

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No.343 of 2007

Reserved on : 23.4.2014

Date of Decision : 30.4.2014

Kewal Krishan alias KaluAppellant.
versus

State of Himachal Pradesh ...Respondent.

Coram:

The Hon'ble Mr. Justice Sanjay Karol, Judge.

The Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting? Yes.

For the Appellant : Mr. Anup Chitkara, Advocate.

For the Respondent : Mr. B.S. Parmar & Mr. Anup Rattan,
Additional Advocates General.

Sanjay Karol, Judge

Appellant-convict Kewal Krishan, hereinafter referred to as the accused, has assailed the judgment dated 19.6.2007, passed by Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, in S.C. No.43-J/VII/06 (S.T. No.06/07), titled as *State of Himachal Pradesh v. Kewal Krishan alias Kalu*, whereby he stands convicted of the offences, punishable under the provisions of Section 302 of the Indian Penal Code and Section 27 of the Indian Arms Act, and sentenced as under:

Offence	Sentence
Section 302 of the Indian Penal Code	Imprisonment for life and pay fine of ₹20,000/- and in default thereof to further undergo simple imprisonment for a period of one year.
Section 27 of the Indian Arms Act.	Simple imprisonment for a period of five years and fine of ₹10,000/-, and in

Whether reporters of the local papers may be allowed to see the judgment?
Yes.

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	default thereof to further undergo simple imprisonment for a period of six months.
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2. It is the case of prosecution that accused, who owns a fishery farm at Sanjwan, Tehsil Indora, District Kangra, Himachal Pradesh, developed intimacy with Usha Rani (PW-6), daughter of Ramesh Chand (not examined), which was objected to by Sonu (deceased), who, while working as a Driver on a Tractor in Shahnehar Project, used to reside in the house of Ramesh Chand. In the presence of Chet Ram (PW-10), accused threatened the deceased of killing him. Ramesh Chand and his wife Rekha Rani (PW-5) used to treat Sonu as their own son. Certain letters were exchanged between the accused and PW-6, expressing intimacy. Dog belonging to Ramesh Chand had died, as accused had given poison. When Sonu learnt about such fact, he confronted the accused. Even then accused threatened Sonu of dire consequences. In the night of 2nd June, 2006, PW-5, PW-6, her sister Nisha and Sonu were sleeping in the compound of their house in village Sanjwan. At that time, Ramesh Chand was away. In the middle of night, accused came armed with a loaded gun, shot Sonu on the chest, as a result of which he instantly died. Hearing the gunshot, Rekha Rani (PW-5) and Usha Rani (PW-6) woke up and tried to switch on the light, but however light could not be switched on, as there was no electricity connection. However, in the moon light, they saw the accused, who was on crutches, holding a gun in his hands.

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Seeing them, he also threatened them not to raise alarm else he would also kill them. However, since alarm had already been raised, accused fled away and hid the gun in the bushes closeby. Ram Kumar (PW-2), Pradhan of the Gram Panchayat, reached on the spot and telephonically informed the police. Rapt (Ex. PW19/A) was entered at Police Station, Indora. Police party headed by SI Ramesh Rana (PW-9) immediately rushed for the spot. PW-5 got her statement (Ex.PW-5/A), under the provisions of Section 154 of the Code of Criminal Procedure, recorded. Ruka (Ex. PW-16/A) was sent through HC Mohinder Singh (PW-16), on the basis of which FIR No.129/06 (Ex. PW-17/E), dated 3.6.2006, under the provisions of Section 302 of the Indian Penal Code and Section 25/27-54-59 of the Indian Arms Act, was registered at Police Station, Indora. Inquest report (Ex. PW-2/A & Ex. PW-2/B) was prepared. Police completed necessary investigation on the spot and sent the dead body for postmortem, which was conducted by Dr. Suresh Sankhyan PW-4). Investigation revealed that accused had deliberately disconnected the electric supply to the house of Ramesh Chand so as to ensure that incident takes place in absolute darkness.

