pointed out by the Division Bench of the Lahore High Court in *Karim Ahmad* v. *Rahmat Elahi and others* (1), that though the word 'sub-division' has not been defined in the Act, it is however, well settled that it is not in all cases synonymous with a Mohalla. The term implies a quarter of a town well-known and recognised and does not mean the streets and lanes of the town. A city may have Mohallas and Bazars and lanes with specific names but from this it does not follow that they are recognised sub-divisions for purposes of pre-emption law.

(8) That the plaintiff himself was not certain of his position is clear from the fact that while in the plaint it is pleaded that the custom of pre-emption prevailed in the whole town of Rupar, the observations made by the Division Bench in Exhibit D. 5 made him change this stand and a case was sought to be made that the custom of pre-emption prevailed in the locality where the house is situate. I think the plaintiff has not been able to establish either that the custom of pre-emption prevails in the town of Rupar generally or that it obtains in Mohalla Pul Bazar. In this view of the matter, the suit has not been rightly decreed and I would accordingly allow his appeal, set aside the judgment of the lower appellate Court and restore that of the trial Court. There would be no order as to costs of this appeal.

*R.N.M.*

APPELLATE CRIMINAL

*Before Ranjit Singh Sarkaria and Gopal Singh, JJ.*

SURAT SINGH,—*Appellant.*

*versus*

THE STATE,—*Respondent.*

**Criminal Appeal No. 278 of 1969**

August 22, 1969

*Evidence Act (I of 1872)—Sections 45 and 106—Evidence of Ballistic Expert—Appreciation of—Principles as to—Stated—Conviction of an accused person solely on the testimony of Ballistic Expert—Whether can be based—Courts—Whether should insist upon corroboration of the expert evidence—Science of Ballistics—Whether has attained degree of perfection—Ballistic Expert—Whether must demonstrate to the Court the basis of his opinion—Firing of two test bullets by the Ballistic Expert—Whether advisable—Section 106—Plea of alibi of an accused person found to be weak or false—Adverse inference against the accused therefor—Whether can be drawn.*

(1) A.I.R. 1946 Lah. 432.

*Held,* that there is no kind of testimony more subject to bias in favour of the adducer than that of skilled witnesses. Human knowledge is imperfect and human judgment is fallible. Ballistic Experts are not an exception to that rule. The primary object of the State in employing the Ballistic Experts is to facilitate detection of crime. This object naturally looms large in the eyes of the Expert when he sets out to work. Fired by the zeal to detect, his mind is apt to suspect and confuse even innocent family or class markings with the individual thumb-prints of the weapon, to imagine missing links where none exists, to strain and stretch apparently dissimilar dots and dashes into matching striations and to take for granted facts consistent with his pre-conceived theories. All these factors so subtly and unmistakably affect the Expert that his judgment is likely to become warped and his opinion fallacious. It must be remembered that apart from the inherent infirmities to which evidence of the Ballistic Expert is susceptible, it does not, in the vast majority of cases,—even if found flawless and impeccable—go beyond establishing only one circumstance, viz., that a given cartridge or bullet has been fired in a particular weapon. And, by itself, it would not show as to when that weapon was fired and by whom it was fired. It follows therefrom that when the charge against the accused is one of murder by shooting with a firearm, the Court will not, as a rule of prudence and caution, convict the accused solely on the basis of the testimony of the Ballistic Expert, without there being other convincing evidence from which it can be indubitably deduced that the crime bullets or cartridges were fired, within all human probability, by the accused and none else from that weapon. (Para 67)

*Held,* that there is nothing in the Evidence Act which requires the evidence of an Expert to be corroborated, in all cases, before it could be acted upon as sufficient proof of what the Expert stated. It would be for the Judge of fact in each case to decide how much reliance can be placed on the evidence of a particular expert witness. Among others, the professional knowledge and experience of the Expert, the labour and the care which he brings to bear upon the examination of the disputed ammunition and the firearm, the tests applied, the data available, and the demonstrable reasons given by him generally help the Court in evaluating of his evidence in a particular case. While it would be going too far to say that the Court must, as a rigid rule of universal application, insist upon the corroboration of the evidence of an Expert in every case, it must be careful not to delegate its authority to a third party, and should itself be satisfied that the accused was guilty and not hold him guilty merely because an expert comes forward and says that in his opinion, the accused must be guilty. The Court should satisfy itself as to the value of the evidence of the Expert in the same way as it must satisfy itself of the value of other evidence. (Para 68)

*Held,* that in spite of the immense strides made by the science of Ballistics in recent years, it has not attained that degree of perfection which has been achieved by the science of a finger-prints. While the identity or otherwise of two sets of finger-prints can be intelligibly demonstrated

even to a layman of average prudence, the same is not true in the case of firearms and ammunition. (Para 66)

*Held*, that Ballistic Expert must note, distinguish and demonstrate to the Court those points of similarity in the photographs taken by him of the crime and the test bullets which are due to "family likeness" and which may be due to the individual marks of the particular weapon. While it is true that every breech-face has its own separate and true individuality, there is a risk of this true individuality not always being recognised by the Expert. In other words, the risk of human error in confusing such 'family markings' for 'individual markings' of the weapon cannot be ruled out, particularly where the Expert does not note and distinguish the two types of markings from each other. The mere fact that such distinction was present to the mind of the Expert at the time of the examination of the disputed ammunition and the test ammunition is not sufficient. He must put those facts, noted by him, on paper and assist the Court and the parties in appreciating and testing the soundness of his opinion. If he fails to do so and keeps his observations locked in the inner recesses of his inscrutable mind, the Court will hesitate to accept his *ipse dixit* as the last word on the point. (Para 65)

*Held*, that one of the reasons for commending the firing of more than one test cartridge is that sufficiently distinct engravings on one bullet or the cartridge case may not be produced which would furnish a sure basis for comparison. The other reason is that one test bullet is not sufficient to show the engraving from a particular barrel is constant in its individualities. It is always better, for eliminating all possible error, to fire more test cartridges. The more the specimen data obtained, the lesser will be the chances of error in the conclusion drawn from a comparative examination of the test and the disputed ammunition. However, the opinion of a Ballistic Expert cannot be dubbed as 'unreliable' merely because he has fired only one test cartridge. All that can be said is that perhaps the opinion of the expert would be more broad-based if he had fired more test cartridges through the crime weapon and thus acquired more data.

(Paras 57 and 58)

*Held*, that it is true that under section 106, Evidence Act, it is for the accused to introduce evidence with regard to his plea of *alibi* which is specifically within his knowledge. It is further true that the standard of proof required for establishing a defence of *alibi* is the same as for the evidence on behalf of the prosecution. But it does not necessarily follow that whenever defence of *alibi* is set up and that defence breaks down, an adverse inference against the accused arises that he was then in all probability present at the time and place of occurrence as alleged by the prosecution. In a criminal case the burden to prove the charge against the accused always rests on the prosecution which is to stand on its own legs and cannot take advantage of the weakness of the defence. (Para 37)

*Appeal from the order of Shri Gurnam Singh, Sessions Judge, Rohtak, dated 21st February 1969, convicting the appellant.*

K. S. KWATRA AND N. C. JAIN, ADVOCATES, for the Appellant.

K. L. JAGGA, ASSISTANT ADVOCATE-GENERAL (HARYANA), for the Respondent.

J. N. KAUSHAL, SENIOR ADVOCATE WITH K. S. SAINI, ADVOCATE, for the complainants.

JUDGMENT

SARKARIA, J.—Ishar, aged 72 years, and his sons, Surat Singh, aged 38 years, and Hoshiara, aged 30 years, of village Lakhan Majra, Police Station, Meham, tehsil Gohana, were tried by the Sessions Judge, Rohtak, for the double murder of their co-villagers, Rulia and his son, Suraj Mal. The learned Sessions Judge has acquitted Ishar and Hoshiara, but has convicted Surat Singh and sentenced him to death. Against that order of the Sessions Judge, Surat Singh convict has preferred Criminal Appeal 278 of 1969, while Murder Reference 28 of 1969 is also before us for confirmation of the death penalty inflicted on Surat Singh. Both will be disposed of by this judgment.

(2) Briefly stated, the prosecution story is that about 1½ years before the murders in question, Suraj Mal deceased had made an indecent assault on Shrimati Muchheri, sister of Surat Singh appellant. Thereupon, a fight took place between the deceased persons, Rulia and Suraj Mal, on one side, and the acquitted accused Ishar and Hoshiara on the other. Respectables mediated and an apparent compromise was brought about. The accused, however, continued to nurse a grudge against the deceased.

(3) Prabhu, P.W. 3, a brother of Rulia deceased, on October 24, 1967, took his turn of canal water from Shiv Nand of village Kharak Jattan at 4 P.M. for irrigating his land situated near the Canal Rest House Bansi, in the revenue estate of the adjoining village Kharak. His turn lasted three hours. At 7 P.M. Suraj Mal deceased took his turn of canal water which was to terminate at 4 A.M. on October 25, 1967. Shortly thereafter, Rulia deceased also came there with the meals of his son and joined him in the irrigation. Prabhu went away to the village. Early next morning, Shrimati Giano, wife of Rulia deceased told the witness (Prabhu) that usually the deceased persons used to return home after irrigating the fields, at 5 A.M. and that they had not done so on that day. After sunrise, Prabhu proceeded to the fields to find out what the matter was. He took Mohinder and Baldeva also with him. On reaching the fields, he noticed that only 3

Bighas of the land had been irrigated and that the watercourse was dry. He shouted for Suraj Mal and Rulia but no one answered. He and his companions followed the watercourse and on reaching near the canal found that there was a breach in the watercourse. The field of Manphool was lying flooded. He sent back Mohinder to fetch Sat Narain, his brother. The remaining two proceeded further and noted blood at two places on the canal bank. They also found a shoe of Suraj Mal deceased lying there. There was also a trail of blood. This aroused suspicions of foul play. In the meantime, Sat Narain and Mohinder also reached there. After searching the canal, they brought out the dead-bodies of Rulia and Suraj Mal. They also found two brass empties and one bullet (lead-piece) lying on the canal bank. Deputing Lachhman and Bhura, Chowkidars to guard the spot, Prabhu proceeded to Police Station, Meham, 12 miles away, and lodged the First Information Report, Exhibit P.F. at 1.00 P.M. on October 25, 1967.

