

PREM SINGH

v.

STATE OF HARYANA

(Criminal Appeal No.925 of 2009)

SEPTEMBER 2, 2011

[HARJIT SINGH BEDI AND GYAN SUDHA MISRA, JJ.]

*Penal Code, 1860: ss. 302/34 – Murder with common intention – Victim-deceased shot in broad daylight – PW-16, the brother of the victim-deceased was informed by his neighbour 'VK' that some persons came in a car and fired shots at the victim-deceased causing him serious injuries – Victim brought dead to hospital – As per the statement of widow of the victim, her husband had property dispute with accused 'DR' and the murder was committed as a consequence of the conspiracy hatched by him along with the co-accused – Appellant and other co-accused arrested – Appellant was arrested from jail where he was already incarcerated in some other criminal case – Appellant was sought to be produced for a test identification parade but he declined to do so – Statements of PW-11 and PW-12 claiming to be eye-witnesses to the murder on record – 'VK' who had informed about the incident to PW-16 was, however, not examined – Trial court acquitted the accused holding that the charges levelled against them were not proved – High Court set aside the acquittal of the appellant and co-accused 'VB' and convicted them u/ss.302/34 but upheld the acquittal of other co-accused – On appeal, **held: per Harjit Singh Bedi, J:** Non-examination of 'VK' was fatal to prosecution case – The presence of PWs 11 and 12 was in serious dispute since they were resident of another city – In the light of the uncertain eye witness account and the fact that 5 of the 7 accused stood acquitted on the same evidence, the order of the trial court of acquittal is restored – **per Gyan Sudha Misra, J (Dissenting):***

- A *Eye-witnesses PWs 11 and 12 gave a graphic description of the incident and stood the test of scrutiny of cross-examination but the accused had declined to participate in the test identification parade – If the accused-appellant had reason to do so, specially on the plea that he had been shown to the*
- B *eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of T.I. Parade – But merely on account of the objection of the appellant, he could not have been permitted to decline from participating in the T.I. Parade from which adverse inference*
- C *can surely be drawn against him at least in order to corroborate the prosecution case – Two eye-witnesses narrated the complete chain of incident in their depositions which were recorded merely after a few hours of the occurrence – Version of the eye-witnesses was not*
- D *contradicted by the defence in any manner – Conviction of the appellant u/ss.302/34 confirmed – In view of the divergence in views, the matter referred to larger Bench.*

E **The prosecution case was that on the fateful day, the victim-deceased had gone for morning walk. PW-16, the brother of the victim-deceased was informed by his neighbour 'VK' that some persons came in a car and fired shots at the victim-deceased causing him serious injuries. PW-16 rushed to the place of occurrence. The**

F **victim-deceased was taken to hospital where he was declared brought dead. The statement of PW-16 was recorded in the hospital. PW-23, the Inspector went to the place of occurrence and recorded the statements of PW-11 and PW-12 who claimed to be eye-witnesses to the**

G **murder. He also recorded the statement of PW-13, the widow of the deceased who gave information that accused 'DR' had property dispute with her husband and the murder was committed as a consequence of the conspiracy hatched by 'DR' along with the co-accused.**

H **The appellant and other co-accused were arrested. The**

appellant was arrested from jail where he was already incarcerated in some other criminal case. The appellant was sought to be produced for a test identification parade but he declined to do so.

The prosecution examined PW-11, PW-12, PW-13 and PW-16. 'VK' who had informed the incident to PW-16 was however not examined. The trial court acquitted two accused even prior to the recording of the statements of the accused under Section 313, Cr.P.C. for want of evidence against them. The trial court acquitted rest of the accused holding that the charges levelled against them were not proved. The High Court upheld the acquittal of three accused but set aside the acquittal of the appellant and co-accused 'VB' and convicted them under Sections 302/34 IPC. The instant appeal was filed challenging the order of the High Court.

Referring the matter to larger bench, the Court

Per Harjit Singh Bedi, J:

Held:

1. Of the 7 accused only 2 stood convicted whereas the evidence with respect to all of them was identical. The High Court's interference in an appeal against acquittal is greatly circumscribed and though the Court is justified in reappraising the evidence to arrive at an independent conclusion, yet if the reasons given by the trial court for acquittal were germane and relevant on the evidence, interference by the High Court should not be made on the premise that a different view was also possible. This principle emanates from the broader principle that an accused is entitled to claim a plea of innocence and it is for the prosecution to prove its case beyond doubt and if the trial court has acquitted an accused, the presumption of innocence is greatly strengthened. The

