

ASHWANI KUMAR @ ASHU & ANR.

A

v.

STATE OF PUNJAB

(Criminal Appeal Nos. 1041-1042 of 2008)

B

APRIL 16, 2015

[MADAN B. LOKUR AND UDAY UMESH LALIT, JJ.]

Penal Code, 1860 – ss. 364/302/307 rw s. 120 B – Murder and kidnapping – Prosecution case that accused hatched a conspiracy and committed murder of the victim-wife and caused injuries to the prosecution witness-husband – Allegation that the marriage of the parties was not to the liking of the mother and maternal uncle of the victim – Trial court convicted seven out of the eleven charged and acquitted four of them – High Court acquitted three more, however, upheld the order of conviction and sentence of the appellants-AS, AK, JS and DS u/s. 302/364/307 rw s. 120 B – On appeal, held: All the circumstances stand proved and clearly point in the direction of the guilt of AS and AK and lend complete support to the testimony of and identification by the husband – Thus, the courts below justified in finding AS and AK guilty of the offences u/ss. 364/307 and 302 – As regards accused JS, in view of the evidence on record and the extra judicial confession that parents of the victim had given money through JS, the courts below justified in finding JS guilty of the offences u/ss. 364/302/367 read with s. 120B – As regards DS apart from telephonic conversations, nothing on record by the prosecution, thus, by giving benefit of doubt, he is acquitted.

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A *Doctrines/Principles – Principle of issue estoppel –*
Explanation of – Held: Principle regarding issue estoppel
relates to admissibility of evidence in subsequent
proceedings which is designed to up-set a finding of fact
recorded on the previous occasion and mandates that the
B *finding so rendered on earlier occasion must operate as*
issue estoppel in subsequent proceedings – It makes it
impermissible to lead any such evidence at a subsequent
stage or occasion.

C **Dismissing Crl A Nos.1041-1043 of 2008 and**
allowing Crl A No.1814 of 2009, the Court

HELD: 1.1 The evidence of PW-15 regarding the
occurrence that took place was fully supported by the
D **medical evidence on record. His assertion regarding**
the place of incident and the manner in which the
occurrence took place was also supported by another
witness PW-14. Though said witness failed to identify
the assailants as he had watched the incident from a
E **distance, he lends complete support to PW-15 as**
regards other material particulars. Considering the
nature of injuries suffered by him and the fact that J-
victim was forcibly taken by the assailants the entire
incident could certainly have afforded sufficient time
F **and opportunity to PW-15 to recollect and identify the**
assailants. The law is well-settled that if the witness
is trustworthy and reliable, the mere fact that no test
identification parade was conducted would not be a
reason to discard the evidence of the witness. The
G **prosecution had made the witness available for test**
identification but the concerned accused had refused
to participate in the test. Though there was no reason
for such refusal and adverse inference could be drawn
against the accused, still other corroborating material
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is looked for which is available in the form of extra A
judicial confession as deposed to by PW-7 and the
incident which had happened at the dhaba as spoken
by PW-5 and PW-6. Photograph of J was recovered
pursuant to disclosure statement by AS is another B
circumstance. That photograph was recovered from
Farm which was under the control of AK. The
description of J in Gurumukhi on the back side of the
photograph was crucial. Refusal on part of AS to give
his specimen hand writing must lead to adverse C
inference against him. The recovery of weapon, namely,
kirpan which according to the doctor could have
resulted in the injuries suffered by PW-15 and J and
the blood-stained seat cover were other circumstances
lending complete corroboration. The communication by D
AS and AK with the number in Canada which itself was
the source for the fax-message was another
circumstance. All these circumstances stand proved
and clearly point in the direction of the guilt of AS and E
AK and additionally lend complete support to the
testimony of and identification by PW 15. The courts
below were therefore, perfectly justified in finding AS
and AK guilty of the offences u/s. 364/307 and 302 IPC.
[Para 17, 18] [1056-F-H; 1056-A-B,G-H; 1058-A-F]

1.2 The rule regarding issue estoppel relates to F
admissibility of evidence in subsequent proceedings
which is designed to up-set a finding of fact recorded
on the previous occasion and mandates that the finding
so rendered on earlier occasion must operate as issue G
estoppel in subsequent proceedings. It makes it
impermissible to lead any such evidence at a
subsequent stage or occasion. The submission that the
subsequent judgment will operate as issue estoppel is
not correct. The offences are different and distinct. The H