(4) After recording the First Information Report, Sub-Inspector Kundan Lal proceeded to the spot. He took into possession the shoe, Exhibit P. 8, the empty cartridge cases, Exhibits P. 2 and P. 3, and lead bullet, Exhibit P. 4, and sealed them into separate parcels. He also removed blood-stained earth from two places from the canal bank and sealed them into parcels,—*vide* memo Exhibit P.H. He prepared the injury statements, Exhibits PJ/1 and PK/1, and the inquest reports, Exhibits PJ and PK, in respect of the dead-bodies of Rulia and Suraj Mal and sent the same under the escort of Joga Ram and Ved Bharat Constables to Medical College, Rohtak. He also prepared the visual site-plan, Exhibit PS.

(5) The Sub-Inspector arrested Hoshiara accused on October 26, 1967, from the village. On November 2, 1967, Hoshiara accused while in Police custody, in the presence of Mehar Singh and Sant Lal, P.Ws., got discovered the bloodstained *kassi,* Exhibit P. 9. Ishar accused was arrested on October 31, 1967. On November 5, 1967, whilst in Police custody, he got discovered the bloodstained *kulhari,* Exhibit P. 10, in the presence of Bhupa and Kewal Singh, P.Ws.

(6) On November 15, 1967, Sub-Inspector Kundan Lal went to Ambala to arrest Subedar Surat Singh appellant. He could not obtain the custody of Surat Singh appellant or his pistol. He, however, sealed the pistol and left it with the Commanding Officer. On January 12, 1968, he arrested Surat Singh. The Investigating Officer obtained the sealed parcel containing the pistol on January

25, 1968, and deposited the same, with seals intact, in the Malkhana of the Police Station on January 26, 1968. He recorded the statements of Prabhu, Hari Singh, Baldeva, Lachhman, Shrimati Giani and Kishan, son of Rulia on October 25, 1967, under section 161, Criminal Procedure Code.

(7) Dr. K. L. Issar conducted the autopsy of Rulia and his son, Suraj Mal, deceased on October 26, 1967, at 3.30 P.M. and 5.00 P.M., respectively. He found the following injuries on the dead-body of Rulia:—

(1) A wound with clean-cut margins 6″×1½″ horizontally across the right side of the head cutting the right pinna, in its upper part of skull and exposing the brain.

(2) A horizontal wound with clean-cut margins 2½″×1″, one inch deep on the right side of neck below the right ear cutting the mastoid bone.

(3) An abrasion ½″×1/6″ just below the anterior end of injury No. 2.

(4) A circular wound with inverted margins just above and lateral to the left nipple. The direction of the wound was towards right side running obliquely inwards and backwards. The wound was ⅓″ in diameter and communicated with the chest cavity.

(5) An oval wound with everted margins half inch in diameter on the right side of chest in the line of osterior axillary fold at the level of the lower angle of scapula. The wound communicated with the chest cavity on the right side. Cuts corresponding to injuries Nos. 4 and 5 were present on the shirt and vest.

The fourth left rib was found fractured against injury No. 4. Pleural cavity was full of blood and punctured in line with injuries 4 and 5. Right ventricle of the heart was found punctured through and through. In his opinion, injuries 1 and 2 were caused with a sharp-edged weapon, injury No. 3 with a blunt weapon, while injuries 4 and 5 had been caused by a bullet. Injury No. 4 was wound of entry and injury No. 5 that of exit. Injuries 1, 4 and 5 were individually sufficient to cause death in the ordinary course of nature. Death followed instantaneously the infliction of the injuries. He further stated that the time that elapsed between the death and the *post mortem* examination was 40/42 hours.

(8) Dr. Issar found these injuries on the corpse of Suraj Mal:—

(1) A wound $\frac{1}{3}$" in diameter on the abdomen left lower quadrent, 2" from the umbilicus with inverted margins running oblique towards the right inwards and backwards. Injury communicated with the abdominal cavity and corresponding cut was present on the vest and shirt.

(2) A wound with inverted margins $\frac{1}{3}$" in diameter on the front of chest, just above and lateral to left nipple.

Fourth rib was fractured and the wound communicated with the chest cavity running obliquely, inwards, downwards and backwards. Corresponding cut was present on the shirt and vest.

(3) A wound with invested margins $\frac{1}{3}$" in diameter on the right side of the chest, just below and outside of the right nipple. Right fourth rib was partially fractured and wound ran obliquely, backwards and slightly towards and inwards. Cut was present on vest and shirt.

(4) A wound $\frac{1}{3}$" in diameter with inverted margins on the left side of the chest, over the seventh ribs in mid axillary line running downwards and backwards. Seventh rib fractured and wound went deep. Corresponding cut was present on the shirt and vest.

(5) A wound with everted margins, on the back right side, $2\frac{1}{2}$" from spine at the level of fourth and fifth lumber vertebra. Cut was present on shirt and vest, and wound communicated with the abdomen.

(6) A wound half inch in diameter with everted margins on the back on the right side, just outside the lower angle of scapula. Corresponding cut was present on the shirt and vest. It communicated with the chest cavity in the sixth intercostal space.

(7) A wound half inch in diameter on the back $2\frac{1}{4}$" below injury No. 6, corresponding cut present on the shirt and vest and wound communicated with the chest.

(8) A nodular swelling on the left side of the back $2\frac{1}{2}$ inches from the mid line and at the level of tenth rib. On

dissection a bullet (of brass) was taken out and the opending communicated with injury No. 4.

(9) An incised wound with clean-cut margins 1½ inches into half inch on the lower jaw on the right side. Angle of the mandible partially cut.

Fourth lumber vertebra was fractured on right side and was lying with injuries 1 and 5. Both the sides of chest cavity were full of blood. Right lung was damaged against injuries 2, 3, 6 and 7. Pericardium was full of blood and punctured in line with injuries 2 and 7. The right ventricle of the heart was found punctured through and through in line with injuries 2 and 7. The stomach contained partially emulsified meals. In Dr. Issar's opinion, injury No. 9 was caused with a sharp-edged weapon, while injuries 1 to 7 were bullet wounds. Injury No. 8 contained an embedded bullet head. Injuries 1, 2, 3, 5, 6 and 7 were individually sufficient to cause death in the ordinary course of nature. The death resulted instantaneously from the injuries. The doctor opined that the interval between the death and the *post mortem* examination was 42 to 44 hours. Witness sealed the extracted bullet into the phial and handed over the same to the Police.

(9) The sealed parcels containing the empties, P. 2 & P. 3, the lead bullet (P. 4) recovered from the scene of occurrence and the bullet (P. 5) extracted from the body of Suraj Mal deceased, and the pistol (Exhibit P. 1) of Surat Singh were sent to the Director of the Forensic Science Laboratory, Chandigarh. Mr. J. K. Sinha, Assistant Director of the Laboratory, P.W. 2, opined that the empty cartridge-cases P. 2 and P. 3, found from the spot had been fired through the pistol, Exhibit P. 1. He further opined that the two bullets, Exhibits P. 4 & P. 5, had also been fired through the same pistol, Exhibit P. 1.

(10) After completing the investigation, the Police challaned the three aforesaid accused persons in the Court of the Judicial Magistrate, who committed them to the Court of Session, with the aforesaid result.

(11) The prosecution sought the conviction of the appellant solely on circumstantial evidence, which may be catalogued as under:—

(a) The appellant had a motive to commit the crime. About 1½ years prior to these murders, Suraj Mal deceased had

outraged the modesty of Shrimati Muchheri, sister of Surat Singh appellant.

(b) A couple of hours before the occurrence, Surat Singh and his brother, Hoshiara, in the company of two strangers were seen in Anonwala field at a distance of about 1 mile from the place of murders. Surat Singh appellant was then armed with a pistol, while Hoshiara was holding a *kassi* and a lantern.

(c) Opinion of the medical witness, who conducted the *post mortem* examination, that Rulia and Suraj Mal died as a result of fireshot injuries.

(d) (i) Empty cartridge cases, Exhibits P. 2 and P. 3, (marked C. 1 and C. 2) and one bullet piece, Exhibit P. 4, (marked B. C. 1), were found lying near the blood at the place of occurrence. One bullet piece, Exhibit P. 5, also marked B.C. 2 was extracted by the Medical Officer from the dead-body of Suraj Mal.

(ii) The pistol, Exhibit P. 1, owned by the appellant under a licence, was found deposited in the Kote (armoury) of the Jat Regiment at Ambala on November 15, 1967. The Investigating Police Officer sealed and left it in the custody of the Army Authorities. This sealed parcel was subsequently taken over by the Investigating Officer on 25th January, 1968.

(iii) Opinion of the Ballistic Expert, Dr. J. K. Sinha, Assistant Director, Forensic Science Laboratory, Chandigarh, to the effect, that the empty cartridge cases, Exhibits P. 2 and P. 3, (C. 1 and C. 2) and the bullet pieces, Exhibits P. 4 and P. 5, (marked as B.C. 1 and B.C. 2), had been fired in the pistol, Exhibit P. 1, (belonging to the appellant).

(12) Evidence regarding the motive comes from the mouths of Prabhu, P.W. 3, brother of Rulia deceased, Shrimati Giano, P.W. 5, widow of Rulia deceased and a collateral Hari Singh, P.W. 9. Prabhu, P.W. 3, has stated that 1½ years prior to the occurrence, Muchheri daughter of Ishar accused, i.e., sister of the appellant, had been caught and pulled by Suraj Mal deceased with the intention of molestation to a sugarcane field. On account of that

there was a fight between Rulia and Suraj Mal on one side, and Ishar and Hoshiara on the other. Bhagwana and Hari Singh, P.W. 9, intervened at the request of the witness and brought about a compromise. Prabhu does not claim to be an eye-witness of the indecent assault alleged to have been made by Suraj Mal deceased on Shrimati Muchheri. In cross-examination, however, he asserted that he was present when as a result of that incident, Suraj Mal and Rulia deceased had a fight with Ishar and Hoshiara accused. The matter was neither reported to the Police, nor to the village Panchayat. Mohan Lal of village Kharak was also present when the compromise was effected. He denied a suggestion made by the defence counsel that the deceased had a dispute with the accused over a plot of land three years before and that it was on account of that dispute that there was a fight between them.