- A High Court has ignored this long settled dictum. The trial court was greatly influenced by the fact that 'VK' was not even cited as an eye witness. The incident happened at about 7 or 7.30 a.m. on the 26th November 1993 and the statement of PW-16 was recorded in the hospital at 9 a.m.
- B the same day with no clue as to the assailants and on its basis the first information report was registered in the Police Station a short while later. Significantly, however, the statement of 'VK' was recorded by the police for the first time on the 28th March 1994 and that too when the
- C Public Prosecutor had raised an objection while checking the challan before its presentation in Court. Faced with this situation, the Public Prosecutor had submitted before the trial court that 'VK' had not been cited as an eye witness as it was in fact the daughter of 'VK' who had
- D told him about the incident and that he himself had no knowledge thereof. This argument was based on the statement of the Investigating Officer which was introduced for the first time during the course of the evidence. This explanation is too an after thought and even otherwise meaningless. Assuming therefore that
- E 'VK' had, in fact, not been an eye witness and his daughter had been the one who had seen the incident, the police concededly did not even try to take her statement at any stage. The prosecution story has accordingly been based on the statements of PW-11 and
- F PW-12 who claimed to be eye witnesses. They identified the accused for the first time in court. PW-11 also admitted in his evidence that he was an employee of Aggarwal Sanitary Store which was owned by the brothers of PW-13, the wife of the deceased, and that PW-12 was his
- G friend and had accompanied him for the morning walk when the incident had happened. This story is unacceptable for the reason that their conduct completely belies their presence. It has come in evidence that the two were aware of the identity of the victim and
- H knew him by face and name since long and were also

conscious of the fact that his house was near the place of murder. Despite this knowledge and his association with the complainant family, PW-11 did not go to the house of PW-13 or even inform her brothers who were his employers as to what had happened or to go to the police station a very short distance away to lodge a report. On the contrary, it comes out from the evidence that after the incident PWs-11 & 12 had moved around aimlessly in Karnal before returning to the murder site at about 1.30 p.m. where their statements were recorded. This factor assumes even more significance as the names of these witnesses did not figure in the F.I.R., and the motive for the murder has been rejected even by the High Court as the acquittal of 'DR' has been maintained. [Paras 6, 7, 8] [963-C-H; 964-A-H; 965-A]

2. The very presence of PWs.11 and 12 in Karnal is in serious dispute. It has come in their evidence that they were residents of Sunam in the State of Punjab and that they had shifted from that town to Karnal about 2 months before the occurrence on account of the fear of terrorism and had settled down in Karnal by taking accommodation on rent and that they had returned to Sunam some time in the middle of 1994. The trial court has found, on a deep appreciation of the evidence, that this story was in doubt and the reasons have been succinctly spelt out. It has been found that the two had not given their addresses in Karnal in their 161 Cr.P.C. statements and when cross-examined by the defence counsel, were unable even at that stage to give accurate and precise details as to where they had been living in Karnal or to produce any rent receipt or document to show residence in Karnal on the day in question. Curiously enough the police did not even care to get hold of any material as to their residence in Karnal and no witness was produced to show that they had ever been residents in Karnal. The trial court has also noticed that they had shifted from Sunam because of the

A fear of terrorism in the year 1993 but the two claimed to have returned to Sunam in the middle of 1994 when terrorism was still at its peak. There is absolutely no discussion as to their presence in Karnal on the crucial day or to the various factors that have been spelt to rule them out, and the High Court appears to have proceeded on the basis that they had been present as they had been cited as eye witnesses. [Para 9] [965-B-H; 966-B-G]

3. The High Court has been greatly influenced by the refusal of the accused to join the test identification parade. The evidence of PW-27 Inspector is relevant in this connection. He deposed that the accused had been arrested from different places at different times and that they had been brought to Karnal and put in a lock up and thereafter produced in court. Significantly, the accused pointed out to the Magistrate PW-27, as well as in their statements in court, that they had been shown to PWs.11 and 12 and also to the sons of the deceased in the Police Station. It is impossible for an accused to prove by positive evidence that he had been shown to a witness prior to the identification parade but if suspicion can be raised by the defence that this could have happened, no adverse inference can be drawn against the accused in such a case. In the light of these facts and particularly the uncertain eye witness account, and that these witnesses had not seen the incident and particularly the fact that the High Court was dealing with an appeal against acquittal and 5 of the 7 accused stand acquitted as of now on the same evidence, interference by the High Court was not called for in the case of the appellant. The judgment of the High Court is set aside and that of the trial court is restored and the appellant's acquittal is ordered. [Para 10] [966-A-E]