3. During the course of investigation, accused made disclosure statement (Ex. PW-2/E), in the presence of Ram Kumar (PW-2) and Narayan Dass (not examined), who appended their signatures as witnesses. On the basis of such statement accused got the weapon of offence, i.e. SBBL gun

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(Ex. P-4) recovered, from the place where he had hidden it. Recovery was effected in the presence of PW-2 and Narayan Dass. Investigation further revealed that weapon of offence, which belonged to Balwant Singh (PW-3), was in fact stolen by the accused. The weapon was sealed and sent for analysis. Clothes belonging to the accused were sent to the Forensic Science Laboratory, and as per report (Ex. PW-17/A) traces of blood were found on the same. Live cartridges bearing 'KF' head stamp, which were stolen by the accused from the house of Jai Pal, who had purchased the same from Rakesh Gupta (PW-20), were also recovered by the police.

4. With the completion of investigation, challan was presented in the Court for trial.

5. Accused was charged for having committed an offence punishable under the provisions of Section 302 of the Indian Penal Code and Section 27 of the Indian Arms Act, to which he did not plead guilty and claimed trial.

6. In order to establish its case, prosecution examined as many as 21 witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he took the following defence:

"I am innocent. I am handicapped. Usha was in love with me and was writing letters to me. Thereafter she got intermingled with Sonu alias Dharampal and after the death of Sonu I am roped in a false case. I never had a gun nor I know to use/fire a gun. On 3-6-06 after 8 A.M. I was present on the spot and remained there till lunch.

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I was implicated falsely after the recovery of the letters from the house of Usha."

No evidence in defence was led.

7. After appreciating the evidence and the material placed on record, trial Court convicted the accused and sentenced him as aforesaid.

8. Before we deal with the testimony of prosecution witnesses, it would be beneficial to reproduce the sequence of events, as they emerge from the record. In the night intervening 2.3.2006 and 3.6.2006, accused shot the deceased with a gun. Pradhan Ram Kumar (PW-2) reached at the spot at 5 a.m. He telephonically informed the police, who reached on the spot at 7 a.m. Statement of PW-5 (Ex. PW-5/A) was recorded. Ruka (Ex. PW-16/A) was sent to Police Station, Indora, District Kangra, where FIR (Ex. PW-17/E) was registered. Thereafter, police conducted the search of house of PW-5, from where letters/note books, indicating that Usha Rani (PW-6) was having an affair with the accused, were recovered. Accused was arrested at 7.30 p.m., who made a disclosure statement (Ex. PW-2/E), on the basis of which weapon of offence (Ex. P-4) was recovered. All this happened on 3.6.2006. Dead body was sent for postmortem, which was received in the hospital on 4.6.2006 at 10.30 a.m.

9. Prosecution has tried to establish guilt of the accused, beyond reasonable doubt, on the following facts/points, but incidentally the same was not done by the trial Court:

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- (a) Immediately, after hearing the gunshot PW-5 and PW-6 saw the accused present on the spot with a gun in his hands. He threatened them not to raise alarm and fled away from the spot.
- (b) Immediately after the incident, accused was seen with a gun, by Santokh Raj (PW-1).
- (c) Accused stole the gun from the house of Balwant Singh (PW-3) and cartridges from the house of Jai Pal.
- (d) Accused made an extra-judicial confession (Ex. PW-2/E), which led to recovery of weapon of offence (Ex. P-4) and seized vide Memo (Ex. PW-2/H).
- (e) To avoid identification, accused ensured that electric supply to the house of PW-5 was disconnected, as proved by Pritam Chand (PW-12) and Bir Singh (PW-13).
- (f) Relationship between the accused and PW-6 was objected to by the deceased, for which reason accused harboured animosity against him.
- (g) Accused had also poisoned the dog of PW-5.
- (h) On two occasions accused had threatened to kill the deceased.

10. We find that genesis of the prosecution case, with regard to accused having killed the deceased with a gun, allegedly witnessed by PW-5 and PW-6, to be absolutely false.

11. It has come in the unrebutted testimony of PW-2 that accused walks only with the help of crutches and that only after police found the letters etc. from the house of PW-5 that "*suspicion against the accused arose*".

12. Rekha Rani (PW-5) states that she got her statement (Ex. PW-5/A) recorded with the police. Investigating Officer (PW-19), who conducted the investigation on the spot,

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states that statement (Ex. PW-5/A) was recorded by him. He also states that her husband had arrived on the spot. PW-19 further states that after preparing inquest report, he forwarded the dead body for postmortem alongwith an application (Ex. PW-19/B). Now significantly, in this application, it is not stated that deceased was murdered by the accused. In fact, it records the fact that deceased was murdered by an "unknown person while he was sleeping".