(13) Shrimati Giano's statement is, more or less, to the same effect as that of Prabhu. Hari Singh, P.W. 9, deposed that 1½ years prior to the occurrence, Suraj Mal deceased on one side, and Ishar accused on the other, had a fight with each other as it was alleged that Suraj Mal had molested the daughter of Ishar accused. Mange, Badlu, Sis Ram, etc., and the witness intervened and brought about a compromise. It may be noted that Hari Singh, P.W. 9, has not stated that Rulia deceased and Hoshiara accused also participated in that fight. It was put to Hari Singh, P.W. also, in cross-examination, that the aforesaid fight had taken place over a plot of land and not on account of any alleged molestation of Shrimati Muchheri. Witness denied that suggestion.

(14) Firstly, this evidence of motive (besides being interested) is of a vague and general character, and is not cogent enough to establish beyond doubt that Surat Singh appellant had a motive to commit this crime. The very story seems to be doubtful. No information about this alleged incident was given to the Police. It has been contended on behalf of the prosecution that in such cases the aggrieved parents of the girl hesitate to report to the Police, for the simple reason that it gives wide publicity, and, in consequence, does more harm to the reputation and future life of the girl than the imaginary redress to be obtained by setting the machinery of criminal law in motion. Undoubtedly, there is some force in this argument, but people do approach in an informal way, the village Panchayat or the village dignitaries, who all are concerned in protecting the honour of their women-folk. No such information was given to the dignitaries of the village.

(15) Secondly, the incident, if any, took place about 1½ years before the occurrence in question and it had resulted in a compromise. There is absolutely nothing on the record to suggest that thereafter there was any overt act, outward manifestation or show of hatred or hostility on the part of the appellant or his brother and father towards the deceased.

(16) Thirdly, Surat Singh appellant was not present in the village when the alleged molestation of Shrimati Muchheri took place. There is not even a suggestion that after the compromise the deceased persons did anything which led to any revival or recrudescene of hostility between the deceased persons and the accused.

(17) Mr. K. L. Jagga, Assistant Advocate-General, contends that villagers, particularly those who are educated and well-placed in life, are very sensitive and jealous about the honour of their sisters and that, consequently, in the eyes of Subedar Surat Singh appellant, the molestation of his sister by Suraj Mal deceased was an unforgivable sin. Despite the compromise, therefore, says Mr. Jagga, the fire of revenge must have kept smouldering in the mind of the appellant. Counsel has drawn our attention to the fact that the pistol, Exhibit P. 1, according to the statement of Surat Singh appellant himself, was purchased by him on 26th September, 1966, i.e., 6 or 7 months after the Muchheri incident. It is argued that since Surat Singh appellant has not explained as to what for he had purchased the pistol and obtained a licence for keeping it, it should be presumed that he had done so with a view to use it against the molestor of his sister.

(18) These contentions appear to be far-fetched. Assuming that there was some such incident concerning Shrimati Muchheri, the hostility generated by it would depend on the extent of the mischief committed by Suraj Mal deceased. It is no-body's case that Suraj Mal had done anything more than pulling Shrimati Muchheri by the hand towards the sugarcane field. Moreover, the evidence of P.Ws. Prabhu, Shrimati Giano and Hari Singh, so far as it relates to the alleged indecent assault on Shrimati Muchheri, is no better than hearsay. None of these persons claims to be an eye-witness to that indecent assault, though they claim to be witnesses either of the fight or the compromise that followed. It cannot be said, therefore, that a person placed in the position of the appellant, in the circumstances of the case, would continue to nurse a grudge

against Suraj Mal deceased as well as his father for about 1½ years preceding the occurrence.

(19) True that by assessing the existence and operation of motives in the average man it is sometimes possible to guess the manner in which that person is likely to behave, but such a course of induction is a rough and ready process "liable to error in its application". (See Wills on Circumstantial Evidence, 7th Edition, page 62). The minds of different persons are differently constituted. "Men are not all of average mental hue or constitution, and it does not follow that because there is something shown which would lead to crime in one man, or many men, that it would necessarily lead to crime in the case under consideration". To recall the words of the same learned author, we must be careful not to forget that 'if we have found a motive which *might lead to crime*, it by no means follows that it *did lead to crime*'. In such cases which rest entirely on circumstantial evidence, the motive for the crime assumes supreme importance and it must be clearly established by cogent, convincing and conclusive evidence. It is not possible to see what is operating in the mind of another. It follows that we must gather and infer the motive from words, shouts, gestures, looks and conduct of the person in whom we are seeking for a motive. Such conduct may be antecedent, contemporaneous or subsequent to the crime. So far as Surat Singh appellant is concerned, there is not a shred of any such evidence of his conduct from which it can be safely deduced that smarting under a sense of dishonour, he has been on the look out for the murder of deceased persons during this period of 1½ years. Nor does the circumstance that Surat Singh appellant acquired the licensed pistol, Exhibit P. 1, about 6 or 7 months after the Muchheri incident, in any way indicate any such motive operating in him. No duty was cast on the accused to explain as to for what purpose he had acquired this pistol and the licence for keeping it. Surat Singh appellant took the risk of appearing in the witness-box as D. W. 5. No question whatever was put to him in cross-examination on this point. Rather, the fact that this licensed pistol was in the ownership of Surat Singh appellant for about one year preceding the occurrence, and never before he expressed any intention or made any attempt to use it against the deceased persons, militates against the inference that he had acquired this only for the purpose of using it against the deceased.

(20) All said and done, the evidence adduced by the prosecution goes no further than establishing a very remote possibility of the

appellant nursing a grudge against the deceased persons on account of some incident concerning his sister, Shrimati Muchheri. At best, the evidence, on record only shows that an incident involving the molestation of Shrimati Muchheri by Suraj Mal deceased *may or may not* have taken place. It would be highly unsafe, therefore, to take this evidence as an effective link in the chain of circumstances by which it is sought to fasten the accused with guilt. "To eke out a weak case", says Wills in his aforesaid book (pages 65-66), "by proof of a motive apparently tending towards possible crime is a very unsatisfactory and dangerous process. Furthermore, suspicion, too readily excited by the appearance of supposed inducement, is incomplatible with than even and unprejudiced state of mind which is indispensable to the formation of correct and sober judgment". This puerile evidence of motive is, therefore, not to be attached more weight than it deserves.

(21) There is another significant circumstance which may be noticed here. Prabhu P. W. 3 has revealed that in the morning, while searching for the deceased, they found that only 3 bighas of the field of the deceased had been irrigated, and the watercourse was dry. Upstream (near the place of the murders), they found a breach in the watercourse and the field of one Manphul lay flooded. The case of the prosecution, itself, as put to Dr. Issar, was that injuries 1 and 2 of Rulia and No. 9 of Suraj Mal deceased were caused with a Kassi. The possibility of a dispute over canal water (in which perhaps Manphul was also concerned), being the immediate cause of the occurrence, could not be altogether ruled out.

(22) Regarding (b), the prosecution evidence is far more unsatisfactory than that adduced in respect of circumstance (a). To substantiate (b) prosecution examined Kishan, P.W. 4, and Shrimati Giano, P.W. 5, the son and the widow, respectively, of Rulia deceased. Kishan stated that when he along with his mother, was returning at about 8.00 p.m. to the village from the fields after serving milk to the deceased, he saw four persons in Anonwala field at a distance of one killa from the field of the deceased. Witness had identified Surat Singh and Hoshiara accused. The latter had a lantern and a Kassi, while Surat Singh had a pistol in a bandoleer. In cross-examinaiton, Ch. Lehari Singh, counsel for the accused, asked him:—

> "What is the distance of your field from the place where Hoshiar Singh, Surat Singh and two other strangers met you?"

There is a note of the trial Judge that the witness did not reply to this question though it was repeatedly put to him. Witness, however, stated that the place where Surat Singh, etc., met him, is at a distance of half a mile from the habitation of the village. This Anonwala field belongs to Ishar accused. He further clarified that the Anonwala field was at a distance of about one mile from the Canal bank (where the occurrence is alleged to have taken place). He further said that they returned home after remaining in the field for 20 minutes with the deceased persons. On the following morning, when a search was instituted for the deceased persons, witness did not tell any one about his having seen Surat Singh and Hoshiara accused in the company of two others in Anonwala field on the previous night. He added that he did not go to the Canal bank even after the dead-bodies had been taken out. He stated that he made his statement about the aforesaid facts to the Police after 10 days. Shrimati Giano, P.W. 5, has made a statement more or less to the same effect as that of her son, Kishan, P.W. She has, however, stated the time when they saw the appellant and others, as 9.00 p.m.

(23) Kishan, P.W. 4, is aged 16 years. It is inconceivable that on learning about the murder of his father and brother he did go to the place of occurrence to see the dead-bodies even on the arrival of the Police. The very fact that he kept his lips tightly sealed for about 10 days after the occurrence about his having seen the appellant and others on the night of murder, indicates that this story has been subsequently concocted as an after-thought. Shrimati Giano candidly admitted, in cross-examination, that on learning about the death of her husband and son, next morning, she went to the spot and told Prabhu, P.W. and all others who had assembled there, that she had seen Hoshiara and Surat Singh appellant with two unknown persons at night time in Anonwala field, and that Surat Singh appellant was then armed with a pistol. She added that the two strangers, who were accompanying Surat Singh appellant, had partly covered their faces and they were in Military uniforms.