Per Gyan Sudha Misra, J. (Dissenting):

H HELD: 1. The High Court was justified in convicting

the appellant under Section 302/34 I.P.C. alongwith 'VB' relying upon the evidence of the two eye-witnesses whose depositions in Court could not be contradicted by the defence using the statements which were recorded under Section 161, Cr.P.C. by PW-23 Inspector only after a few hours of the incident at 12.30 p.m. on the date of occurrence on 26.11.1993 as the incident of shooting had taken place on the same date in the morning at 6.30 a.m for which F.I.R. was registered at 9.25 a.m. These two eye-witnesses who also had gone for a morning walk had their residence quite near to the place of incident and were the most natural witnesses who had watched the incident of shooting from a close range at the deceased. If the prosecution had the intention merely to plant these two witnesses PW-11 and PW-12 as eye-witnesses to prove the prosecution story, then 'VK' who had informed the brother of the deceased about the incident would have been a better option for the prosecution to plant him as eye-witness but he has not even been examined. [Para 2] [967-C-F]

2. The two eye-witnesses PW-11 and PW-12 have given a graphic description of the incident and have stood the test of scrutiny of cross-examination and had also stated that they could identify the assailants, but the accused had declined to participate in the test identification parade on the ground that he had been shown to the eye-witnesses in advance. It was not open to the accused to refuse to participate in the T.I. parade nor it was a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the accused-appellant had reason to do so, specially on the plea that he had been shown to the eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of test identification parade. But

A merely on account of the objection of the accused, he
could not have been permitted to decline from
participating in the test identification parade from which
adverse inference can surely be drawn against him at
least in order to corroborate the prosecution case. [Para
B 3] [967-G-H; 968-A-C]

Shyam Babu v. State of Haryana, (2008) 15 SCC 418:
2008 (15)SCR 1020; *Munna v. State (NCT of Delhi)*, (2003)
4 Crimes 166: AIR 2003 SC 3805 – relied on.

C *State of Haryana v. Surender* (2007) 11 SCC 281: 2007
(7) SCR 885; *Teerath Singh (D) by LR v. State* 2007 (1) ALL
LJ (NOR) 143 (UTR) – referred to.

3. The arguments advanced by the defence that the
D two eye-witnesses were, in fact, not living in the
neighbourhood near the place of incident where they
claimed to have been living is quite a far fetched theory
of the defence for once the witnesses furnished their
addresses stating that they lived merely 250 feet away
E from the place of occurrence and PW-11 was also an
employee of the brother-in-law of the deceased, his
testimony could not be dislodged merely on a
speculative story without any defence evidence to that
effect that they had not migrated from Sunam (Punjab) to
F Karnal (Haryana) where the incident of shooting took
place. In fact, the eye-witnesses PW-11 and PW-12 whose
statements were recorded only after a few hours of the
shooting and later deposed in Court without any variance
or contradiction have not only given graphic description
of the incident, but also described the colour of the car,
G the model of the car which was white Maruti as also the
car No. which could be partially noticed as D-57 and had
gone to the extent of stating that the number plate of the
car was smeared with mud. It is not possible to brush
aside all these weighty evidences of the eye witnesses
H led by the prosecution giving minute details so as to hold

that they were interested or partisan witnesses planted by the prosecution party merely to support the prosecution version. It would further not be appropriate to overlook a redeeming feature of the prosecution version that the present case is not a case based on circumstantial evidence but had happened during the morning walk of the deceased where the two eye-witnesses from the neighbourhood had the chance to witness the occurrence since they too had gone for a morning walk, who had residence close by in the neighbourhood. The defence version in order to demolish the evidence of these two eye-witnesses is too far fetched and not worthy of credence on the ground that they in fact had not been living near the place of incident as they had not even migrated to Karnal. The two eye-witnesses narrated the complete chain of incident in their deposition which they had witnessed and stands duly corroborated by their statement which were recorded under Section 161 Cr.P.C. merely after a few hours of the occurrence and their version could not be contradicted by the defence in any manner. The explanation that these witnesses had not been living there at the address given, does not stand to reason for if it were so, their statement could not have been recorded only after a few hours of the incident. The defence story that they were not living near the place of occurrence clearly stands contradicted by the Section 161 Cr. P.C. statement of these witnesses as it is well established that such statement is admissible at least for contradiction. [Paras 5, 6] [968-H; 969-A-H; 970-A-B]