13. For better appreciation, translated version of statement (Ex. PW-5/A) is reproduced as under:

"I am a resident of the aforesaid place and am a housewife. My husband is working in Forest department at Dhanara on daily wages. I have two daughters namely Usha Rani aged 18 years and Nisha Rani aged 15 years. I don't have any son. The work on Shahnehara is in progress near y house which has been undertaken by Mahinder Singh, Contractor. Dharampal alias Sonu s/o Sh. Ram Singh, caste Chaudhary, r/o Lado Chak, PO saran, Distt. Gurdaspur, Punjab was working as a tractor driver here. He often visited our house for taking water etc. and thus we got acquainted with him. As we asked him about his family, he told that his parents were not more and that he didn't have any sister while he had his only younger brother namely Pawan Kumar who stays at the house of his maternal uncle. At this, I asked the aforesaid Sonu alias Dharampal to put up at our house as our son as we don't have any son of our own. Therefore, Sonu was putting up at our house for the last around one year. On 1.6.06, my husband Ramesh Chand went Dhanara for his duty and has not returned since. Yesterday i.e. on 2.6.06 around 6 p.m., Sonu returned home after duty and as usual, all of us slept on the cots in our courtyard around 9 p.m. after having dinner. My younger daughter Nisha Rani's cot was laid alongside the cot of Sonu, alongside which (Nisha's cot), I slept together with my elder daughter Usha Rani on antoher cot. It must be around 1 a.m. When I heard the sound of an explosion and then Sonu's cries. At this, I and

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both of my daughter immediately got up and saw that the left side of Sonu's chest was bleeding. I tried to serve water to Sonu but till then, he had breathed his last. I and both of my daughters saw here and there but could not see any person there. I and both of my daughters started crying. At this, Raj Kumar, Prabhat and Santokh Raj son of Sh. Shakar Dass, my brother-in-law Tilak Raj and many villagers reached the spot. Then I sent for Up-Pradhan Ram Kumar, who then telephonically informed the police about the incident. The aforesaid Dharampal alias Sonu has been shot dead by some unknown person while he was sleeping. Legal action be taken. Sd/- (in Hindi) Rekha Rani."

(Emphasis supplied)

14. Now significantly, in this statement, PW-5 does not even name the accused. She does not mention about earlier threats extended by the accused either to her or the deceased. She does not refer to the earlier incident of the accused having poisoned her dog. She does not refer to the relationship, which her daughter was having with the accused. She does not even refer to the relation between the accused and the deceased being inimical in any manner. She even does not raise suspicion of any kind about the complicity of the accused. One cannot ignore the fact that this statement was recorded at a time when male members of the village, including her relatives, were present. Her husband had soon arrived at the spot as is so admitted by PW-19. FIR (Ex. PW-17/E) records the fact that contents of the statement were read over and explained to the complainant, who admitted it to be correct and appended her signatures in token thereof. In Court, PW-19 states that he recorded statement (Ex. PW-

5/A). No other police official has recorded any other statement of PW-5.

15. The fact that Sonu died as a result of gun shot is not in dispute. Dr. Suresh Sankhyan (PW-4), who conducted postmortem on 4.6.2006, proved postmortem report (Ex. PW-4/A), based on opinion received from the Forensic Science Laboratory, in no uncertain terms, has deposed that "*History was given by the police was that the deceased was shot dead while sleeping at night by unknown person on the night between 2nd June 2006 and 3rd June, 2006 at around 2:00 A.M.*" He opined that time gap between the injury and the death could be few seconds to few minutes. Cause of death is cardio respiratory failure as a result of excess bleeding, after sustaining gunshot injury, involving heart and both lungs.

16. It is in this backdrop, one needs to examine the testimonies of PW-5 and PW-6, who allegedly witnessed the occurrence of the incident. At this juncture, we may also observe that Ramesh Chand, though cited as a witness, was not examined in Court. In fact it has come in the testimony of PW-2, PW-5, PW-6 and PW-19 that his house was searched for more than two hours. PW-5 also admits that at that time her husband was present. In our considered view, his examination in Court was absolutely necessary, particularly when members of his family were suspect, for which reason his house was searched by the police. For the very same reason prosecution ought not to have given up witness Nisha Rani.