(24) Prabhu, P.W. 3, did not mention in the F.I.R., Exhibit PF, that Surat Singh, appellant was seen along with three others any where in the fields nearabout village Lakhanmajra. On the contrary, Prabhu alleged in the F.I.R. :—

> "Hoshiara, son of Ishar, Giana, son of Ran Singh, Ram Narain, son of Giana have murdered my brother, Rulia, and my

nephew, Suraj Mal, *in connivance* with Subedar Surat Singh and his father Ishar. Now-a-days, Subedar Surat Singh is employed in military and is posted at Ambala Cantonment. He visits the village on motor cycle. He has also a hand in the murder of both these persons."

(25) In cross-examination, Prabhu stated that before his proceeding to the fields in search of the deceased persons he had talked with Smt. Giano, P.W., for about ten minutes. Questioned as to whether Smt. Giano had told him anything about her having seen Surat Singh and others on the night of occurrence, witness stated : "Rulia's wife was weeping and did not tell anything". He added : "She did not tell me that she had seen Hoshiara, Surat Singh and two strangers going towards the Canal at night time". The conduct of Smt. Giano in not telling any such story to Prabhu at the place of occurrence before his proceeding to the Police Station, undoubtedly shows that the story of Smt. Giano and her son, Kishan, having seen the appellant and others on the night of occurrence, is a myth. It has been subsequently invented and was, therefore, rightly rejected as incorrect by the learned trial Judge. Thus, circumstance (b) was not established.

(26) Circumstance (c) has been established by the testimony of Dr. K. L. Issar, who conducted the autopsy of the dead-bodies of Rulia and Suraj Mal. Mr. Jagga contends that the presence of emulsified meals in the stomachs of the deceased persons strongly corroborates the evidence of Smt. Giano and Kishan, P.Ws., inasmuch as these witnesses stated that they had gone to the deceased persons in the field at about 7 or 8 p. m. and had served them with milk.

(27) In the first place, mere emulsification of meals does not necessarily mean that it was due to ingestion of milk. Secondly, even if it is assumed that the deceased had taken milk with their last meal, then also that fact will not reassure or guarantee the truth of the statements of Smt. Giano and Kishan, P.Ws., about their having seen Surat Singh, appellant and three others in the field at a distance of about one mile from the place of occurrence. The medical witness has opined that the deaths, which instantly followed the fireshot injuries, took place about 40/42 hours before the *post mortem* examination of Rulia deceased, which was conducted on 26th October, 1967 at 3.30 p.m. Counting back, the time of the deaths calculated according to the opinion of Dr. Issar, will work out to 9.30 to 11.30 p.m. on 24th October, 1967. There is no other corroborative evidence with

regard to the time of these murders. This much is on the record that the deceased persons departed from home, and were seen irrigating their fields at about 7 or 8 p.m. and thereafter never returned, and their dead-bodies were discovered next morning near the place of occurrence in the canal. Thus, the medical evidence only proves that a firearm, probably a 32-bore pistol, was used in inflicting the fatal fireshot injuries. This circumstance, though relevant, is insufficient, by itself, to fasten the appellant with guilt.

(28) Regarding circumstance (d), Mr. Jagga has vehemently contended that the appellant fabricated false evidence to show (a) that his licensed pistol, Exhibit P. 1, was, at all relevant times, not in his personal custody, but was lying deposited in the *kóte* (Armoury) of his Army Unit, and (b) that he was on the night of the occurrence present at Chandi Mandir, where he, at about midnight, checked the *kote-guard,* and, on the following morning, participated in the parade. It is maintained that according to Sections 105 and 106 of the Evidence Act, the burden to establish these twin facts was on the appellant and that he had miserably failed to prove the same. An adverse inference, says Mr. Jagga, should, therefore, be drawn that the appellant was, in fact, present at the time and place of occurrence, and perpetrated these murders in association with others. In support of these contentions, he has referred to *Sarat Chandra Dhupi* v. *Emperor* (1). *Harprasad Ghashiram Gupta and another* v. *State* (2), and *Harbhajan Singh* v. *State of Punjab and another* (3).

(29) It will be useful to first deal with the evidence produced by the accused, in defence. He himself appeared in the witness-box as D.W. 5, and stated that he was a Subedar of A—Company of 5th Jat Regiment. On October 7, 1967, the Company of the accused had gone to Chandigarh and remained stationed at the Chandi Mandir up to October 29, 1967, Major S. S. Gehlawat was in command, while Subedar Hazari Lal and Subedar Rajpal were also with them. The Chief of the Army Staff was to take a general salute at Chandigarh on October 29, 1967. Eleven Companies, including that of the accused, from different Regiments had come to Chandigarh to participate in the parade. While at Chandi Mandir, the accused and the Jawans of his Company used to parade from 6 to 7 a.m. Thereafter, from 8 a.m. to 11.30 a.m., they used to parade in the University ground at Chandigarh. At 11.30 a.m. they used to return to Chandi Mandir.

(1) 35 Cr. L.J. 1934.
(2) A.I.R. 1952 Bom. 184.
(3) A.I.R. 1966 S.C. 97.

In the evening, they used to start from Chandi Mandir to Chandigarh at 4 p.m. and the parade used to last from 4.30 p.m. to 5.30 p.m. Thereafter, they used to return to Chandi Mandir at 6.00 p.m. Roll-call was daily taken at about 7.00 p.m. Thereafter, they used to go to the mess at about 8.30 p.m. to read newspapers, etc. The mess time was 9.30 p.m. They used to remain in the mess up to 10.00 p.m. All their arms used to be kept in a tent called the *kote* guarded by a regular guard, which used to be checked daily by a Junior Commissioned Officer under the orders of the Major Incharge. Surat Singh added that from October 7, 1967 to October 29, 1967, he remained at Chandi Mandir and at Chandigarh and observed the programmes stated above. On the night between the 24th and 25th of October, 1967, the Major had deputed the accused to check the *kote-guard* and, consequently, he checked the guard on that night at 1.00 a.m. A *kote* register was used to be maintained. Accused signed that register at 1.00 a.m. in token of that inspection. He produced a certified copy of the *kote*-register and also of the mess bill, Exhibit D.W. 4/B. He added that during the night of 24th/25th October, 1967, he had not left his Company, but had stayed throughout at Chandi Mandir. He attended the parade from 6.00 to 7.00 a.m. at Chandi Mandir on October 25, 1967.

(30) In respect of the pistol, Surat Singh, accused (D.W. 5), stated that he purchased it on 26th September, 1966, and soon thereafter deposited it in the *kote* of the Support Company. An entry with regard to that deposit was made in the Private Arms Register kept by that Company. In the beginning of 1967, witness was transferred to A-Company. Consequently, his pistol was sent by the Support Company to the A-Company. Surat Singh categorically stated that he did not get back the pistol, Exhibit P. 1, from the custody of the *kote* since the day he had deposited it there. He stated that his village Lakhanmajra is at a distance of 160/170 miles from Chandi Mandir. Witness did not know how to drive a motor-cycle and never possessed one. He stated that the version that Suraj Mal deceased had tried to molest or had molested his sister, was absolutely wrong. Cross-examined, he admitted that Chandi Mandir and Lakhanmajra were connected by a metalled road. He also admitted that their Company used to maintain a duty register. Without seeing such a register, he could not give the dates on which he had checked the *kote*. He also revealed that parade attendance registers were not maintained at Chandi Mandir, though roll-call register has been maintained in their Company. With regard to the pistol licence, witness stated that he did not deposit it in the *kote*, but retained it

with himself. He did not deposit any cartridge along with the pistol because at the time of the purchase of the pistol, he had no cartridge. Nor did he deposit the cartridges in the *kote* when he subsequently acquired them. Surat Singh added: "On 15th November, 1967, when a Police Officer went to my regiment with my warrant of arrest, I was called by Major Brar and he obtained my pistol licence and 25 cartridges."

(31) Captain Gehlawat, D.W. 1, testified that Subedar Surat Singh, A Junior Commissioned Officer of his Unit, had deposited pistol No. 663562 (Exhibit P. 1) in their *kote* on September 26, 1967. According to the *kote* register, this pistol was taken out of the *kote* on December 16, 1967, and was handed over to 6th/11th Gorkha Rifles. Witness produced the *kote* register and a correct copy of the entries in that register, Exhibit D.W. 1/A. He further explained that according to the orders no person of any Unit could keep any arm with him whether it was his personal property or of the Army. No private weapon can be taken out of the *kote* without an order of the Commanding Officer, and when such a weapon is handed over to the owner from the *kote* his signatures are taken in token of receipt. Witness added that according to their record, the pistol, Exhibit P. 1, was never taken out of the *kote* by Subedar Surat Singh. He has further stated how from the 7th October, 1967 to 29th October, 1967, their Company, including Subedar Surat Singh accused, were stationed at Chandi Mandir. Witness was commanding that Company. Witness has categorically stated that from October 7, 1967 to October 29, 1967, Subedar Surat Singh never absented himself from the Company at any time. He added that at Chandi Mandir, their *kote* was in a camp. Witness used to depute a Junior Commissioned Officer to check the *kote* at night, and such time of inspection used to be specified by the witness. Captain Gehlawat further stated that on the 24th October, 1967, Subedar Surat Singh accused came to him after roll-call for enquiring the time for checking the *kote*. Witness directed him to check the *kote*-guard at 1.00 a.m. and that, consequently, the accused checked the *kote*-guard at 1.00 a.m. on October 25, 1967, and signed the *kote*-guard register, which was kept in the discharge of official duty under an Army Order. The *kote*-guard register of the 24th October, 1967, was checked by the witness on October 25, 1967, at about 2.30 a.m. The original checking entry had been signed by Subedar Surat Singh accused. Witness was told by the Sentry that the accused had checked the guard at 1.00 a.m. On October 25, 1967, Subedar Surat Singh was present in the parade from morning till evening. *Cross-examined,* the witness stated, that

he had not brought the roll-call register or the original *kote*-guard register as the same could not be available due to shortage of time. Witness had received the summons on December 30, 1968 and he had come from the forward area on the 31st December, 1968, while the registers were in their office with the Head Clerk who happened to be on leave. The extracts from the registers were prepared on March 19, 1968, and the registers were given to the Head Clerk for safe custody as a special case. Witness produced the copy marked 'X' from his own possession in Court. That copy was in the possession of their office in the file of Subedar Surat Singh accused. It was *from memory* that witness stated that Subedar Surat Singh was present in the Company at Chandi Mandir on the 24th October, 1967 and also on the 25th October, 1967. When the witness checked the *kote*-guard at 2.30 a.m. on 25th October, 1967, Om Bir Sepoy was on duty. Witness further revealed that an owner could withdraw his private arm any number of times from the *kote* during the year. Only weapons are got deposited in the *kote* and not the private ammunition and the licences.