4. The reason as to why the names of the eye witnesses had not been mentioned in the FIR has been convincingly explained as the FIR was registered in the morning at 9.25 a.m. and only upon preliminary enquiry, which is most natural human conduct that it came to the knowledge of the prosecution that these witnesses in fact

A had not only seen the incident, but could also identify the
assailants. Perhaps, there would have been scope to
ignore the evidence of these two eye-witnesses on the
plea that they had not migrated to Karnal and were not
living near the place of incident if their statement had not
B been duly recorded on the date of the incident under
Section 161 Cr.P.C. But the fact that their statements
were recorded promptly and they also claimed to have
identified the two accused who had fired the shots at the
deceased and the appellant declined to participate in the
C test identification parade is sufficient to draw a
reasonable and logical inference that the two eye-
witnesses were in fact credible witnesses and could not
be disbelieved on the specious plea that they were
planted by the prosecution. In fact, there is yet another
D reason not to disbelieve these two witnesses for if the
prosecution had reason to falsely implicate the accused
persons, it is the master mind of the whole incident who
was 'DR' with whom the deceased had differences on
account of property dealings, who could have been
roped in but the fact that 'DR' was not alleged to have
E shot the deceased but got it executed through the hired
assailants that the appellant and 'VB' (who has not even
appealed against his conviction and sentence) stood duly
proved beyond reasonable doubt by the two eye-
witnesses and their testimony cannot be disbelieved on
F the ground that they were not living near the place of
incident as they had not migrated to Karnal. The defence
story is too weak and speculative in order to brush aside
the eye-witness account on the plea that they were not
living in the neighbourhood. In fact, the prosecution
G witnesses have not even been cross-examined by the
defence on the point that the eye-witnesses had not
migrated to Karnal and were not living near the place of
occurrence which could brush aside the eye-witness
account. [Para 7, 8] [970-C-H; 971-A-C]

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5. The High Court is correct and legally justified in convicting the appellant and 'VB' (who has not appealed) under Section 302/34 I.P.C. for shooting the deceased and his conviction and sentence is upheld. [Para 9] [971-D]

Case Law Reference

Per: Gyan Sudha Misra, J:

2008 (15)SCR 1020 relied on Para 4

AIR 2003 SC 3805 (3809) relied on Para 4

2007 (7) SCR 885 relied on Para 4

2007 (1) ALL LJ (NOR) referred to Para 4

CRIMINAL APPEALTE JURISDICTION : Criminal Appeal No. 925 of 2009.

From the Judgment & Order dated 12.5.2008 of the High Court of Punjab & Haryana at Chandigarh in CrI. Appeal No. 757-DBA of 1997.

D.B. Goswami, Sapan Biswajit Meitei, Gaurav Jasan, Khwairakpam Nobin Singh for the Appellant.

Suryanarayana Singh, Pragati Neekhra for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J.

This appeal by way of special leave arises out of the following facts:

1. At about 9.20 a.m. on the 26th November 1993 PW-16 Sohan Lal, the brother of the deceased Siri Krishan, was out for a morning walk when he was informed by his neighbour Vijay Kumar that some persons had come in a white coloured Maruti

A car and had halted in front of Siri Krishan and had fired shots at him causing him serious injury. Sohan Lal PW-16 then rushed to the site and removed Siri Krishan to the Government hospital where he was declared brought dead on arrival. His statement was then recorded by PW-24 Sub-Inspector Gurcharan Singh in the Government hospital who reached there on receiving information from the doctor. The Inspector inspected the dead body and took steps to have it subjected to a post-mortem. He also visited the place of occurrence and recovered several empty cartridges and a spent bullet from the spot. Inspector Om Parkash PW-23 also went to the site of the murder at 12.30 p.m. and recorded the statements of PW-11 Sohan Lal son of Anant Lal and PW-12 Bhagat Lal son of Banarsi Dass at 1:30 p.m. who claimed to be the eye witnesses to the murder. He also recorded the statement of PW-13 Pushpa Devi, the widow of the deceased, who gave the information that Daulat Ram had a property dispute with her husband and this murder had been committed as a consequence of the conspiracy hatched by him along with his co-accused. Further investigation was also done by PW-27 Inspector Gordhan Singh. He arrested Daulat Ram on the 4th January 1994, and Prem Singh accused 10 days later from Tihar Jail where he was already incarcerated in some other criminal case. Prem Singh was also sought to be produced for a test identification parade but he declined to do so. Ballu accused was arrested on the 18th January 1994 and a pistol was recovered on a statement made by him, Vishwa Bandhu accused was arrested on the 23rd January 1994 and an effort was made to put him up for an identification but he too declined the offer. The other two accused Radhey Shyam and Surinder were arrested on the 19th April 1994 and 27th May 1994 respectively. On the completion of the investigation, the accused were charged for offences under Sections 302/149 and 120-B of the Indian Penal Code and Section 27 of the Arms Act and were accordingly brought to trial.

