extra-judicial confession of the accused before Deputy Prasad on 18.03.1975 but also the recoveries of the blood-stained clothes and kirpans made by the police on 18.03.1975 following the alleged statements of the accused lose all credibility. This was the principal ground on which the High Court came to the conclusion that there was "padding" in the prosecution case and that certain evidence was fabricated in order to implicate the accused.

(48) In the present case, in case Gurpreem Singh was seen by Baldev Singh (PW-3/complainant) on 08.09.2008 when he went to the

police station to get his supplementary statement recorded, it would not affect the case as against the appellants, herein, as Gurpreem Singh has already been acquitted by the learned trial Court and the benefit, if any, of padding as regards the arrest of Gurpreem Singh has been given to him. Besides, in the facts and circumstances of the present case, the arrest of Gurpreem Singh on 11.09.2008, which is the date set up by the prosecution would not affect the case of the appellants as the eye witness account of Baldev Singh (PW-3/complainant) as regards the manner in which the incident had actually occurred has been quite clearly deposed by him, which gets, further corroboration from the deposition of Rajinder Singh (PW-4). Therefore, the arrest of Gurpreem Singh on 11.09.2008, even, if it is to be taken on 08.09.2008 is inconsequential as regards the appellants. The principle of *falsus in uno falsus in omnibus* is inapplicable in India and merely because the arrest of Gurpreem Singh is held to be on a different date from that he was actually arrested would not mean that the date of arrest of the appellants is also wrong or is a result of padding. There is in fact no discrepancy as regards the arrest of Tejinder Bawa @ Happy (appellant) and that of Suraj Ahluwalia (appellant). It has been deposed by SI Ravinder Singh (PW-5) that on 17.09.2008, he arrested Suraj Ahluwalia (appellant) vide memo Ex.PW5/M.

(49) The contention of Mr. Randeep Singh Rai, Senior Advocate appearing for the appellant-Tejinder Bawa (in CRA No. D-1046-DB of 2011) is that no role of actual firing has been attributed to Tejinder Bawa @ Happy (appellant) may be considered. It is submitted that in the FIR Ex.PW5/A, it has been alleged that while the complainant-Baldev Singh (PW-3) was returning after buying the cigarettes then Harjinder Singh (sic. Rajinder Singh) son of Amar Singh met him. When they both saw inside the office that Happy (Tejinder Bawa) was arguing with Kamaljit Singh (deceased) and Suraj Ahluwalia (appellant) was abusing Kamaljit Singh (deceased). In the meantime, Happy (Tejinder Bawa-appellant) who was having a pistol with him fired a shot at the head of Kamaljit Singh (deceased), whereas, Suraj Ahluwalia (appellant) snatched the carbine of his gunman and fired a shot on the head of Kamaljit Singh (deceased). As against this, it is submitted that Baldev Singh (PW-3/complainant) in his deposition in Court has deposed that Happy (Tejinder Bawa) was having a Revolver with him and fired towards the head of Kamaljit Singh (deceased). Therefore,

it is contended, that in the FIR it is stated by the complainant-Baldev Singh (PW-3) that Happy (Tejinder Bawaappellant) fired at the head of Kamaljit Singh (deceased), whereas, in his deposition in Court it is deposed that he fired towards the head of Kamaljit Singh (deceased). This in our view does not in any manner affect the prosecution case. Admittedly, no gun shot injury was suffered or received by Kamaljit Singh (deceased) from firing of the Revolver by Tejinder Bawa (appellant). A perusal of the FSL report Ex. PY as regards the .32 inch revolver, which was recovered in the case, it has been stated that chemical examination of barrel wash of .32 inch revolver No. FG-2917 marked W/2 indicates that it had been used in firing. However, its last date of fire could not be ascertained. Therefore, the .32 inch revolver had indeed been fired although its last date of fire could not be ascertained. The FSL report is corroborative in nature and the actual deposition of eye witness Baldev Singh (PW- 3/complainant) does make a mention that Tejinder Bawa @ Happy (appellant) had fired with the revolver but admittedly, no fire shot was suffered or received by Kamaljit Singh (deceased) from the revolver fired by Tejinder Bawa @ Happy (appellant).

(50) The incident had occurred during a quarrel between the appellants and Kamaljit Singh (deceased) with respect to the settlement of fare. Suraj Ahluwalia (appellant) had gone at the spot armed with a pistol, he had his gunman also with him but there is indeed no prior enmity between the appellants and Kamaljit Singh (deceased). Therefore, from the facts and circumstances, it cannot be said that both the appellants had gone with prior planning to commit the murder of Kamaljit Singh (deceased) and it is not a case where act of murder was done by the appellants in furtherance of the common intention of both so as to make them liable in the same manner as if it was done by Suraj Ahluwalia (appellant). In *Mahbub Shah* versus *Emperor* (6), the deceased Allah Dad, died as a result of gun shot wounds inflicted on him. One Wali Shah, who fired shot that killed the deceased was a fugitive from justice and had not been arrested. The father of Wali Shah namely Mohammad Hussain Shah, who was committed to the Sessions Court on a charge of abetment of murder, was acquitted by the Sessions Judge. Allah Dad (deceased in the said case) with a few others left their village Khanda Kel by boat for cutting reeds growing on the banks of the Indus river. When they had travelled for about a mile downstream, they saw