(32) Subedar Raj Pal Singh, D.W. 2, stated that Major Gehlawat had deputed Surat Singh to check the *kote* duty on the night intervening 24th and 25th October, 1967. Witness, however, added that he could not say whether Subedar Surat Singh remained at Chandigarh after 10.30 p.m. on the 24th October, till the morning of 25th October, 1967.

(33) Sepoy Surat Singh, D.W. 3, stated that he was on duty at Chandi Mandir from 6.00 p.m. to 8.00 a.m. on the 24th October, 1967, and then during the succeeding night from 12.00 midnight to 2.00 a.m., and that Subedar Surat Singh had checked the *kote* during that night at 1.00 a.m. Lk. Deep Chand was their Guard-Commander, who had produced their duty-cum-*kote* register before Subedar Surat Singh and the latter signed the register in the presence of the witness. Witness belongs to district Karnal.

(34) The defence evidence, the substance of which has been reproduced above, falls short of establishing positively that Surat Singh appellant on the night of the murders (i.e., 24th and 25th October, 1967) was throughout at Chandi Mandir, and that at the material time his pistol was lying in the *kote*. The register produced to establish that the pistol, Exhibit P. 1, was during the night of occurrence lying deposited in Kote at Chandi Mandir, is a suspicious

record. On the binding cover, just before page 1, is a certificate purporting to have been signed by Captain S. S. Gehlawat, on July 17, 1966, 'that the register contains pages 1 to 43'. An actual count of the pages, however, shows that they are 44. Secondly, the first entry on page 2 of this register is in respect of a private arm deposited by one Major P. R. Sarker, the possession of which was sanctioned on 23rd May, 1967. The second entry relates to Subedar Surat Singh, accused, regarding the pistol, Exhibit P. 1. It shows that the possession of this firearm was sanctioned by the Commanding Officer on 26th September, 1966. The permission would expire on 29th September, 1967. It is not understood why these entries have been made in the reverse chronological order. If the licence in favour of Subedar Surat Singh accused was sanctioned earlier on 26th September, 1966 and he had deposited the firearm in the kote on that very day, there is no reason why this entry in the ordinary course, does not precede the entry, dated 23rd May, 1967, pertaining to Major P. R. Sarker's firearm. There are no other entries in this register. All the remaining pages in this register are lying blank. Moreover, it is said that this entry relating to Subedar Surat Singh's pistol was "carried over" from another register of private arms maintained in the Support Company. That register has not been produced, nor is there anything in this entry to show that it was 'carried over' from any other register.

(35) Captain Gehlawat's statement about the inspection of the Kote-guard at Chandi Mandir at 1.00 a.m. (on the night of occurrence) by Surat Singh accused, is not direct evidence. It is partly based on the entry in the kote-guard register, signed by the accused at 1.00 a.m., and partly on the information derived from Sepoy Om Bir. Neither the original entry in the Kote-guard register signed by Surat Singh, nor Om Bir have been produced in Court.

(36) Even if Captain Gehlawat's statement that the accused was present at Chandi Mandir on the following morning at the parade, i.e., at 6.30 or 7.00 a.m., is true, then also it was not improbable for the appellant to sign the Kote-guard Register and post-time the entry as 1.00 a.m. and then slip out after the roll-call at about 7.00 p.m. on 24th October, 1967, from Chandi Mandir and reach the place of occurrence within 3 or 4 hours on a fast automobile, perpetrate the crime at about 11.00 p.m. or 12.00 midnight and return to Chandi Mandir before the morning parade. Captain Gehlawat has stated that the appellant sought his directions in the evening of 24th October, 1967,

at the time of the roll-call for checking the Kote on the succeeding night. It is true that when the pistol was found, after the crime, by the Investigating Police Officer, it was lying deposited in the Kote on 15th November, 1967. Unfortunately, no question was put to Surat Singh accused when he appeared as his own witness, in cross-examination, as to whether he had ever come to his village on leave or *furlough* after he had acquired the pistol and deposited it in the Kote. So far as Captain Gehlawat's statement to this effect is concerned that all Army personnel, who own private arms, are required to deposit the same in the Kote or Armoury of the Unit, it is not open to exception. But the question, whether the appellant after depositing it in the Kote, had withdrawn it at any time before this occurrence. This question cannot be answered in the negative, simply because there is no entry in the suspicious Kote register of private arms, showing any such withdrawal or re-deposit of the pistol, Exhibit P. 1, by the accused. Captain Gehlawat candidly stated in cross-examination that the entries in this register were not in his hand. We have, therefore, no hesitation in holding that the defence evidence produced by Subedar Surat Sngh, for establishing that at the time of occurrence he as well as his pistol were at Chandi Mandir, was not cogent and satisfactory enough to establish these facts. At the same time, no definite finding can be recorded that the defence witnesses have necessarily perjured themselves.

(37) It is true that under section 106 of the Evidence Act, it was for the accused to introduce evidence with regard to the facts constituting his two-fold plea of *alibi,* which were specially within his knowledge. It is further true that the standard of proof required for establishing a defence of *alibi* is the same, as for the evidence on behalf of the prosecution. But it does not necessarily follow that whenever defence of *alibi* is set up and that defence breaks down, an adverse inference against the accused arises that he was then in all probability present at the time and place of occurrence as alleged by the prosecution. It appears to me that the observations made by the learned Judges of the Calcutta High Court to the contrary in *Sarat Chandra Dhupi's case* (1), *ibid,* are too wide and in my humble view do not state the law correctly. The general proposition that seems to have been enunciated in *Sarat Chandra Dhupi's case* (1), offends against the cardinal principle that in a criminal case the burden to prove the charge against the accused always rests on the prosecution which has to stand on its own legs and cannot take advantage of the weakness of the defence.

(38) In this view, I am fortified by two Division Bench judgments in *Anna and others* v. *State of Hyderabad* (4); and *Nga Zaw Gyi Aung* v. *Emperor* (5). In the latter case, it was observed that the weakness or falsity of an *alibi* is not a sufficient ground for holding that the case for prosecution, in a charge of murder, is thereby improved. Thus, no cast-iron rule can be laid down that whenever the accused person fails to establish his plea of *alibi* an adverse inference in favour of the prosecution must be drawn that the accused was at the time of occurrence at the place where he is alleged by the prosecution to be. The burden to prove the participation of the appellant in the commission of these murders was on the prosecution. It could not shift to the appellant, simply because the evidence adduced by the latter was not satisfactory enough to establish his defence.

(39) I have no quarrel with the proposition of law with regard to the onus in criminal trial laid down in *Harprasad Ghashiram Gupta's case* (2), *ibid.* The facts of that case were different. There, the accused wanted to take advantage of an Exception. He had not set up a plea of *alibi. Harprasad Ghashiram Gupta's case* (2), therefore, is here of no assistance to the prosecution.

(40) *Harbhajan Singh's case* (3), also does not advance the contention of Mr. Jagga. In that case, their Lordships of the Supreme Court were dealing with the burden of proof which rests on an accused person to establish circumstances bringing his case within Exception 9 to section 499, Indian Penal Code. It was held that where the accused is called upon to prove that his case falls under an Exception, law treats the onus as discharged if he succeeds in proving a preponderance of probability. As soon as the preponderance of probability is established the burden shifts to the prosecution which still has to discharge its original onus. Basically, the original onus never shifts and the prosecution has, at all stages of the case, to prove the guilt of the accused beyond a reasonable doubt.

(41) The above being the law on the point it is clear that the mere fact that the accused had failed to establish his defence satisfactorily, does not whittle down the onus on the prosecution for proving that he was at the material time at the place of occurrence and perpetrated these murders. Thus, circumstance (d), which would be relevant under section 8 of the Evidence Act as conduct of the accused, was not established.

(4) A.I.R. 1956 Hyderabad 99.

(5) A.I.R. 1937 Rangoon 10.

(42) The most important circumstance on which the prosecution stakes its all is (d) (iii), which in turn is based on the premises furnished by circumstances (d) (i) and (d) (ii). Two empty cartridge cases, Exhibits P. 2 and P. 3, also marked as C. 1 and C. 2, respectively and one bullet piece, Exhibit P. 4 (also marked as B.C. 1) were found at the place of occurrence near patches of blood. One bullet piece, Ex. P. 5 (also marked as B.C. 2) was extracted by the medical witness from the dead-body of Suraj Mal. The presence of these cartridge cases and the bullet piece, Exhibit P. 4, at the spot finds mention in the First Information Report, Exhibit PF, lodged by Prabhu, P.W., on the following day at 1.00 p.m. At the trial, Prabhu, deposed to this circumstance. Sub-Inspector Kundan Lal, P.W. 19, also vouchsafed this fact and added that he had taken these empties and the bullet into possession on October 25, 1967, and turned them into sealed parcels,—*vide* memo, Exhibit PH. As disclosed in cross-examination, he sealed these parcels with his own seal bearing the initials 'SK' of his son Swaran Kumar. Witness deposited these sealed parcels in the Malkhana of the Police Station on the 28th October, 1967, with seals intact. They remained in the Malkhana till the 11th December, 1967, when they were dispatched to the Forensic Science Laboratory, Chandigarh.

(43) Gaje Singh Constable, No. 937 in his affidavit, Exhibit P.V./2, has sworn that on December 11, 1967, he took two sealed parcels with seals intact from Piara Lal Moharrir, Head Constable of Police Station Meham, and delivered the same in the office of the Forensic Science Laboratory, Chandigarh. So long as the parcels remained in his custody, nobody tampered with them.