A attempt on part of counsel is just the opposite. He seeks to rely on the finding at a subsequent stage to up-set a finding of fact recorded on a previous occasion. [Para 19] [1058-G-H; 1059-A]

B 1.3 As per deposition of PW-8 and other material on record, the tempo was under the control of JS. It was this tempo which was used by AS as stated by PW-5 and PW 6. The telephonic conversations between JS, a serving police officer and AS and AK just before and soon after the incident are extremely crucial. No explanation has been offered on part of JS. The record further indicates that JS was also in touch with the same number from Canada, in respect of which again there was no explanation. In the extra judicial confession deposed to by PW-7, there was clear assertion that parents of J had given money through JS. In the circumstances, the assessment made by the courts below in finding JS guilty of the offences u/ ss.364, 302, 367 read with s.120B IPC is concurred with. [Para 20] [1059-G-H; 1060-A-D]

F 1.4 As regards DS all that the prosecution has produced is the record of telephonic conversations. No doubt that there have been communications with AS, AK, JS and the number from Canada but such communications are from a landline number which stands in the name of the brother of DS. There is no evidence on record that the said landline number was under the exclusive control of DS. Secondly, given the fact that his daughter is married with the son of SS from Canada, the conversations with the number in Canada are explainable. It is true that suspicion against DS was expressly stated in the first statement of PW-15 itself. However, apart from telephonic conversations

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nothing has been placed on record by the prosecution. A
Therefore, benefit of doubt is given to DS and he is
acquitted of the charges leveled against him. [Para 21]
[1060-E-H; 1061-A]

Ashok Debbarma v. State of Tripura 2014 (4) SCR 287: B
(2014) 4 SCC 747; *Sangeetaben Mahendrabhai Patel v.*
State of Gujarat 2012 (3) SCR 1155: (2012) 7 SCC 621–
referred to.

Case Law Reference

2014 (4) SCR 287 referred to. Para 17 C

2012 (3) SCR 1155 referred to. Para 19

CRIMINAL APPELLATE JURISDICTION: Criminal D
Appeal Nos. 1041-1042 of 2008.

From the Judgment and Order dated 15.02.2008 of the
High Court of Punjab and Haryana at Chandigarh in
Criminal Appeal No. 921-DB of 2005.

WITH E

Crl. A. Nos. 1043 of 2008 and 1814 of 2009

K. T. S. Tulsi, R. K. Dash, R. K. Kapoor, Kheyali Sarkar,
Rama, Priyanka Agarwal, Mandakini Singh, Maheen, F
Shweta Kapoor, Anis Ahmed Khan, V. Sushant Gupta, R.
N. Keshwani, Ram Lal Roy for the Appellants.

Jayant K. Sud, Addl. AG, Jasleen Chahal, Asstt. AG,
Vishal Dabas, Ajay P. Tushir, Kuldip Singh, for the
Respondent. G

The Judgment of the Court was delivered by

UDAY UMESH LALIT, J. 1. These appeals by H
special leave challenge the judgment and order dated

A 15.02.2008 passed by the High Court of Punjab and Haryana. Criminal Appeal Nos.1041-1042 of 2008 are by Ashwani Kumar @ Ashu and Joginder Singh, Criminal Appeal No.1043 of 2008 is by Anil Kumar while Criminal Appeal No.1814 of 2009 is by Darshan Singh. The
B appellants stand convicted under Sections 364/302/307 read with Section 120B IPC. Since these appeals arise from the same judgment, they are being dealt with and disposed by this common judgment. Initially eleven
C persons were sent for trial while two absconding accused were marked as proclaimed offenders. The trial court convicted seven out of those eleven accused and acquitted four accused. In the appeals by the convicted accused, the
D High Court acquitted three more accused, confirming the conviction and sentence of the present appellants. Since the acquittal of others has attained finality, the facts narrated hereafter are confined to the appellants herein.