Mohammad Shah father of Wali Shah (absconder) bathing on the bank of the river. On being told that they were going to collect reeds, he warned them against collecting reeds from the land belonging to him. Ignoring his warning they collected about 16 bundles of reeds, and then started for the return journey. While the boat was being pulled upstream by means of a rope, Ghulam Quasim Shah, nephew of Mohammad Hussain Shah-acquitted by the High Court- who was standing on the bank of the river asked Allah Dad (deceased) to give him the reeds that he had collected from his uncle's land, which was refused by Allah Dad (deceased). Quasim Shah then caught the rope and tried to snatch it away. He then pushed Allah Dad (deceased) and gave a blow to Allah Dad (deceased) with a small stick but it was warded off on the rope. Allah Dad (deceased) then picked up the 'lari' (a bamboo pole for propelling the boat, about ten feet long and six inches thick) from the boat and struck Quasim Shah. Quasim Shah then shouted out for help and Wali Shah and Mahbub Shah-appellant came up. They had guns in their hands. When Allah Dad (deceased) and Hamidullah tried to run away, Wali Shah and Mahbub Shah-appellant came in front of them and Wali Shah fired at Allah Dad (deceased) who fell down dead and Mahbub Shah fired at Hamidullah, causing injuries to him. The question that was considered by the Privy Council was whether a 'common contention' to commit the crime came into being when Ghulam shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired with their respective guns. The High Court having answered the question in the negative as regards Ghulam Quasim, the learned Judges (of the High Court) had expressly stated, that with respect to the appellant-Mahbub Shah and Wali Shah, it must be held that the 'common intention' of killing one or more of the members of the complainant party came into being later, when they fired the shots. Their Lordships of the Privy Council, however, did not agree with the view and they were prepared to accept that the appellant-Mahbub Shah and Wali Shah had the 'same intention' viz., the intention to rescue Quasim if need be by using the guns and that, in carrying out this intention, the appellant-Mahbub Shah picked out Hamidullah for dealing with him and Wali Shah, the deceased, but there was no evidence of 'common intention' to commit the criminal act complained against, in furtherance of such intention? The evidence falls short of showing that the appellant-Mahbub Shah and Wali Shah ever entered into a premeditated concert to bring about the murder of Allah Dad in carrying

out their intention of rescuing Quasim Shah. It was held that care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked would result in miscarriage of justice. It was also held that the inference of common intention within the meaning of the term in Section 34 IPC should never be reached unless it is a necessary inference deducible from the circumstances of the case.

(51) Applying the ratio of said case to the present case, it may be noticed that during the skirmish between the appellants and Kamaljit Singh (deceased) the tempers had risen. The appellants were armed and in fact had come armed. Both of them fired at Kamaljit Singh on his head. The revolver shot fired by Tejinder Bawa alias Happy (appellant) missed. Suraj Ahluwalia (appellant) snatched the carbine of his gunman and also fired on the head of Kamaljit Singh, which hit him. In the circumstances there was an intention on the part of both to commit the murder of Kamaljit Singh but it was not a common intention although it was same or similar and this distinction is to be kept in view to prevent mis-carriage of justice. The appellants indeed did not share any common intention to murder Kamaljit Singh and there is no evidence of common intention to commit the act of murder in furtherance of such an intention. There is no evidence to show that the appellants ever entered into a premeditated concert to commit the murder of Kamaljit Singh though the intention may be same or similar but it was not common. Therefore, each of the appellant is to be held liable for their individual act, which is done by same or similar intention and not in furtherance of the common intention. Therefore, Suraj Ahluwalia (appellant) would be liable for committing the offence of murder in his individual capacity and since the fire arm from the revolver of the Tejinder Bawa @ Happy (appellant) did not hit the deceased-Kamaljit Singh, although during the course of skirmish there was an intention to hit, it would be a case of attempt to murder in terms of Section 307 IPC as distinguished from murder. The act done by Tejinder Bawa @ Happy (appellant) by firing a shot towards the head of Kamaljit Singh-deceased was done with such intention and knowledge that if, he by that act caused the death, he would be guilty of murder. Therefore, the effect of contention Mr. Rai learned Senior counsel for Tejinder Bawa (appellant) that no role of actual firing has been attributed

to Tejinder Bawa @ Happy-appellant would be that he (Tejinder Bawa @ Happy) is liable for attempt to murder while Suraj Ahluwalia (appellant) is liable for committing the offence of murder.