(44) Mr. J. K. Sinha, P.W. 2, has testified that two sealed parcels were received in the office of the Laboratory on the 12th December, 1967. One of those sealed parcels contained two fired 7.65 m.m. cartridge-cases (P. 2 and P. 3) and one fired bullet (P. 4). The second sealed parcel contained one fired bullet (P. 5). He stated that these sealed parcels were brought on the 12th December, 1967, by Gaje Singh Constable. The seals on the parcels bore the letters 'SK'. He added that the parcels, as usual, are received by the Receptionist (clerk) of their office. They remained with the Receptionist till their examination on February 9, 1968, by the witness. On February 9; 1968; the seals on the parcels were found intact and tallied with the specimen seals.

(45) The learned counsel for the appellant contends that there are two snags in the prosecution evidence, which do not exclude the

possibility of fabrication of these cartridge cases and bullets after the seizure of the pistol, P. 1, by the Investigating Officer. The first snag, says the counsel, is that there was no evidence on the record to show that the Sub-Inspector after sealing these parcels, had entrusted his seal to some independent person from whom he did not take it back till the report of the Ballistic Expert. The second snag, according to the learned counsel, is that the Receptionist in whose custody these parcels remained from 12th December, 1967 to 9th February, 1968, has not been examined. Stress has also been laid on the long delay in sending the sealed parcels to the Forensic Science Laboratory by the Sub-Inspector. It is suggested that the Investigating Sub-Inspector in connivance with the Receptionist (clerk) in the office of the Forensic Science Laboratory might have substituted for the originals, the cartridges, P. 2 and P. 3, and the bullet pieces, P.4 and P. 5, after firing them through the pistol, P. 1, seized from the appellant.

(46) We have carefully considered these contentions. Certainly, there has been a delay of about 46 or 47 days in sending the sealed parcels containing the cartridges, P. 2 and P. 3, and the bullets, P. 4 and P. 5, to the Laboratory. The pistol, Exhibit P. 1, as vouchsafed by Sub-Inspector Kundan Lal, came into his possession on the 25th January, 1968, i.e., long after the sealed parcels had been delivered in the Forensic Science Laboratory, Chandigarh. It is true that Sub-Inspector Kundan Lal, P.W. 19, (as deposed to by the witness, and Lt. Col., Raj Singh, P.W. 8), first found the pistol lying deposited in the Kote of the Regiment on the 15th November, 1967, Lt. Col: Raj Singh, refused to hand over either the pistol or Subedar Surat Singh to the Investigating Officer without the previous permission of the higher authorities. Lt. Col. Raj Singh, however, directed that the pistol should be sealed in the presence of the Sub-Inspector and kept in safe custody with the Regiment till the clearance orders were received from the higher authorities. He issued the letter, Exhibit PL, to the Magistrate, who had issued the warrant of arrest of Subedar Surat Singh. It is true that the pistol was sealed with the seal of the Sub-Inspector, but it remained in the custody of the Regiment till the parcel was handed over to the Investigating Officer on the 25th January, 1968. Thus, when the Sub-Inspector obtained the custody of the pistol, Exhibit P. 1, the parcel containing the empties had already reached a safe place out of the control of the Investigating Officer and there was no possibility of their being tampered with or replaced after 12th December, 1967. Gaje Singh Constable, who carried the sealed parcels to the Forensic Science Laboratory was not cross-examined by the defence though they had

every right and opportunity to do so. In the seizure memo, Exhibit P. H., a document which has been duly proved by the evidence of its scribe, Sub-Inspector Kundan Lal, P.W. 19, it is recited that the seal was handed over to Shri Krishan Lal Lambardar, after use. The correctness of this recital was never questioned by the defence while cross-examining Shri Kundan Lal. It will, therefore, be not extravagant to presume under section 114 of the Evidence Act that all these official acts were rightly and properly done.

(47) I have already alluded to the evidence of Lt. Col. Raj Singh, P. W. 8, as to how on the 15th November, 1967, the Investigating Officer came to seize the pistol and arrest the accused and how the weapon was left for safe custody with the Regiment on that date by the Investigating Officer. It is also in the evidence of Sub-Inspector Kundan Lal, that after taking over this sealed parcel containing the pistol, on January 25, 1968, he deposited that parcel for safe custody in the Malkhana of the Police Station on January 26, 1968. It is further in the affidavit of Piara Lal Head Constable, Exhibit PV, that this sealed parcel was received by him in the Malkhana on January 26, 1968, and that he handed it over, with seals intact, to Shyam Sunder, Constable, No. 973 on February 6, 1968, for taking it to the Forensic Science Laboratory, Chandigarh, for expert examination. Shyam Sunder, Constable in his affidavit, Exhibit PV/5, has sworn that on February 6, 1968, he carried the sealed parcel containing the pistol, cartridges and the licence of Subedar Surat Singh accused from Piara Lal, Head Constable and delivered the same, with seals intact: on the 9th February, 1968, in the office of the Forensic Science Laboratory, Chandigarh. Mr. J. K. Sinha, P.W. 2, has stated how this sealed parcel was received on February 9, 1968, by the Receptionist in their office. Witness opened this sealed parcel on the 9th February, 1968. It bore the seal with the inscription 'PM' which tallied with the sample. Thus, circumstances (d) (i) and (d) (ii) were established by the prosecution.

(48) Having discussed that, in all probability, the "crime" cartridge cases, P. 2 and P. 3, and the bullet, P. 4, found from the spot and the bullet piece, P. 5, extracted from the dead-body of Suraj Mal, reached safely in sealed parcels the Forensic Science Laboratory, Chandigarh, I pass on to discuss the opinion of the Ballistic Expert, Dr. J. K. Sinha, Assistant Director of the Forensic Science Laboratory, Chandigarh. Mr. Sinha has testified that he fired a test cartridge, marked by him as T. 1 through the pistol, Exhibit P. 1, and compared and examined the individual characteristic markings produced on

the test cartridge, T. 1, with those found on the cartridges marked C. 1 (P. 2) and C. 2 (P. 3) under a comparison microscope. He also took photomicrographs, Exhibits PC and PD, of the breach-face markings found on the test cartridge, R. 1, and the cartridge case, C. 1 (Exhibit P. 2). In his opinion, these markings and striations on the test cartridge, T. 1, tallied with the corresponding markings on the cartridge cases, C. 1 and C. 2. He, therefore, came to the conclusion that all these cartridge cases, namely, T. 1, C. 1 (P. 2) and C. 2 (P. 3) had been fired in the pistol, Exhibit P. 1. He added that Exhibit PE was his detailed report in respect of his opinion.

(49) Mr. J. K. Sinha, P.W. 2, was first examined in the trial Court on January 6, 1969. He was recalled and further examined in that Court on February 6, 1969. Since the Expert had not taken photomicrographs of all the portions of the test cartridge T. 1, and the questioned cartridges; P. 2 and P. 3; and the bullets, P. 4 and P. 5, and the test bullet, P. 6 (marked B. T. 1) and had also not given detailed reasons in support of his opinion, we recalled Mr. Sinha and examined him. He has now taken photomicrographs of the other portions of these cartridges and the bullets. These are marked Exhibits C.W. 1/2, C.W. 1/3, C.W: 1/4, C.W. 1/5, C.W: 1/6, C:W: 1/7 and C:W: 1/8: He has now stated that he has noticed on the crime cartridges and the test cartridge, the extractor marks, the ejector marks, loading marks, the breach-face markings and the firing-pin marks, but the firing-pin marks were marked due to the fact that the letters 'ICI' were embossed on the percussion caps of crime cartridges, P. 2 and P. 3, and the test cartridge, T. 1. He has added that the markings left behind by the firing pin had got mixed up with the 'ICI' markings and hence they were not suitable for comparison. Witness has also produced his notes marked C.W. 1/1, which he took simultaneously with his observations at the time of the first examination. Witness has explained that the photograph, Exhibit C.W. 1/2, has been taken under low magnification and consequently the relative position and markings of the breach face, the ejector and the firing pin are not very clear. He has added that the markings on them still tally, though not with great clarity. Witness has shown the striation matchings by numbers 1, 2, 3, 4, 5, 6 and 7 in the photographs T.1 and C. 1 on Exhibit C.W. 1/4. In his opinion they exactly tally with each other. Exhibit C.W. 1/4 relates to the base of the cartridge case, C. 1, and the cartridge case, T. 1. Photograph C.W. 1/5, shows the extractor markings on the rim of the crime cartridge, C. 2, and the test cartridge, T. 1. The markings in these photographs, according to the witness, tally with each other with regard to shape and other

points of similarity denoted by him by digits 1, 2, 3, 4 and 5. In his opinion, the situation and striations of the two photographs in Exhibit C.W. 1/5 perfectly match with each other. Photograph C.W. 1/3 shows breach-face markings on C. 2 and the test cartridge. T. 1 Witness has stated that the markings on C. 2 are not so clear and distinct as those of C. 1 shown in Exhibit PD. Witness has tended to add: "Although the markings shown in the photographs, T. 1 and C. 2, on Exhibit C.W. 1/3 tally with each other and are sufficient for identification, but the markings shown in the corresponding photographs on Exhibit PD are clearer and more distinct." Photograph C.W. 1/6 shows the loading marks on the crime cartridge, C 2 and the test cartridge, T. 1 Photograph C.W. 1/8 shows the striae matchings on the questioned bullet, B.C. 2, and the test bullet, B.T. 1. He opined that these markings on the bullets, B.C. 2 and B.T. 1, tally with each other. The groove markings on these photographs have been marked 'G', while land-markings have been marked as 'L', Exhibit C.W. 1/9 are the rough notes which the witness had taken simultaneously with the further examination of the questioned cartridges, bullets, and the test cartridge and the test bullet. They are in the hand of the witness: Witness was, therefore, of the opinion that the cartridge cases, P. 2 and P. 3, and the bullets, P. 4 and P. 5, had been fired through the pistol; Exhibit P. 1.