2. One Jaswinder Kaur @ Jassi, normally residing with her parents in Canada, married PW-15 Sukhwinder Singh
E resident of village Kaoka Khosa, District Sangroor, Punjab on 15.04.1999. It was a court marriage and against the wishes of her parents and her maternal uncle. Jassi thereafter went to Canada on 02.05.1999 and while she
F was there, on the basis of a fax message (Ext.PAO) allegedly under her signature, FIR No.38 dated 23.02.2000 was registered with Police Station Sadar Jagraon against
PW 15 Sukhwinder Singh under Sections 342, 467, 468, 471 and 506 of the IPC. When Jassi got to know about
G this, she came back to India and appeared before the police. Her statement was recorded that she had married PW 15 Sukhwinder Singh out of her free will, that the alleged signature on the fax message was not hers and
H that the marriage was not to the liking of her parents and maternal uncle. Her statement under Section 164 Cr.P.C.

was also recorded and thereafter closure in respect of said A
crime was ordered. Jassi then started living with her
husband in the house of PW 20 Sukhdev Singh, maternal
uncle of her husband, in village Narike.

3. On 08.06.2000 PW 15 Sukhwinder Singh and Jassi B
were coming back on a scooter from Malerkotla to their
village and when they had reached village Sykhe at about
9.30 PM, four persons armed with hockey sticks and
swords got down from a white Maruti car and attacked C
them. PW 15 Sukhwinder Singh received number of
injuries. Leaving him in injured condition, those persons
forcibly took away Jassi in that car. PW 15 Sukhwinder
Singh somehow managed to reach the house of PW 20
Sukhdev Singh who got him admitted in the Civil Hospital,
Malerkotla, where PW-1 Dr. Amit Modi found him to have D
suffered the following injuries:-

1. 2 X 1cm incised wound over left side of face 2 cm
below ear pinna.

2. Swelling and tenderness over left side of mandible. E

3. 10 X .5 cm wound over left side of scalp 8 cm over
left pinna.

4. 4X .5 cm incised wound over left side of scalp in F
temporal area 2 cm above ear pinna.

5. 3 X .5cm incised wound over left side of scalp 3
cm above ear pinna in temporal area 2 cm from injury
No. 4. G

6. 4.5 X .5cm incised wound over left side of scalp 6
cm above ear pinna 1cm away from injury No. 4 and
2cm away from injury No. 5 H

A 7. 4 X 3cm lacerated wound with this much of it hanging and attached to remaining scalp by superficial layer of skin only 1cm from injury No. 6. For injuries No. 1 to 7 X-ray was advised.

B 8. 8 X 4cm incised wound from web space between middle and ring finger proximally towards wrist joint-cutting all structures from skin to skin from dorsal to ventral aspect of hand, cutting, skin, nerves, tendons and bone.

C 9. 2 x .5cm incised wound over right little finger proximal phalanx over the dorsal aspect.

D 10. Right ring finger amputated obliquely at middle phalanx. Wound margins sharp clean cut.

E For injuries No. 8 to 10 X-ray was advised. In all the injuries except injury No. 2 fresh bleeding was present. Injuries No. 1 to 8 were kept under observation, whereas injuries No. 9 and 10 were grievous. Probable duration of injuries was within six hours. The kind of weapon used for injuries No. 1,3,4,5,6,8,9 and 10 was sharp, whereas for injuries No. 2 and 7 was blunt.”

F 4. PW-1 Dr. Amit Modi sent intimation or ruqa Ext.PB to the police who recorded the statement of PW 15 Sukhwinder Singh, in which it was stated as under:-

G “....I was coming back alongwith my wife Jaswinder Kaur on scooter from Malerkotla to Village Narike and when we reached the Village of Syhke, a white Maruti car was parked near the bridge of the drain and when we reached nearby, then 4 persons came out of said Maruti car who were armed with hockeys and swords and attacked us. I received many injuries and I was

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thrown and my wife was forcibly kidnapped with A
intention to kill her. I, on my scooter in staggering
condition, reached the house of my maternal parents.
Sukhdev Singh, my maternal uncle got me admitted
in the Civil Hospital, Malerkotla. You have written my
statement and it is correct. I have doubts against B
Hardev Singh @ Mintu etc. s/o Darbara Singh, Village
Kaonke Khosa who have done this. I can identify
others when brought before me.”