2. The prosecution in support of its case placed primary reliance on the testimony of PW-11 Sohan Lal and PW-12

Bharat Lal who claimed to be the eye witnesses to the murder, PW-13 Pushpa Devi who deposed to the property dispute between her husband and Daulat Ram accused and PW-16-Sohan Lal the first informant, who had received the information of the murder from Vijay Kumar. Vijay Kumar was, however, not examined. The Trial Court observed that on the basis of the evidence of the prosecution witnesses, as led, no evidence whatsoever had been spelt out against Satish and Surinder and they were accordingly acquitted even prior to the recording of the statements of the accused under Section 313 of the Cr.P.C. The Trial Court then, very comprehensively, examined the evidence against the other accused and recorded several reasons which have been spelt out by the High Court in its judgment and we quote therefrom herein below:

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“(i) Vijay Kumar who informed PW-16 Sohan Lal, brother of the deceased about the occurrence, was not examined, which was necessary for unfolding of the narrative of the prosecution.

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(ii) PW-11 Sohan Lal and PW-12 Bharat Lal were falsely introduced as eye witnesses. Both of them claimed to have come from Punjab about two months prior to the occurrence. One of them shifted back to Sunam. They did not have any proof of residence of Karnal. PW-11 Sohan Lal was employee of brother-in-law of the deceased. They did not go to the police station to lodge the report. Their names were mentioned in the FIR. Their versions were discrepant on the issue of the person who caught hold of the deceased Satish or Ballu. Their normal conduct was to be to go to the house of the deceased to give information. There were further discrepancies in their versions about the direction from which the car came.

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(iii) Recoveries and linkage of pistols with the empty cartridges was not free doubt.

(iv) Identification in Court was not reliable.

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A (v) The accused were arrested from one or the other lock up and could have been shown to the witnesses.

(vi) No adverse inference could be drawn by their refusing to take in the TIP.

B (vii) Charge of conspiracy was without any basis."

3. The trial court accordingly acquitted all the accused of the charges leveled against them. An appeal was thereafter filed in the High Court by the State of Haryana against the acquittal of 5 of the accused, that is Daulat Ram, Prem Singh, Ballu, Radhey Shyam and Vishwa Bandhu. The High Court has, vide its judgment under challenge before us, confirmed the acquittal of Daulat Ram, Ballu @ Vijender and Radhey Shyam accused and dismissed the appeal but has set aside the judgment qua D Prem Singh and Vishwa Bandhu and they have been convicted and sentenced to life imprisonment for the offence under Section 302/34 etc. The present appeal has been filed by Prem Singh alone.

4. The learned counsel for the appellant has raised several E pleas before us. He has first pointed out that the prosecution story hinged primarily on the motive which Daulat Ram carried as he bore some animosity with the deceased and that he had obtained the services of the other accused who were apparently hired assassins to get rid of him and as Daulat Ram had been F acquitted, the entire story perforce must fall through. He has also pointed out that the only witness who could have sworn to the incident was Vijay Kumar who had informed PW-16 Sohan Lal that he had witnessed the murder on which the latter had G lodged the FIR but surprisingly Vijay Kumar had not even been cited as a witness and PW-11 Sohan Lal and PW-13 Bharat Lal had subsequently been introduced as eye witnesses clearly H spelt out that the prosecution evidence could not be relied on, more particularly as their presence had not been explained and their conduct immediately after the incident also did not inspire

confidence. It has also been pointed out that merely because three of the accused had refused to join the test identification parade would not by itself be of any significance as the accused had alleged that they had already been shown to the witnesses.

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5. The learned counsel for the State of Haryana has, however, supported the judgment of the High Court.

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6. We see that of the 7 accused only 2 stand convicted whereas the evidence with respect to all of them is identical. In this background, it has also to be borne in mind that the High Court's interference in an appeal against acquittal is greatly circumscribed and though the Court is justified in reappraising the evidence to arrive at an independent conclusion, yet if the reasons given by the trial court for acquittal are germane and relevant on the evidence, interference by the High Court should not be made on the premise that a different view was also possible. This principle emanates from the broader principle that an accused is entitled to claim a plea of innocence and it is for the prosecution to prove its case beyond doubt and if the trial court has acquitted an accused, the presumption of innocence is greatly strengthened. We are of the opinion that the High Court has ignored this long settled dictum. We have examined the various arguments raised in the background of the above observations.