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17. In Court, PW-5 states that after taking meals, she, her daughters Nisha Rani (not examined), Usha Rani (PW-6) and deceased slept on the cots in the compound of their house. At about 2 a.m., she heard a gunshot. Discrepancy with regard to time is ignored. She got up and found that deceased, who was crying, was hit with a bullet in his chest and blood was oozing out. She tried to switch on the light but since there was no electric supply, light could not be switched on. However, in the moon light, she saw the accused going towards the backside of the kitchen. He proclaimed that in case any alarm is raised, he would kill her. She tried to give water to Sonu, but he died. When, she raised alarm, Raj Kumar (not examined), Prabhat Singh (PW-7), Santokh Raj (PW-1) (both closely related to her), Tilak Raj (not examined) and other persons arrived on the spot. Also, Ram Kumar (PW-2) reached and telephonically informed the police. Police party came and recorded her statement (Ex. PW-5/A). She states that initially she had not disclosed the factum of accused extending threats but disclosed such fact in her supplementary statement. She also states that on an earlier occasion accused had poisoned her dog. She states that deceased had asked the accused not to visit her house.

18. Significantly, when one examines testimony of PW-19, one finds that there is no reference of any supplementary statement recorded by him. Also, no other police official has deposed that any supplementary statement

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of PW-5 was ever recorded by them. Supplementary statement has not been exhibited and proved on record. Thus, we find that in Court there is material improvement in her version with regard to presence of the accused on the spot or accused having fired a gunshot and killed the deceased or accused having extended any threats to her or her family members. Be that as it may, we find that testimony of this witness, in any event, cannot be said to be worthy of credence. It is wholly unreliable. She has not deposed the truth in Court. She denies having knowledge of her daughter having a love affair with the accused, which fact stands materially contradicted by PW-6. Further, in cross-examination, she states that "*Correct that I have not told the police that we have fear from the accused. Correct that I am telling about fear in the court today.*" Now, if she had no fear from the accused then why is it that she did not inform the police, her husband or other members of family/village narrating the events, which she wants us to believe. For this no plausible explanation is forthcoming. Her version that her dog was poisoned by the accused appears to be false as she did not disclose such fact to anyone prior to her deposition in Court. There is no corroboration of such fact. For some strange reason, PW-19 denies that till the time of preparation of inquest report and sending the dead body for postmortem, he had no information as to who had killed the deceased. Inquest report was prepared on the date of the incident and

dead body was received in the hospital for postmortem the following day. Police station, spot of crime and hospital are all closeby and distance can be covered within one hour.

19. Significantly, except for PW-5, all witnesses state that PW-19 had recorded the "statement" and not "statements" on the spot. The word used is singular and not plural. Even though legally impermissible, however, to satisfy judicial conscience, we went through the purported supplementary statement made by PW-5, so recorded by the police during investigation. We find that even in Court, PW-5 has not fully deposed what she allegedly got recorded therein. In Court, she does not state that in a state of shock she fell unconscious and as such could not disclose the identity of the accused. In fact she states that after hearing the gunshot she gave water to the deceased.

20. Earlier version recorded by PW-5 appears to be plausible. Time gap between occurrence of incident and her statement being recorded was of more than four hours. Male members of the family, including the accused, were present at the time when police arrived and her statement was recorded. She has not deposed that she was in a state of shock or lacked coherence in any manner. Villagers had collected immediately, yet she failed to disclose complicity of the accused in the crime to anyone of the persons present on the spot. It is not that she was wounded either. Now, if male

members of the village, including Pradhan, had arrived on the spot, than where was the question of fear, if any, of the alleged threats given by the accused. Also, we find that rather than giving up Nisha Rani as a witness, prosecution ought to have recorded her statement in Court. Her conduct casts doubt on her veracity about her truthful deposition.