5. FIR No. 48 was accordingly registered with police C
station Amargarh under Sections 307, 364 and 34 IPC at
about 1.50 AM on 09.06.2000. PW 15 Sukhwinder Singh
was then referred and taken to Christian Medical College,
Ludhiana for further treatment where he was attended to
by PW 2 Dr. Deepak Bansal and PW 4 Dr. Subhasish Das. D
On 09.06.2000 at about 10.00 AM one Bahadur Singh of
Village Bolara while going to his agricultural field found
dead body of a young lady aged about 22-23 years lying
in water on the edge of minor canal. He reported the
matter to the police, pursuant to which FIR No.197 dated E
09.06.2000 under Section 302 IPC was registered with the
police station Sadar Ludhiana. The body was identified to
be that of Jassi. In the post mortem conducted by a Board
of three doctors on 10.06.2000 at about 4.00 PM, following
injuries were noticed on the body of Jassi:- F

a. An incised wound 7½ inch x 2 ½ inch into muscle
deep in front of the neck.

b. An incised wound just below the chin 4 ½ inch x 2 G
½ inch was cutting the skin, sub coetaneous tissue
and muscles.

c. An incised wound 6" x ½ " x skin deep on the front
of chest placed horizontally. H

A The post mortem further indicated:-

“.:The cause of death in this case in our opinion was due to shock and hemorrhage as a result of injury to the vital organs, which were sufficient to cause death in the ordinary course of nature. All the injuries were ante-mortem in nature....”

6. On 09.06.2000 itself a supplementary statement of PW-15 Sukhwinder Singh was recorded in which he gave the number of said Maruti car as DNJ 4862 and also stated his firm belief that the occurrence had been committed in connivance with Hardev Singh @ Mintu, Surjeet Singh, Malkiat Singh, Darshan Singh and Gurnek Singh @ Bhatti. It appears that despite such clear assertions no arrests were effected. The matter was being investigated by PW 38 Sub-Inspector Hardeep Singh who had gone to the spot on 09.06.2000 and prepared the site plan and was able to recover one sandal, a handle of cricket bat and upper portion of a hockey stick. Under the orders of the Special Superintendent of Police, investigation was taken up by PW 40 Inspector Swarn Singh on 20.06.2000. Hardev Singh whose name was mentioned in the FIR as well as supplementary statement was arrested on 21.06.2000 while Darshan Singh was arrested on 22.06.2000. On 28.06.2000 Anil Kumar was arrested, while six others including Ashwani Kumar @ Ashu were arrested on 30.06.2000.

7. While he was in custody, statement of Anil Kumar was recorded which led to the discovery of a pistol, three live cartridges and one Maruti car bearing no. DNJ 4862 from which a mobile having No.9814011272 and an additional SIM having No.9814038404 were recovered. Blood stained portion of back seat of the car was cut and seized. The statement of Ashwani Kumar led to the

discovery of a kirpan and a photograph of Jassi (Ext.P-38) A
from a farm named Bolara Farm. On the back side of the
photograph, in Gurumukhi was written her name, physical
description including complexion and the clothes that she
would normally wear. The description was meant to enable
a stranger to identify with clarity the person in the B
photograph. It was a full photograph taken out from the
collection of someone known to her or the family. From the
house of Ashwani Kumar mobiles were seized with
numbers 9814014562 and 9316053404. C

8. On 05.07.2000 statement of PW 5 Jagdeep Singh
was recorded under Section 164 Cr.P.C to the effect that
about one and a half months before, one Gurwinder Singh
and Ashwani Kumar had taken him and PW6 Harjeet Singh D
to the dhaba of one pahlwan in a tempo. They were told
to give beating to PW 15 Sukhwinder Singh as he had
contracted marriage with a girl related to Ashwani Kumar
without the consent of her family. Said PW 5 Jagdeep
Singh and PW 6 Harjeet Singh not having agreed to, they E
left the dhaba. Later in the newspaper he saw the
photograph of PW 15 Sukhwinder Singh and his wife and
therefore had appeared before the Investigating Officer to
get the statement recorded before the Magistrate. To the
similar effect was the statement of PW 6 Harjeet Singh F
which was also recorded under Section 164 Cr.P.C. on
05.07.2000.

9. On 12.07.2000 a request was made to PW 23 Shri
B.S. Deol, Judicial Magistrate, First Class, Malerkotla to G
conduct Test Identification Parade in respect of accused
Anil Kumar, Ashwani Kumar and other named accused.
However, he received letters (Ext. PO, Ext. PO-5 and
Ext.PO-6) from the concerned Jail Superintendent that the
accused were not willing to subject themselves to the such H

A test.