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7. It will be seen that the trial court was greatly influenced by the fact that Vijay Kumar had not even been cited as an eye witness. The incident happened at about 7 or 7.30 a.m. on the 26th November 1993 and the statement of Sohan Lal PW-16 was recorded in the hospital at 9 a.m. the same day with no clue as to the assailants and on its basis the first information report had been registered in the Police Station a short while later. Significantly, however, the statement of Vijay Kumar was recorded by the police for the first time on the 28th March 1994 and that too when the Public Prosecutor had raised an objection while checking the challan before its presentation in Court.

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- A Faced with this situation, the Public Prosecutor had submitted before the trial court that Vijay Kumar had not been cited as an eye witness as it was in fact Vijay Kumar's daughter who had told him about the incident and that he himself had no knowledge thereof. This argument was based on the statement of the Investigating Officer which was introduced for the first time during the course of the evidence. This explanation is too our mind an after thought and even otherwise meaningless. Assuming therefore that Vijay Kumar had, in fact, not been an eye witness and his daughter had been the one who had seen the incident, the police concededly did not even try to take her statement at any stage.

8. The prosecution story has accordingly been based on the statements of PW-11 Sohan Lal and PW-12 Bharat Lal who claimed to be eye witnesses. It is significant that they identified the accused for the first time in court. PW-11 also admitted in his evidence that he was an employee of Aggarwal Sanitary Store which was owned by Brij Lal and Naresh Kumar, the brothers of PW-13 Pushpa Devi, the wife of the deceased, and that PW-12 was his friend and had accompanied him for the morning walk when the incident had happened. This story is unacceptable for the reason that their conduct completely belies their presence. It has come in evidence that the two were aware of the identity of Siri Krishan and knew him by face and name since long and were also conscious of the fact that his house was near the place of murder. Despite this knowledge and his association with the complainant family, PW-11 did not go to the house of Pushpa Devi or even inform her brothers who were his employers as to what had happened or to go to the police station a very short distance away to lodge a report. On the contrary, it comes out from the evidence that after the incident PWs-11 & 12 had moved around aimlessly in Karnal before returning to the murder site at about 1.30 p.m. where their statements were recorded. This factor assumes even more significance as the names of these witnesses did not figure in

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the F.I.R., and the motive for the murder has been rejected even by the High Court as the acquittal of Daulat Ram has been maintained.

9. We also see that the very presence of PWs.11 and 12 in Karnal is in serious dispute. It has come in their evidence that they were residents of Sunam in the State of Punjab and that they had shifted from that town to Karnal about 2 months before the occurrence on account of the fear of terrorism and had settled down in Karnal by taking accommodation on rent and that they had returned to Sunam some time in the middle of 1994. The trial court has found, on a deep appreciation of the evidence, that this story was in doubt and the reasons have been succinctly spelt out. It has been found that the two had not given their addresses in Karnal in their 161 Cr.P.C. statements and when cross-examined by the defence counsel, were unable even at that stage to give accurate and precise details as to where they had been living in Karnal or to produce any rent receipt or document to show residence in Karnal on the day in question. Curiously enough the police did not even care to get hold of any material as to their residence in Karnal and no witness was produced to show that they had ever been residents in Karnal. The trial court has also noticed that they had shifted from Sunam because of the fear of terrorism in the year 1993 but the two claimed to have returned to Sunam in the middle of 1994 when terrorism was still at its peak. We have also examined the reasons given by the High Court in concluding that the evidence of PWs.11 and 12 could be relied upon. We find that there is absolutely no discussion as to their presence in Karnal on the crucial day or to the various factors that have been spelt to rule them out, and the High Court appears to have proceeded on the basis that they had been present as they had been cited as eye witnesses. We are unable to accept such a conclusion and that too in a case of murder. The trial court has also examined their evidence inter-se in a broader perspective and has concluded that it differed in material particulars as well.