(52) It is also contended on behalf of the appellant-Tejinder Bawa @ Happy that the empties of the bullet which are said to have been fired by him were not recovered. This in our view is quite inconsequential as the empties of a bullet do not eject out from a revolver as they do in a case of such pistol or a rifle or shot gun, which ejects its empties. In a revolver the empties remain in its revolving chamber. Therefore, when Tejinder Bawa @ Happy-appellant fled with his weapon the empties that he fired were in the chamber of the revolver and these could not have been recovered from the spot.

(53) Another contention that is raised is that the motive has been changed by the prosecution insofar as Tejinder Bawa @ Happy (appellant) is concerned. It is submitted that in the FIR Ex.PW-5/A, it is alleged that the motive behind the occurrence was that Kamaljit Singh (deceased) was to take the fare of the taxi from the appellants, whereas, Baldev Singh (PW- 3/complainant) in his deposition in Court has stated that motive behind the occurrence was regarding rent of taxi between Kamaljit Singh (deceased) and Happy (Tejinder Bawa-appellant, owner of the taxi stand). Indeed while deposing in Court Baldev Singh-complainant (PW-3) has held the motive to be attributable only to Tejinder Bawa @ Happy (appellant), whereas, in the FIR EX.PW5/A, it is attributed to both the appellants. This in our view would not make much of a difference as the actual firing is said to have been done even by Tejinder Bawa @ Happy (appellant) as well though the revolver shot did not hit Kamaljit Singh (deceased).

(54) Mr. Baldev Singh, Senior Advocate appearing for Suraj Ahluwalia (appellant) has rightly contended that the learned trial Court erred in imposing death sentence on the appellant-Suraj Ahluwalia for committing the offence under Section 27 (3) of the Arms Act. The said provision envisages that whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of Section 7 and such use or act results in the death of any other person, shall be punished with death. Suraj

Ahluwalia (appellant) for the act of taking the carbine of his bodyguard and firing it on the head of Kamaljit Singh (deceased) which resulted in the death of the latter, has been convicted and sentenced to death in terms of Section 27 (3) of the Arms Act. The Hon'ble Supreme Court in *State of Punjab versus Dalbir Singh (7)*, has held that Section 27 (3) of the Arms Act to be ultra vires the Constitution and void. Earlier a Five Judges Bench of the Supreme Court in *Mithu versus State of Punjab (8)*, struck down as unconstitutional the provisions of Section 303 IPC being violative of Article 14 and 21 of the Constitution. Section 303 IPC provided mandatory punishment of death in respect of those committing murder while under sentence of imprisonment for life. It was held in Dalbir Singh's case (supra) that apart from the decision in Mithu's case (supra), it appears that in Section 27 (3) of the Arms Act the provision of mandatory death penalty is more unreasonable inasmuch as it provides that whoever uses any prohibited arms or prohibited ammunition or acts in contravention of Section 7 of the Arms Act and if such use or act results in the death of any other person then that person guilty of such use or acting in contravention of Section 7 shall be punishable with death. Therefore, Section 27 (3) of the Arms Act having been struck down to be violative of the Constitution. The imposition of sentence of death for committing the said offence under Section 27 (3) of the Arms Act is not warranted and to the said extent the order of the learned trial Court is liable to be set aside.

(55) Accordingly, for the foregoing reasons, Murder Reference No.6 of 2011 is declined and is answered in the negative. The conviction and sentence of death imposed on the respondent for the offence under Section 27 (3) of the Arms Act is set aside. In Criminal Appeal No.D-1026-DB of 2011, the judgment of conviction and sentence of rigorous imprisonment for life and fine of Rs.10,000/- and in default thereof to undergo rigorous imprisonment for a period of six months for the offence punishable under Section 302 IPC as also conviction and sentence of rigorous imprisonment for three years and fine of Rs.500/- and in default thereof to undergo rigorous imprisonment of two more months for the offence under Section 27(1) of the Arms Act in respect of Suraj Ahluwalia (appellant) as imposed

(7) (2012) 3 SCC 346

(8) AIR 1983 SC 473

by the learned trial Court are upheld and maintained and the appeal is accordingly dismissed to the said extent. However, his conviction and sentence of death in respect of the offence under Section 27(3) of the Arms Act are set aside and the appeal is allowed to the said extent. The sentences of imprisonment shall run concurrently and in Criminal Appeal No.D-1046-DB of 2011, the judgment of conviction and sentence for the offence under Section 302 read with Section 34 IPC in respect of Tejinder Bawa alias Happy (appellant) is set aside and the appeal is allowed to the said extent, however, he is convicted for the offence punishable under Section 307 IPC and sentenced to rigorous imprisonment for ten years and pay a fine of Rs.10,000/- and in default thereof, to undergo rigorous imprisonment for six months; besides, his conviction and sentence for the offence under Section 25 of the Arms Act is upheld and maintained and the appeal is accordingly dismissed to the said extent. The sentences of imprisonment shall run concurrently.