21. To corroborate the version of PW-5, prosecution has invited our attention to the testimony of Usha Rani (PW-6). No doubt in her examination-in-chief, she states that accused, holding a gun, went towards the backside of the house and threatened them of dire consequences, but we find that even she is not a truthful witness. We discard her statement, implicating the accused, for the reason we have discarded her mother's statement. She states that deceased was adopted which fact stands contradicted by her mother. Her mother denies knowledge of relationship between this witness and the accused, which is materially contradicted by her. Both the witnesses materially contradicted each other. She admits that accused could walk with the help of crutches. She admits that in front of her house there is a public passage, which fact is verified from the perusal of photographs (Ex. PW-8/A-1 and Ex. PW-8/A-4). Significantly, this witness does not state that police recorded statement of her mother twice. She only states that statement of her mother was recorded by the police immediately on arrival. Her statement was recorded after her house was searched and material revealing her

relationship was recovered. It appears that there was due deliberation and only thereafter her statement was recorded later in the day. We find that this witness, at the first instance, has not come out with the truth and version that the accused shot at the deceased and thereafter extended threats not to be inspiring in confidence at all. No report with regard to poisoning of dog was ever lodged by any person with any authority. In fact this fact was not even disclosed to Pradhan/Up-Pradhan (PW-2).

22. We find that the complainant was aware of all the facts. She knew everything, yet she failed to disclose the same to all present on the spot, including the Investigating Officer, without any plausible or justifiable reason. Omission on her part goes to the root of the prosecution case, affecting its probative value. Not only this act has resulted into her statement being wholly unreliable, impeaching her credibility and trustworthiness, but has also rendered reasonable doubt with regard to complicity of the accused in the crime, more so in the light of the other evidence on record. Absence of name of the accused, in the given facts, would entitle him, to say the least, to the benefit of doubt.

23. We find that Prabhat Singh (PW-7), who is a close relative of PW-5 and PW-6, has deposed that after hearing gunshot, he also reached the spot at 2.15 a.m. He was told by PW-5 that accused had left after firing at the deceased. Now, in cross-examination, this witness, when confronted with his

statement (Ex. DA), admits such fact not to have been recorded therein. There is material improvement of a fact. We do not believe version of this witness also for the reason that he feigns ignorance with regard to any search having been conducted by the police and letters recovered from the house of PW-5. Significantly, this witness does not state that PW-5 had disclosed to him about any threats extended by the accused to her. If PW-6 had already disclosed the identity of the assailant to him then why is it that he did not disclose such fact to the police on arrival? Was he trying to shield her own relatives? After all statement (Ex. PW-5/A) was recorded in his presence.

24. With regard to alleged threats given by the accused to the deceased, in the presence of Chet Ram (PW-10), we find his testimony not to be inspiring in confidence at all. Despite the accused having threatened the deceased in his presence, he did not take any action. The witness states that the deceased had come with his brother to his shop at the time when accused extended such threats. Significantly, to corroborate such fact, brother of the deceased was neither associated during investigation nor examined in Court. He was the best person to have deposed on this fact, particularly when PW-10 admits that at the time when alleged threats were extended, he was inside his shop, at a distance of 20 metres from the place where accused and the deceased were talking with each other and there were customers present in

his shop. He satisfactorily does not explain presence of accused around his shop. It is not that accused has his farm closeby or purchases ration from him.

25. Neither PW-5 nor PW-6 has ever referred to this incident or record presence of brother of the deceased in the village. Version of Chet Ram (PW-10), unworthy of reliance and credence, appears to be concocted one.

26. Ram Kumar (PW-2) only states that Pawan Kumar and Raj Kumar (both not examined) informed him that Sonu had been shot at the house of Ramesh Chand. He reached the spot and telephonically informed the police. Undisputedly, as is evident from his testimony, other persons were present at the time when house of PW-5 was searched. He states that note books, showing intimate relationship between the accused and PW-6 were recovered by the police vide seizure Memo (Ex. PW-2/D). He was one of the first ones to have reached the spot. Why is it that PW-5 or PW-6 did not disclose that after killing the deceased, accused had also threatened them? He also does not state about the manner in which the incident took place. In fact, he admits that "*police arrested the accused only on suspicion*". Most importantly, he admits it to be correct that "*accused was present at the time when police came*". Subsequent conduct of the accused only renders his defence to be probablized. We may only observe that police has not sufficiently explained the absence of Ramesh Chand from his house on the fateful day, after all his

family was suspect. It has come on record that gun was stolen after Sonu started residing with him. Was he the suspect?