10. On 18.07.2000 statement of PW-7 Jasbir Singh under Section 164 Cr.P.C. was recorded that Anil Kumar, Ashwani Kumar, Ginder and Tony were his friends and they would often assemble on the farm of Anil Kumar for drinks and meals. It was further stated that on 16.06.2000 when they had so assembled, Anil Kumar asked him if he had read the newspaper of the day and upon his answering in the negative Anil Kumar stated that news regarding the murder of Jassi had appeared in the newspaper of that day which murder was committed by them. Anil Kumar further stated that Joginder Singh Thanedar was with them and the parents of the girl had given them money through Joginder Singh, Thanedar for the said murder. On 22.07.2000 PW-8 Bhagwan Singh produced one tempo bearing No.PB-10/9719 before the police. This was the tempo stated to have been used by Ashwani Kumar and Gurwinder Singh for taking PW-5 Jagdeep Singh and PW-6 Harjeet Singh to the dhaba of pahlwan.

11. On 26.07.2000 Joginder Singh, serving police officer was arrested but was released on bail, the same day. He was later re-arrested on 19.01.2001 after his bail was cancelled. On 29.08.2000 an application was moved by the police for taking specimen hand-writing of Ashwani Kumar who was then confined in District Jail, Sangroor to compare with the writing found on the back side of the photograph of Jassi (Ext.P-38). PW-23 Shri B.S. Deol, Judicial Magistrate asked the Superintendent of Jail to take the specimen hand-writing of Ashwani Kumar. However, Ashwani Kumar vide Ext. DK dated 05.09.2000 refused to submit his specimen hand-writing.

12. After completion of investigation charge-sheet was filed against eleven persons while Surjeet Singh, maternal

uncle and Malkiat Kaur, mother of Jassi were declared A
proclaimed offenders. It was the case of the prosecution
that the accused had hatched the conspiracy to commit the
murder of Jassi and had caused injuries to PW-15
Sukhwinder Singh and thus committed the offences with B
which they were charged. It was alleged that the marriage
of Jassi with PW 15 Sukhwinder Singh, who was simply a
three wheeler driver, was not to the liking of the mother
and the maternal uncle of Jassi. The prosecution in support
of its case examined 45 witnesses and produced number C
of documents on record while 42 witnesses were examined
in defence. The gist of the testimony of the witnesses
examined by the prosecution, inter alia, was as under:-

i) PW-3 Dr. Jasbir Singh who was one of the doctors D
conducting the post-mortem on the body of Jassi,
stated about her injuries and the cause of death and
that kirpan Ext.P-12 recovered pursuant to disclosure
statement could have caused those injuries.

ii) PW-1 Dr. Amit Modi, PW-2 Dr. Deepak Bansal and E
PW-4 Dr. Subhasis Das deposed about the injuries
of PW-15 Sukhwinder Singh and the treatment given
to him by them.

iii) PW-5 Jagdeep Singh and PW-6 Harjeet Singh F
stated about their meeting with Ashwani Kumar and
Gurwinder at the dhaba of a pahlwan and that they
did not agree to the proposal of beating PW-15
Sukhwinder Singh. They identified the tempo and
stated about having given statements under Section G
164 Cr.P.C.

iv) PW-7 Jasbir Singh deposed that Ashwani Kumar, H
Anil Kumar, Ginder and Tony were his friends, that
they had met at a farm on 16.06.2000 when Anil

A Kumar had asked him whether he had read newspaper of the day. He further deposed that Anil Kumar stated that they had committed the murder of Jassi, that Joginder Singh Thanedar was with them and that the money was paid through said Joginder Singh. He stated about having given a statement under Section 164 Cr.P.C.

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C v) PW-8 Bhagwant Singh deposed that his tempo PB-10/9719 was impounded by CIA staff of which Joginder Singh was in-charge and that the tempo was released on 07.06.2000 after he had paid money as demanded. This version was corroborated by PW-9 Jagir Singh.

D vi) PW-14 Barjinder Singh stated that on 08.06.2000 he saw a car of white colour with four persons standing close by. Later he heard the voice of a woman asking for help and that those persons had forcibly taken her away. Though he failed to identify the persons, his version supported the case as regards the location and the time of incident.

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F vii) PW-15 Sukhwinder Singh deposed that he was married with Jassi on 15.03.1999, that it was against the wishes of her parents, that Malkiat Kaur and Surjeet Singh viz. mother and maternal uncle of Jassi, used to give him threats and stated how the incident occurred on 08.06.2000. He had shown his willingness and capacity to identify the assailants and did identify Ashwani Kumar and Anil Kumar in court.