(50) Regarding the evidence of Mr. Sinha, P.W. 2, Mr. Kwatra, learned counsel for the appellant, has canvassed two points:—

(i) The opinion of the Ballistic Expert is unreliable, because—

(a) He fired only one test cartridge through the pistol, P. 1, which could not, according to the authorities on the Science, furnish him adequate data or markings for comparison with the questioned cartridges and bullets.

(b) He has deliberately failed to note the points of dissimilarity in the markings found on the questioned cartridges and bullets and those on the test cartridge and test bullet.

(c) He has been unable to point out those markings which are termed by the authorities on the Science as 'family-likeness' and distinguish the same from those markings which do not fall under that category. His failure to do so exposes his opinion to the risk of grave error.

(d) He has failed to demonstrate to the satisfaction of the Court and the counsel for the parties from the photomicrographs the grounds of his opinion.

(ii) As a rule of prudence and caution, no conviction for murder can be based on the uncorroborated testimony of the Ballistic Expert, alone. In support of his contention, counsel has referred to *Mir Abbas Hayat Khan* v. *Emperor*, (6).

(51) In response to these arguments, it has been urged by Mr. Jagga that the Ballistic Expert has given detailed reasons in support of his opinion, which he has demonstrated in the photomicrographs produced by him. It is emphasised with reference to the testimony of Mr. Sinha, that the markings produced on the single cartridge, and bullet fired through the Pistol, Exhibit P. 1, were clear and distinct so as to furnish him with sufficient data for forming a definite opinion by their comparative examination with the questioned cartridges and the questioned bullets.

(52) With regard to the second contention of Mr. Kwatra, it is maintained that there is corroboration of the testimony of the Ballistic Expert by the circumstance of motive, and, that even apart from that circumstance, there is no prohibition in law to convict the appellant solely on the testimony of the Ballistic Expert. In support of his contention he has referred to the decison of the Supreme Court in *Kalua* v. *State of Uttar Pradesh* (7). It is urged that since the pistol, Exhibit P. 1, is a licensed weapon admittedly belonging to Surat Singh appellant, an inference be drawn under section 114 of the Evidence Act that it was the accused who fired the cartridges, P. 2 and P. 3, and bullets, P. 4 and P. 5, and thereby committed the murders in question, and that if the pistol had been taken away and used by any one else, the burden under section 106 of the Evidence Act would shift on to the accused to establish those circumstances, which would displace the first and foremost presumption that arises against him.

(53) We have ourselves examined the photomicrographs produced by the Expert and have made a serious endeavour to understand the reasons which the Expert has given in support of his opinion. While points of similarity in the breach face markings or striations, as the Expert calls them, in the photograph, Exhibit P.D., are discernible even to a layman, some marks of dissimilarity are also apparent. In the pho-

(6) A.I.R. 1937 Peshawar 99.
(7) A.I.R. 1958 S.C. 180.

tographs on Exhibit PC, also, there are some markings, particularly numbers 12, 11, 10 and 9, which do not to the eye of a layman show any marked similarity. Rather they appear to be dissimilar. There is, however, some similarity in the markings shown by digits 1, 2, 5, 6 and 7. These striations in one picture B.C. 1 as juxtaposed with the corresponding markings on the photograph, B.T. 1, form more or less straight lines matching with each other. In the other photographs, Exhibits C.W. 1/2 to C.W. 1/8, the points of similarity are not sufficiently distinct and clear. This is particularly true of the markings 1, 2, 3, 4 and 8 in the photograph, Exhibit C.W. 1/6, though there is some superficial resemblance in the markings 9, 10 and 7. In short, whereas most of the markings shown in the photographs reveal points of similarity demonstrable even to the satisfaction of a layman, many other points of dissimilarity are also there.

(54) In cross-examination in this Court, the Expert was questioned as to whether it was not proper for him to have fired more than one test cartridge through the pistol, Exhibit P. 1. Witness replied this question in the negative. Attention of the witness was invited to the following observations of Major Sir Gerald Burrard in his well-known work 'The Identification of Firearms and Forensic Ballistics', 1950 Edition, page 148:—

> "I do not regard one test bullet enough because bullets vary in their engravings, and an important component of the thumb-mark of the barrel may be so faintly engraved on one bullet as to escape notice unless its presence was being particularly sought.
>
> Besides in preparing evidence it is essential to show that the engraving from a particular barrel is constant in its individualities, and this can only be shown if there are two or more test bullets which have been fired through that barrel".

(55) Witness was asked whether he agreed with the above-quoted view. He replied:—

> "In one way, I agree with the aforesaid observation that if only one bullet is fired and the engravings left behind on the bullet are faint, then another bullet must be fired. I did not fire bullets to prove that every barrel has a thumb-print because this has already been established by different Scientists that every barrel has its own thumb-print and

this fact is undisputed throughout the world. As such, I did not feel the necessity of firing more than one test bullet. ....."

(56) Witness was further questioned as to whether he agreed with the view of Major Sir Gerald Burrard that "from the point of view of 'bullet evidence' alone the best number of test bullets is probable three. But if 'cartridge evidence' is also required, it may be necessary to fire 5 shots, in which case all five bullets should be recovered and used for purposes of comparison". He replied that he did not wholly agree with that view because out of about 1,000 cartridge cases examined by the witness, he did not find the necessity of firing more than one test cartridge in about 500 cases, the markings produced on the test cartridge being distinct enough for the identification purposes.

(57) It is true that one of the reasons for commending the firing of more than one test cartridge by Major Sir Gerald Burrard, is, that sufficiently distinct engravings on one bullet or the cartridge case may not be produced which would furnish a sure basis for comparison. So far as this reason is concerned, we would accept Mr. Sinha's opinion that the markings produced by the single test cartridge fired by him were sufficiently distinct and adequate. But there is another reason also given by the learned author for his suggestion. That reason is that one test bullet is not sufficient to show that the engraving from a particular barrel is constant in its individualities. Mr. J. K. Sinha has tried to meet this reason by saying that now it has been well established by the opinion of different scientists that every barrel leaves its individcal thumb-print on the ammunition fired through it. However, Mr. Sinha has further stated that since the gases in the cartridge fired and the hardness of the metal of the percussion cap vary considerably from cartridge to cartridge, there may be variations in the markings produced both in quantity and quality.

(58) As already observed above, many of the markings as visible in the photographs, found on the disputed cartridges and the disputed bullets are not identical with (if not positively dissimilar from), the markings on the test cartridge and the test bullet. These variations, according to Mr. Sinha, were due to the variations in the pressure developed as a result of the firing in the cartridges and the variation in the hardness of the percussion caps. It would have been certainly better, for eliminating all possible error, to fire more test cartridges as has been recommended by Major Sir Gerald Burrard.

Had this been done, perhaps the markings produced on some of those test cartridges might or might not have tallied with those markings which do not, at present, resemble with each other in the photographs. The more the specimen data obtained, the lesser will be the chances of error in the conclusion drawn from a comparative examination of the test and the disputed ammunition. However, the opinion of Mr. Sinha cannot be dubbed as 'unreliable' merely because he has fired only one test cartridge, because most of the markings produced on the test cartridge and the test bullet, as vouchsafed by the witness, were clearer and more distinct than the markings found on the disputed cartridges and ammunition. All that we would say is that perhaps the opinion would be more broad-based if he had fired more test cartridges through the pistol, Exhibit P. 1, and thus acquired more data.

(59) For a comparative examination of the two sets of cartridges and bullets, in his aforesaid book at page 133, Sir Gerald has said that the finding of the thumb-mark of the suspect pistol on the crime cartridge "in itself may not necessarily be sufficient definitely to marry pistol and cartridge, because although it is true that every breach face has an individuality of its own, it is also a fact that all cuts made by the same tool in a machine will bear a strong "family likeness" to each other. And since brass is not a perfectly plastic substance such as warm wax, it may happen that the cartridge case is only imprinted with the "family" thumb-print common to every breach face of that particular batch, and not with the individual thumb-print of the breach face of one single pistol. A rather low pressure, for instance, may easily result in the cartridge being imprinted only with some "family" mark instead of the smaller individual marks of one pistol."

(60) Further at page 134, the same learned author has warned:—

> "The chief risk connected with the family likeness lies in the original tool markings only being partly obliterated by subsequent work, and when this occurs it is possible to mistake some very pronounced mark or marks for the one and only 'thumb-mark' of some particular weapon. Such pronounced marks are easily seen and easily photographed and tend to attract attention away from the more insignificant, finer, and less visible tool marks left by the work subsequent to the original cuts. It is these finer markings

which are of primary and vital importance, and any identification based solely on one or two major markings without any finer striations as well should be regarded with suspicion.

So the possibility of the existence of a family likeness or thumb-mark must be kept in mind, and when some very pronounced and obvious tool cuts have been found to leave their imprint on the base of a fired cartridge the investigator should not jump at conclusions too rapidly, but should search carefully for some finer imprints which will possibly be of more value in determining the true thumb-mark of the weapon which fired the cartridge.

"And when identification is based on comparatively vague generalities of major markings, as it sometimes is although it never should be, negative evidence becomes essential and without it the positive evidence is completely valueless. By this I mean that before it is possible to declare that the "crime" cartridge marries the suspect weapon it is essential to prove that it does not marry equally well any single one of a number of similar weapons of the same make."

(61) Mr. Sinha was questioned by the defence counsel as to whether he had kept the distinction between the 'family markings' and the 'individual markings on the ammunition in question. He replied that he was in agreement with the observations of Sir Gerald, but for an experienced eye it is easy to detect which markings are due to the class characteristics (family likeness) and which are due to the individuality of the weapon. He was asked :—

"Did you also look for any negative evidence, i.e., any dissimilarities, in the markings found on the test cartridge and the disputed cartridges ?"

The answer was:—

"While examining any cartridge case for comparison purposes all the similar and dissimilar points are viewed under a miscroscope and the individuality of the weapon is picked out, and dissimilarities, if any pronounced, and the reason for these is also sought before coming to a conclusion for the positive identification. Many of the dissimilar markings are present in this case also."