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A 10. As already indicated, the High Court has been greatly
 influenced by the refusal of the accused to join the test
 identification parade. The evidence of PW-27 Inspector
 Gordhan Singh is relevant in this connection. He deposed that
 B the accused had been arrested from different places at different
 times and that they had been brought to Karnal and put in a
 lock up and thereafter produced in court. Significantly, the
 accused pointed out to the Magistrate PW-27, as well as in
 their statements in court, that they had been shown to PWs.11
 and 12 and also to the sons of Siri Krishan in the Police Station.
 C It must be borne in mind that it is impossible for an accused to
 prove by positive evidence that he had been shown to a witness
 prior to the identification parade but if suspicion can be raised
 by the defence that this could have happened, no adverse
 inference can be drawn against the accused in such a case.
 D We are of the opinion that in the light of the above facts and
 particularly the uncertain eye witness account, and our opinion
 that these witnesses had not seen the incident and particularly
 the fact that the High Court was dealing with an appeal against
 acquittal and 5 of the 7 accused stand acquitted as of now on
 the same evidence, interference by the High Court was not
 E called for in the case of the appellant. We accordingly allow this
 appeal, set aside the judgment of the High Court and restore
 that of the trial court and order the appellant's acquittal.

DISSENTING JUDGMENT AND ORDER

F **GYAN SUDHA MISRA, J.** 1. The High Court vide its
 impugned judgment and order has convicted the appellant
 Prem Singh under Section 302 read with Section 34 I.P.C.
 along with the co-accused Vishwa Bandhu essentially relying
 G upon the testimony of the two eye-witnesses PW-11 Sohan Lal
 and PW-12 Bharat Lal who according to the prosecution had
 shot the deceased victim-Siri Krishan on 26.11.1993 at 6.30
 a.m. while he had gone for a morning walk. The co-accused
 Vishwa Bandhu has not preferred any appeal against his
 conviction and it is only the appellant Prem Singh who has filed
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this appeal and the other co-accused persons who were alleged to be in the Maruti Car on which the accused-appellant had arrived for killing the deceased Siri Krishan have been acquitted, as the appellant and co-accused Vishwa Bandhu have been held as hired shooters who killed the deceased from a point blank range.

2. Having carefully and meticulously examining the evidence of the eye-witnesses PW-11 and PW-12 in the light of the other attending circumstances, I am of the considered opinion that the learned Judges of the High Court were justified in convicting the appellant Prem Singh under Section 302/34 I.P.C. alongwith Vishwa Bandhu relying upon the evidence of the two eye-witnesses whose depositions in Court could not be contradicted by the defence using the statements which were recorded under Section 161, Cr.P.C. by PW-23 Inspector Om Prakash only after a few hours of the incident at 12.30 p.m. on the date of occurrence on 26.11.1993 as the incident of shooting had taken place on the same date in the morning at 6.30 a.m for which F.I.R. was registered at 9.25 a.m. These two eye-witnesses who also had gone for a morning walk had their residence quite near to the place of incident and were the most natural witnesses who had watched the incident of shooting from a close range at the deceased Siri Krishan. If the prosecution had the intention merely to plant these two witnesses PW-11 and PW-12 as eye-witnesses to prove the prosecution story, then Vijay Kumar who had informed the brother of the deceased about the incident would have been a better option for the prosecution to plant him as eye-witness but he has not even been examined.

3. The two eye-witnesses PW-11 and PW-12 have given a graphic description of the incident and have stood the test of scrutiny of cross-examination and had also stated that they could identify the assailants, but the accused had declined to participate in the test identification parade on the ground that he had been shown to the eye-witnesses in advance. In my

A considered view, it was not open to the accused to refuse to participate in the T.I. parade nor it was a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the accused-appellant had reason to do so, specially on the plea that he had been shown to the eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of test identification parade. But merely on account of the objection of the accused, he could not have been permitted to decline from participating in the test identification parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case.

D 4. In the matter of *Shyam Babu V. State of Haryana*, (2008) 15 SCC 418 (425): AIR 2009 SC 577 where the accused persons had refused to participate in T.I. parade, it was held that it would speak volumes, about the participation in the Commission of the crime specially if there was no statement of the accused under Section 313 Cr. P.C. that he had refused to participate in the T.I. Parade since he had been shown to the witnesses in advance. In the matter of *Munna v. State (NCT of Delhi)*, (2003) 4 Crimes 166: (2003) 7 JT 361 : AIR 2003 SC 3805 (3809) as also in the *State of Haryana Vs. Surrender*, (2007) 11 SCC 281 (284): AIR 2007 SC 2312; F in *Teerath Singh (D) by LR v. State*, 2007 (1) ALL LJ (NOR) 143 (UTR) the Supreme Court still further had been pleased to hold that if the statement of the accused refusing to participate in T.I. Parade which was recorded in the order of the Magistrate was missing under Section 313 Cr.P.C., it was held that it was not open to the accused to contend that the statement of the witnesses made for the first time in Court identifying him should not be relied upon.