27. Santokh Raj (PW-1) states that after he heard the gunshot, he left with a torch in his hand and after covering a distance of 200 metres saw the accused beneath the canal bridge of Shahnehar, carrying a gun. He heard cries coming from the house of Ramesh Chand and went there. We find that apart from the fact that his testimony is absolutely uninspiring in confidence, he materially contradicts himself in his cross-examination. He admits to be a relative of Ramesh Chand. He also reached the spot, yet did not report having seen the accused with a gun to anyone of the persons assembled in the house. Why so? he has not explained. Contradiction in his version is in the shape of his admission that he informed the police that assailant "*was like accused*". Now, police did not carry out any test identification parade. He saw the accused without the crutches. Significantly, it has come on record through the testimony of PW-2 and PW-6 that accused cannot walk without crutches. If that be so, then where is the question of accused holding a gun in his hands. The person whom he saw without crutches, with certainty, cannot be said to be the accused. If PW-1 suspected this person, carrying the gun to be like accused, police ought to have carried out test identification parade, which was not done. Also, why is it that he did not disclose such fact to the police when accused was also present there.

28. On the question, as to whether accused had disconnected the electric supply to the house of the accused, before committing the crime, prosecution has invited our attention to the testimony of Pritam Chand (PW-12) and Bir Singh (PW-13), officials of Electricity Department, posted in the area in question.

29. PW-12 wants us to believe that since accused was familiar with electric work, he committed the mischief of loosening the kit-kat of the electric switch. The suggestion, to say the least, is preposterous. That apart, witness admits that accused had not worked with him and also no complaint of any mischief was ever received. PW-13 simply states that on 3.3.2006 a complaint was received from Baldev Singh (not examined) with regard to non-supply of electricity to his house. He deputed officials and on checking the transformer, the electric supply was restored. It has not come on record that the electric supply of the entire village Sanjwan was disconnected in the night intervening 2.6.2006 and 3.6.2006.

30. With regard to recovery of gun, pursuant to alleged disclosure statement made by the accused, we find the prosecution case to be totally shattered by the unrebutted testimony of PW-2, who states that "No statement of accused was recorded by the police prior to the recovery of gun". According to PW-19, accused made disclosure statement (Ex. PW-2/E) and thereafter got the gun recovered in the presence of Ram Kumar and Narain Dass. Now, Narain Dass has not

been examined in Court. Further, Ram Kumar states that after recovery of gun he appended his signatures on 2-3 papers. He did not read what was written therein. Earlier he had affixed his signatures on the papers regarding recovery of registers etc. Thus, witness also renders the prosecution case with regard to recovery to be absolutely false. Testimony of PW-19, cannot be said to be inspiring in confidence. We shall elaborately deal with it at different place in the judgment.

31. We find that gun, in no manner, is connected with the accused. There is no corroboration with regard to voluntary nature of disclosure statement (Ex. PW-2/E). It is not that he owned the gun. Owner Balwant Singh himself was a suspect.

32. It has come on record that people in the locality were not happy with the conduct of the deceased. The gun was found to have been missing only after he started residing in the house of Ramesh Chand.

33. Balwant Singh (PW-3), who is on visiting terms with Ramesh Chand (husband of PW-5), tried to prove that SBBL gun (Ex. P-4) was stolen in December, 2005 and he lodged complaints (Ex. PW-2/K and Ex. PW-2/L) in that regard. Now significantly, these letters are dated 12.12.2005 and yet no FIR was registered by the police. This witness even did not pursue the matter any further. None has come forward to depose that these complaints were ever received at the Police Station. They do not bear any diary number nor is there any

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stamp of receipt or acknowledgement thereupon. His explanation that FIR was not registered as he was told to report the matter to the Panchayat, does not appear to be plausible or true. He does not categorically state that he lodged any report with the Panchayat. Pradhan (PW-2) has also not deposed anything, except that documents (Ex. PW-2/K and 2/L) were handed over by Balwant Singh to the police. PW-3 admits that his SBBL gun was found missing after deceased started staying in the house of Ramesh Chand. Most importantly, he admits it to be correct that after the gun was recovered, all persons from the village who were having guns, were called. Guns of all the villagers were checked by the police and thereafter gun recovered by the police was identified as his gun. Though he denies that he identified the gun after police slapped him, but however, admits that police had told him "*to be ready to go to jail*". Police suspected persons, other than the accused, to be involved in the crime. Guns of all the villagers were checked. This also casts doubt about the alleged recovery of the gun, on the asking of the accused. The Investigating Officer did not bother to verify the factum of report of loss of gun at the Police Station. In our considered view, prosecution cannot be said to have established, in any manner, that it was the accused who had stolen the gun belonging to Balwant Singh (PW-3). Testimony of PW-19 stands impeached by Balwant Singh (PW-3) on the question as to when the gun was stolen. In fact, no

explanation is forthcoming from him, explaining the circumstances, raising suspicion against the persons other than the accused.