G viii) PW-20 Sukhdev Singh, uncle of PW-15 Sukhwinder Singh who had taken him to the hospital, supported the version of PW-15 Sukhwinder Singh.

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ix) PW-23 B.S. Deol, Judicial Magistrate spoke about the refusal on part of Anil Kumar and Ashwani Kumar to participate in test identification parade and refusal by Ashwani Kumar to give his specimen handwriting. A

x) PW-24 constable Bikkar Singh deposed about the recoveries effected from Bolara Farm pursuant to the disclosure statement of the accused. B

xi) PW-27 Charan Preet Singh stated that he knew Ashwani Kumar and Anil Kumar and that they used to call from their telephone numbers. C

xi) PW-32 Jaswinder Singh deposed that at the request of ADGP, Punjab, Intelligence his company had supplied copies of print outs of telephone Nos.9814014562, 9814031374, 9814011272, 9814090919, 9814075614 and 9814036765. PW-34 Ved Prakash Julka produced the record pertaining to telephone No.605219 installed in the name of Joginder Singh. D
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xii) PW-37 SI Harjinder Singh deposed about the FIR No.38 dated 23.02.2000 which was registered pursuant to fax message Ext.PAO and that he had recorded the statement of Jassi. He further stated about the statement of Jassi under Section 164 Cr.P.C. and that he had recommended cancellation after having found the case to be false. F

xiii) PW-38 SI Hardeep Singh spoke about the registration of FIR in the present case and the investigation conducted by him till it was handed over to PW-41 Inspector Swaran Singh who in turn deposed about various stages of investigation including the arrests of the accused, disclosure G
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A statements made by the accused and the recoveries
made pursuant thereto and various other aspects.

13. The trial court after considering the material on
record and hearing rival submissions, vide its judgment
dated 21.10.2005 found that the prosecution had
successfully proved its case against seven accused
persons including the appellants. It found them guilty
under Section 302/364/307 read with Section 120B IPC.
Accused Anil Kumar, Ashwani Kumar @ Ashu, Gurwinder
Singh @ Ginder and Gursharan Singh @ Tony were
sentenced under Section 302 IPC to undergo life
imprisonment, under Section 364 IPC to undergo RI for 10
years and under Section 307 IPC to undergo RI for seven
years with separate sentences of fine and sentences in
default. Three other accused, namely, Joginder Singh,
Hardev Singh and Darshan Singh were convicted with the
aid of Section 120B IPC and sentenced to suffer similar
imprisonment on the aforesaid three counts. However
benefit of doubt was given to other four accused, namely,
Jaswant Singh @ Soni, Ravinder Singh @ Lilu, Kamaljeet
Singh @ Komal and Gurnek Singh @ Bhatti and they were
acquitted of all the charges. All seven convicted accused
filed Criminal Appeal Nos.836-DB/2005 and 921-DB/2005
before the High Court, which gave benefit of doubt to
Hardev Singh, Gurwinder Singh and Gursharan Singh @
Tony and acquitted them, while it confirmed the conviction
and sentence of the present appellants, which judgment is
now under challenge in the present appeals.

14. As regards appellants Ashwani Kumar and Anil
Kumar, the trial court as well as the High Court have
principally relied upon the evidence regarding assault on
PW-15 Sukhwinder Singh as stated by him and the fact
that he identified them to be part of the group of assailants.

The extra judicial confession, as stated by PW-7 Jasbir Singh and the recoveries effected pursuant to the disclosure statements were relied upon. The testimony of PW-5 Jagdeep Singh and PW-6 Harjeet Singh as well as the communications between the accused soon before and after the incident of assault on PW-15 Sukhwinder Singh and kidnapping of Jassi were also relied upon. The other two appellants were found guilty with the aid of Section 120B IPC as conspirators. The telephonic communications between them and Ashwani Kumar and Anil Kumar were relied upon as against Joginder Singh and Darshan Singh.