(62) Pressed further, Mr. Sinha admitted that he did not count or note those dissimilarities because there was no such necessity. He, however, added that those, dissimilarities had been taken into account by him while examining the test and the crime cartridges, etc. He further conceded that one in a thousand cases, a metal-jacketed bullet may not show identity in the markings produced with those on the other bullets of the same type fired from the same weapon consecutively. It also depends, according to Mr. Sinha, on the condition of the firearm and also on the fact whether after firing it was kept cleared and was not allowed to rust.

(63) When it was subsequently put to the Expert that points 3 and 5 in the photograph, T. 1, did not tally with the corresponding points 3 and 5 in the photograph C. 2 on Exhibit C.W. 1/3, he replied:—

> "These markings tally with each other. The only difference is that in point number 3 of C. 2, a certain portion of the curve has not appeared, although the continuity of the curve in this photograph also can easily be seen at the corresponding position. Similarly there is no dissimilarity between point number 5 in C. 2 and point number 5 in T. 1."

(64) A similar answer was given by the witness with regard to point number 2 on the photographs C. 2 and T. 1 on Exhibit C.W. 1/3. He, however, added that the markings in C. 2 are not as complete as in T. 1. Similar reply was given by the witness with regard to the apparent dissimilarity in point number 7 on photographs C. 2 and T. 1 on Exhibit C.W. 1/3. He added that the only difference was that in C. 2 the impression was faint. Similar was his answer with regard to point number 13 in the photographs C. 2 and T. 1, on Exhibit C.W. 1/6.

(65) In a way, the Expert had to admit that the aforesaid points in the two sets of photographs were not identical with each other, though they were partly similar. The fact remains that the Expert has not noted, distinguished and demonstrated to the Court those points of similarity in the photographs which may be due to what Sir Gerald Burrard calls "family likeness" and those which may be due to the individual marks of the particular weapon. While it is true that every breach-face has its own separate and true individuality, there is a risk of this true individuality not always being recognised by the Expert. In other words, the risk of human error

in confusing such 'family markings' for 'individual markings' of the weapon cannot be ruled out, particularly where the Expert does not note and distinguish the two types of markings from each other. The mere fact that such distinction was present to the mind of the Expert at the time of the examination of the disputed ammunition and the test ammunition is not sufficient. He must put those facts, noted by him, on paper and assist the Court and the parties in appreciating and testing the soundness of his opinion. If he fails to do so and keeps his observations locked in the inner recesses of his inscrutable mind, the Court will hesitate to accept his *ipse dixit* as the last word on the point.

(66) In spite of the immense strides made by the science of Ballistics in recent years, it has not, in my humble opinion, attained that degree of perfection which has been achieved by the science of finger-prints. While the identity or otherwise of two sets of finger-prints can be intelligibly demonstrated even to a layman of average prudence, the same is not true in the case of firearms and ammunition.

(67) It has been said that perhaps there is no kind of testimony more subject to bias in favour of the adducer than that of skilled witnesses. Human knowledge is imperfect and human judgment is fallible. Ballistic Experts are not an exception to that rule. The primary object of the State in employing the Ballistic Experts is to facilitate detection of crime. This object naturally looms large in the eyes of the Expert when he sets out to work. Fired by the zeal to detect his mind is apt to suspect and confuse even innocent family or class markings with the individual thumb-prints of the weapon to imagine missing links where none exists, to strain and stretch apparently dissimilar dots and dashes into matching striations and to take for granted facts consistent with his pre-conceived theories. All these factors so subtly and unmistakably affect the Expert that his judgment is likely to become warped and his opinion fallacious. It must be remembered that apart from the inherent infirmities to which evidence of the Ballistic Expert is susceptible, it does not, in the vast majority of cases,—even if found flawless and impeccable—go beyond establishing only one circumstance, viz., that a given cartridge or bullet has been fired in a particular weapon. And, by itself, it would not show as to when that weapon was fired and by whom it was fired. It follows therefrom that when the charge against the accused is one of murder by shooting with a firearm, the Court will not, as a rule of prudence and caution, convict the accused solely

on the basis of the testimony of the Ballistic Expert, without there being other convincing evidence from which it can be indubitably deduced that the crime bullets or cartridges were fired, within all human probability, by the accused and none else from that weapon.

(68) In *Mir Abbas Hayat Khan's case* (6), *ibid,* it was held that the opinion of the Ballistic Expert has a corroborative value only and is useful in ascertaining whether the direct evidence is true or not and it is absolutely unsafe to base a conviction on that opinion only, when there is no other evidence in the case. The above rule has perhaps been too widely stated, because there is nothing in the Evidence Act which requires the evidence of an Expert to be corroborated, in all cases, before it could be acted upon as sufficient proof of what the Expert stated. It would be for the Judge of fact in each case to decide how much reliance can be placed on the evidence of a particular expert witness. Among others, the professional knowledge and experience of the Expert, the labour and the care which he brings to bear upon the examination of the disputed ammunition and the firearm, the tests applied, the data available, and the demonstrable reasons given by him generally help the Court in evaluating his evidence in a particular case. While it would be going too far to say that the Court must, as a rigid rule of universal application, insist upon the corroboration of the evidence of an Expert in every case, it must, in the words of Chief Justice Beaumont (*Fakir Mohamed Ramzan* v. *Emperor*) (8), be careful not to delegate its authority to a third party, and should itself be satisfied that the accused was guilty and not hold him guilty merely because an expert comes forward and says that in his opinion, the accused must be guilty. The Court should satisfy itself as to the value of the evidence of the Expert in the same way as it must satisfy itself of the value of other evidence. It may be noted that *Fakir Mahomed Ramzan's case* (8), was one of finger-prints.

(69) Conceivably, there may be cases where the evidence of the Expert not only established the identity of the crime ammunition with a particular weapon, but also raises an immediate and direct inference that the crime ammunition was, in all probability, fired from that weapon by the accused and none else. Such would be the case where, for instance, the accused leaves his finger impressions on the crime cartridges and the firing weapon. Such cases will, however, be rare and the expert testimony if meets the judicial satisfaction of the Court can alone form the basis of conviction without

(8) I.L.R. 60 Bom. 187.

corroboration. But in cases where the expert testimony does not establish any circumstance raising the direct and immediate inference of the crime ammunition having been fired from the weapon concerned, by the accused, the Court should, as a matter of necessity and prudence, to connect the weapon and the ammunition with the accused, look for independent and reassuring evidence and stay its hands from convicting the accused merely on the evidence of the Expert. However, if the evidence of the Ballistic Expert is not altogether impeccable, such as is the case here, the Court would, as a matter of caution, hesitate, in the absence of independent reassuring circumstances, to take his evidence as conclusive even with regard to the identity of the weapon with the crime ammunition.

(70) Assuming—but not holding—that the evidence of the Ballistic Expert in the instant case is sufficient to establish beyond doubt that the crime cartridges, P. 2 and P. 3, and the crime bullets, P. 4 and P. 5, were fired in and through the pistol, Exhibit P. 1 (belonging to the accused), then also that circumstance and that circumstance alone will not be incompatible with the hypothesis that some person other than the accused might have fired these crime cartridges and the bullets in this pistol, for excluding such a hypothesis compatible with the innocence of the accused, some other links in the chain of circumstances fastening the accused with guilt would be necessary. As discussed already, the other two links; namely; the circumstance of motive, and the accused having been seen a couple of hours before the time of occurrence at a distance of one mile from the scene of murders, have not been satisfactorily established. The evidence with regard to motive is too tenuous and illusory, and that with regard to the second link is utterly untrustworthy.

(71) The third link relied on by the prosecution is the circumstance that the pistol, Exhibit P. 1, is a licensed weapon belonging to the accused and, as such, it must have been used by him. It will not be safe to raise such an inference under section 114 of the Evidence Act. The mere fact that the pistol, Exhibit P. 1, belongs to the accused, is not sufficient to raise the inference that he and he alone could have fired it, particularly when it is the prosecution case itself that at the time of its seizure by the Investigating Police Officer, ths weapon was lying deposited in the armoury (Kote) of his unit where it should naturally have been. It is not disputed that there are standing orders of the Army Authorities, according to which

all private weapons owned by the Army personnel have to be deposited by them in the Kote or armoury of the unit and a register of such firearms is also maintained in discharge of official duties. Weapons thus deposited can be taken out of the Kote, only with the permission of the Commanding Officer. No such permission was ever taken in the present case. The evidence adduced by the appellant, in defence, though falls short of proving affirmatively that this pistol was, at the time of occurrence, lying deposited in the Kote at Chandi Mandir, is at least sufficient to create a doubt with regard to the custody and possession of the pistol by the appellant at the material time. In other words, in the case before us it has not been proved beyond all manner of doubt that at or about the time of these murders the pistol, Exhibit P. 1, was in the personal custody or actual possession of the appellant.

(72) The decision of their Lordships of the Supreme Court in *Kalua's case* (7), *ibid*, does not advance the case for the prosecution. In that case, the conviction of the appellant was not based on the sole testimony of the firearms expert. There was corroborative evidence furnished by these circumstances: (1) There was motive for the crime and a few days before the killing, the accused had held out a threat against the deceased; (2) after the murder, the accused absconded and was arrested 14 miles away from his village which was the place of occurrence; and (3) the accused produced an illicit pistol from his house in circumstances which clearly showed that he only could have known of its existence there. In the case before us, such corroborative circumstances have not been established. There is not an iota of evidence to show that the appellant ever held out any threat to the deceased or committed any overt act, indicating that he was nursing ill-will against the deceased. *Kalua's case* (7) is, therefore, quite distinguishable on facts from the present case.

(73) For all the reasons aforesaid, we would allow Surat Singh's appeal, accord him the benefit of doubt and acquit him. Murder Reference 28 of 1969 *ipso facto* fails and stands declined.

GOPAL SINGH, J.—I agree.

*K.S.K:*