34. Noticeably, except for PW-2 and PW-7, prosecution failed to examine any of the witnesses, who first arrived at the spot. Except for disclosure statement and recovery of weapon of offence, PW-2 does not state anything, establishing complicity of the accused in the alleged crime and PW-7 is not a trustworthy witness.

35. In our considered view, to establish guilt of the accused, beyond reasonable doubt, examination of other witnesses was absolutely material. They alone, being independent witnesses, could have spoken the truth.

36. The deceased was sleeping in an open courtyard. The open compound is just adjoining to a public passage and anyone, taking benefit of darkness, could have fired the gunshot.

37. Cartridges used for firing the gunshot belonged to Jai Pal, who purchased it from Rakesh Gupta (PW-20). This fact stands established through the testimony of Desh Raj (PW-9) and PW-20 and report of the Forensic Science Laboratory. But then this fact does not establish complicity of the accused as it has not come on record that it was the accused, who had stolen the cartridges.

38. From the conjoint reading of testimonies of Parmodh Singh (PW-14) and Rajinder Singh (PW-15), it is

evident that report from the Ballistic Science Laboratory (Phillaur), about the testing of gun was obtained by the investigating agency, yet the same was not placed on record or proved. As such, this is a material concealment. It is also for this reason, we find that role of police officials, who conducted investigation to be dubious and not fair. Persons were threatened, intimidated, searched and without any basis falsely implicated the accused in the alleged crime.

39. It is not in dispute that accused has a fish farm in the village. However, it has come on record that he actually resides at a place, which is at a distance of 8-10 kms from the village in question. None has come forward to depose that on the fateful day accused had not returned home or remained in his farm house.

40. Significantly, copy of FIR was placed before the Magistrate, the place where Police Station is situated, at 4 p.m. on 3.6.2006. Supplementary statement of PW-4, allegedly recorded by the police, was also not brought to his notice.

41. In the instant case, it appears that the Investigating Officer was marking time with a view to decide what shape was to be given to the case. First, he suspected the family of the complainant and conducted search of their house; secondly, he threatened the witnesses of sending them to jail; and thirdly, suspicion against the accused arose only

after discovery of his affair with PW-6. It appears he did not conduct and carry out the investigation in a fair manner. He started a roving inquiry against all and eventually, without any incriminating material, arrested the accused and filed the challan in the Court. It is not denied at the bar that the accused belongs to a caste lower than that of the witnesses. As person, who is not able to walk without the help of crutches allegedly fired a gunshot, which version appears to be unbelievable.

42. Prosecution having failed to establish the factum of recovery of gun from the accused, there is no question of having committed the offence under the Arms Act.

43. Trial Court, in our considered view, committed grave error, illegality and irregularity in completely and correctly appreciating the testimony of prosecution witnesses.

In fact Court was duty bound to frame points and then discuss the evidence, but simply reproduced the evidence and without reflecting any cogent, convincing and plausible reasons has straightway returned finding of guilt of the accused, with regard to the charged offences and ordered the accused to serve sentence of imprisonment. Findings are unreasonable, based on no evidence.

44. We find testimonies of the prosecution witnesses not to be inspiring in confidence, creditworthy, believable or reliable. Thus, findings of conviction and sentence, returned by the Court below, cannot be said to be on the basis of any

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clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused.

45. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, dated 19.6.2007, passed by the trial Court in S.C. No.43-J/VII/06 (S.T. No.06/07), titled as *State of Himachal Pradesh v. Kewal Krishan alias Kalu*, is set aside and the accused is acquitted of the charged offences. He be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to him. Release warrants be prepared accordingly.

Appeal stands disposed of, so also pending application(s), if any.

(Sanjay Karol),
Judge.

(Rajiv Sharma),
Judge.

April 30, 2014_(sd)