15. Appearing for Ashwani Kumar and Anil Kumar, Mr. R.K. Kapoor, learned Advocate submitted that identification by PW-15 Sukhwinder Singh for the first time in court could not be taken as conclusive evidence. The evidence in the form of extra judicial confession was also not conclusive inasmuch as certain other accused, though named in such confession were acquitted by the courts below. Shri K.T.S. Tulsı, learned senior Advocate appearing for Joginder Singh submitted that in a subsequent trial initiated against Joginder Singh on the allegation of demand of bribe for releasing the same tempo bearing No.PB-10/9719, he was honourably acquitted and as such said judgment would operate as issue estoppel. Shri Ratnakar K. Dash learned senior Advocate appearing for Darshan Singh submitted that the landline telephone number in question stated to be that of Darshan Singh was actually in the name of his brother installed at the residence of said brother and there was no evidence to suggest that it was exclusively under the control of Darshan Singh. In any case daughter of Darshan Singh was married to the son of Surjeet Singh, maternal uncle of Jassi and as such calls from the said landline number to the number in Canada were completely justified and no inference could be drawn that said Darshan

A Singh was one of the conspirators.

16. Appearing for State of Punjab Shri Jayant K. Sud, Additional Advocate General assisted by Ms. Jasleen Chahal, Assistant Advocate General took us through the entire record. It was submitted that the offence in the present case was an act of conspiracy which was clear from the fact that fax message Ext.PAO had originated from the same number in Canada with which the accused Ashwani Kumar @ Ashu and Anil Kumar were constantly in touch, that the backside of the photograph (Ext.P-38) and the conversations deposed to by PW-5 Jagdeep Singh and PW-6 Harjeet Singh lend complete corroboration, that identification by PW-15 Sukhwinder Singh was completely trustworthy and fully reliable, that the record of telephonic conversations show all the four appellants were in touch with each other as well as with the number in Canada soon before and immediately after the occurrence, that the recoveries of kirpan, blood-stained seat cover and photograph (Ext.P-38) corroborated the prosecution case and that the extra judicial confession as stated by PW-7 Jasbir Singh further clinched the issue.

17. The evidence of PW-15 Sukhwinder Singh regarding the occurrence that took place on 08.06.2000 is fully supported by the medical evidence on record. He was immediately taken for medical attention and found to have suffered 10 injuries, some of which were by sharp cutting weapon. His assertion regarding the place of incident and the manner in which the occurrence took place is also supported by another witness PW-14 Berjinder Singh. Though said witness failed to identify the assailants as he had watched the incident from a distance, he lends complete support to PW-15 as regards other material particulars. Considering the nature of injuries suffered by

him and the fact that Jassi was forcibly taken by the A
assailants the entire incident could certainly have afforded
sufficient time and opportunity to PW-15 to recollect and
identify the assailants. The law on the point is well-settled
that if the witness is trustworthy and reliable, the mere fact B
that no test identification parade was conducted would not
be a reason to discard the evidence of the witness. It was
observed by this Court in **Ashok Debbarma Vs. State of
Tripura**¹ as under:-

“21 The abovementioned decisions would indicate that C
while the evidence of identification of an accused at a
trial is admissible as substantive piece of evidence, it
would depend on the facts of a given case as to
whether or not such a piece of evidence can be relied D
upon as the sole basis of conviction of an accused. In
Malkhansingh V. State of M.P., this Court clarified that
the test identification parade is not a substantive piece
of evidence and to hold the test identification parade
is not even the rule of law but a rule of prudence so E
that the identification of accused inside the courtroom
at the trial can be safely relied upon. We are of the
view that if the witnesses are trustworthy and reliable,
the mere fact that no test identification parade was
conducted, itself, would not be a reason for discarding F
the evidence of those witnesses....”

18. The prosecution had made the witness available G
for test identification but the concerned accused had
refused to participate in the test. Though there was no
reason for such refusal and adverse inference could be
drawn against the accused, we still looked for other
corroborating material which is available in the form of extra
judicial confession as deposed to by PW-7 Jasbir Singh

A and the incident which had happened at the dhaba of pahlwan as spoken by PW-5 Jagdeep Singh and PW-6 Harjeet Singh. The fact that a photograph of Jassi (Ext.P-38) was recovered pursuant to disclosure statement by Ashwani Kumar is another circumstance. That photograph
B (Ext.P-38) was recovered from Bolara Farm which was under the control of Anil Kumar. The description of Jassi in Gurumukhi on the back side of the photograph is crucial. Refusal on part of Ashwani Kumar to give his specimen hand writing must lead to adverse inference against him.
C The recovery of weapon, namely, kirpan which according to the doctor could have resulted in the injuries suffered by PW-15 Sukhwinder Singh and Jassi and the blood-stained seat cover are other circumstances lending complete corroboration. The communication by Ashwani
D Kumar and Anil Kumar with the number in Canada which itself was the source for the fax-message Ext.PAO is another circumstance. All these circumstances stand proved and clearly point in the direction of the guilt of
E Ashwani Kumar and Anil Kumar and additionally lend complete support to the testimony of and identification by PW 15 Sukhwinder Singh. The courts below were therefore perfectly justified in finding Ashwani Kumar and Anil Kumar guilty of the offences under Sections 364/307 and 302 IPC.