H 5. The arguments advanced by the defence that the two eye-witnesses were, in fact, not living in the neighbourhood near

the place of incident where they claimed to have been living, in my opinion, is quite a far fetched theory of the defence for once the witnesses furnished their addresses stating that they lived merely 250 feets away from the place of occurrence and PW-11 was also an employee of the brother-in-law of the deceased, his testimony could not be dislodged merely on a speculative story without any defence evidence to that effect that they had not migrated from Sunam (Punjab) to Karnal (Haryana) where the incident of shooting took place. In fact, the eye-witnesses PW-11 and PW-12 whose statements were recorded only after a few hours of the shooting and later deposed in Court without any variance or contradiction have not only given graphic description of the incident, but also described the colour of the car, the model of the car which was white Maruti as also the car No. which could be partially noticed as D-57 and had gone to the extent of stating that the number plate of the car was smeared with mud. In my view, it is not possible to brush aside all these weighty evidences of the eye witnesses led by the prosecution giving minute details so as to hold that they were interested or partisan witnesses planted by the prosecution party merely to support the prosecution version.

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6. It would further not be appropriate to overlook a redeeming feature of the prosecution version that the present case is not a case based on circumstantial evidence but had happened during the morning walk of the deceased where the two eye-witnesses from the neighbourhood had the chance to witness the occurrence since they too had gone for a morning walk, who had residence close by in the neighbourhood. The defence version in order to demolish the evidence of these two eye-witnesses is too far fetched and not worthy of credence in my opinion on the ground that they in fact had not been living near the place of incident as they had not even migrated to Karnal. The two eye-witnesses narrated the complete chain of incident in their deposition which they had witnessed and stands duly corroborated by their statement which were recorded

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A under Section 161 Cr.P.C. merely after a few hours of the
occurrence and their version could not be contradicted by the
defence in any manner. The explanation that these witnesses
had not been living there at the address given, does not stand
to reason for if it were so, their statement could not have been
B recorded only after a few hours of the incident. The defence
story that they were not living near the place of occurrence
clearly stands contradicted by the 161 Cr. P.C. statement of
these witnesses as it is well established that such statement
is admissible at least for contradiction.

C 7. The reason as to why the names of the eye witnesses
had not been mentioned in the FIR has been convincingly
explained as the FIR was registered in the morning at 9.25 a.m.
and only upon preliminary enquiry, which is most natural human
conduct that it came to the knowledge of the prosecution that
D these witnesses in fact had not only seen the incident, but could
also identify the assailants. Perhaps, there would have been
scope to ignore the evidence of these two eye-witnesses on
the plea that they had not migrated to Kamal and were not living
near the place of incident if their statement had not been duly
E recorded on the date of the incident under Section 161 Cr.P.C.
But the fact that their statements were recorded promptly and
they also claimed to have identified the two accused who had
fired the shots at the deceased and the appellant Prem Singh
declined to participate in the test identification parade is
F sufficient to draw a reasonable and logical inference that the
two eye-witnesses were in fact credible witnesses and could
not be disbelieved on the specious plea that they were planted
by the prosecution.

G 8. In fact, there is yet another reason not to disbelieve
these two witnesses for if the prosecution had reason to falsely
implicate the accused persons, it is the master mind of the
whole incident who was Daulat Ram with whom the deceased
had differences on account of property dealings, who could have
been roped in but the fact that Daulat Ram was not alleged to
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have shot the deceased but got it executed through the hired A
assailants that the appellant Prem Singh and Vishwa Bandhu
(who has not even appealed against his conviction and
sentence) stands duly proved beyond reasonable doubt by the
two eye-witnesses and their testimony cannot be disbelieved B
on the ground that they were not living near the place of incident
as they had not migrated to Karnal. In my considered opinion,
the defence story is too weak and speculative in order to brush
aside the eye-witness account on the plea that they were not
living in the neighbourhood. In fact, the prosecution witnesses C
have not even been cross-examined by the defence on the point
that the eye-witnesses had not migrated to Karnal and were not
living near the place of occurrence which could brush aside the
eye-witness account.

9. I am, therefore, of the view that the High Court is correct D
and legally justified in convicting the appellant Prem Singh and
Vishwa Bandhu (who has not appealed) under Section 302/34
I.P.C. for shooting the deceased and hence, I uphold his
conviction and sentence. Consequently, this appeal is
dismissed.

ORDER

In view of the divergence in views, the Registry is directed E
to place the matter before the Hon'ble the Chief Justice of India
for placing the matter before a larger Bench.

D.G.

Matter referred to Larger Bench. F