F 19. We now deal with the case of the other appellants. The submission advanced by Shri Tulsi that the subsequent judgment will operate as issue estoppel is not correct. First and foremost the offences are different and distinct. The
G rule regarding issue estoppel relates to admissibility of evidence in subsequent proceedings which is designed to up-set a finding of fact recorded on the previous occasion and mandates that the finding so rendered on earlier occasion must operate as issue estoppel in subsequent
H proceedings. It makes it impermissible to lead any such

evidence at a subsequent stage or occasion. The attempt on part of Mr. Tulsi is just the opposite. He seeks to rely on the finding at a subsequent stage to up-set a finding of fact recorded on a previous occasion. The law on the point was succinctly stated by this Court in **Sangeetaben Mahendrabhai Patel v. State of Gujarat**² in following words:

“23. This Court has time and again explained the principle of issue estoppel in a criminal trial observing that where an issue of fact has been tried by a competent court on an earlier occasion and a finding has been recorded in favour of the accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a *different or distinct offence*, but as precluding the acceptance/reception of evidence to disturb the finding of fact when the accused is tried subsequently for a different offence. This rule is distinct from the doctrine of double jeopardy as it does not prevent the trial of any offence but only precludes the evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding has been recorded at an earlier criminal trial. Thus, the rule relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent court in a previous trial on a factual issue...”

We therefore reject the submission.

20. As per deposition of PW-8 Bhagwan Singh and other material on record, the tempo in question bearing No.PB-10/9719 was under the control of Joginder Singh.

- A It was this tempo which was used by Ashwani Kumar as stated by PW-5 Jagdeep Singh and PW 6 Harjeet Singh. The telephonic conversations between Joginder Singh, a serving police officer and Ashwani Kumar and Anil Kumar just before and soon after the incident are extremely crucial.
- B No explanation has been offered on part of Joginder Singh. The record further indicates that Joginder Singh was also in touch with the same number from Canada, in respect of which again there is no explanation. In the extra judicial confession deposed to by PW-7, there is clear assertion
- C that parents of Jassi had given money through Joginder Singh. In the circumstances we fully agree with the assessment made by the courts below in finding Joginder Singh guilty of the offences under Sections 364, 302 and 367 IPC with the aid of Section 120B IPC. His conviction
- D and sentence, in our considered view, is completely justified.

21. However, as regards Darshan Singh all that the prosecution has produced is the record of telephonic
- E conversations. No doubt that there have been communications with Ashwani Kumar, Anil Kumar, Joginder Singh and the number from Canada but such communications are from a landline number which stands
- F in the name of the brother of Darshan Singh. There is no evidence on record that the said landline number was under the exclusive control of Darshan Singh. Secondly,
- G given the fact that his daughter is married with the son of Surjeet Singh from Canada, the conversations with the number in Canada are explainable. It is true that suspicion against Darshan Singh was expressly stated in the first statement of PW-15 Sukhwinder Singh itself. However,
- H apart from telephonic conversations nothing has been placed on record by the prosecution. We, therefore, give benefit of doubt to Darshan Singh and acquit him of the

charges leveled against him.

A

22. In the circumstances Criminal Appeal Nos.1041-1042 of 2008 preferred by Ashwani Kumar @ Ashu and Joginder Singh and Criminal Appeal No.1043 of 2008 by Anil Kumar are dismissed affirming the orders of conviction and sentence recorded against them. The appeal of Darshan Singh, namely, CrI. Appeal No.1814 of 2009 is allowed and he is acquitted of all the charges. The bail bonds furnished by him stand cancelled. Ashwani Kumar @ Ashu, Anil Kumar and Joginder Singh who were not granted bail, must undergo the sentences awarded.

B

C

Nidhi Jain

Appeals disposed of.