

SUKHVINDER SINGH AND ORS.

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v.

STATE OF PUNJAB

MAY 12, 1994

[DR. A.S. ANAND AND FAIZAN UDDIN, JJ.]

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*Indian Penal Code, 1860 : Section 302 read with Section 149/120B—Circumstantial evidence connecting the appellants with the criminal conspiracy to commit murder—Whether proved beyond reasonable doubt—Conviction and sentence—Validity of.*

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*Terrorist and Disruptive Activities (Prevention) Act, 1987 : Section 3—Conviction and sentence cannot be sustained in the absence of any allegations and ingredient of the section being established in the case.*

*Evidence Act, 1872 : Section 27—Provision not to be made use of to re-discover the discovered fact.*

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*Section 73—Recourse to be had only by the Court holding enquiry under the Code of Criminal Procedure or the Court trying the accused person by directing the accused person to give his specimen handwriting for enabling it to compare the same.*

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*Words & Phrases : Any person present in the Court'—Meaning of in the context of s. 73 of Evidence Act, 1872 :*

On the basis of a complaint lodged by one 'R' that some unknown persons had abducted his son with intent to get some ransom and that the abductors had threatened to kill his son, a case was registered under Section 364/149 IPC. After the investigation all the five accused were prosecuted for the murder of R's son. Subsequently, on the basis of the disclosure statements made by three accused persons to the effect that they had kidnapped the deceased and later on strangulated him, put him in a gunny bag and concealed the dead body in the house of one of the accused, the offence was converted to one under Section 302/149 IPC read with Section 120 B IPC and Section 3 of TADA Act. The Designated Court, held that the prosecution has proved the guilt of the accused beyond the possibility of doubt and convicted and sentence the appellants for offences

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A under section 302 read with Section 149/120B IPC read with Section 3 of TADA Act.

B In the appeal before this Court, it was contended that none of the five circumstances relied upon by the prosecution had been established in the case and that even otherwise all the alleged circumstances could not be said to be not compatible with the innocence of the accused and consistent only with the hypothesis of their guilt.

C On behalf of the respondent-State, it was contended that the circumstances relied upon by the prosecution were consistent only with the hypothesis of the guilt of the appellants and that each of the circumstances had been positively established by the prosecution and all the circumstances taken together unmistakably established that the appellants and appellants alone had committed the crime; that since the appellants had not raised any objection at the time when their specimen writings were taken, they could not be heard at this stage to complain about it; that the recovery of the dead body from the house of one of the accused on the disclosure statements made by some of the accused connected all the appellants with the crime; and the law did not bar more than one disclosure statement to be made leading to one and the same discovery and therefore the disclosure statements did not suffer from any infirmity whatsoever.

Party allowing the appeal, this Court

F HELD : 1.1. The conviction recorded by the Designated Court under Section 3 of Terrorist and Disruptive Activities (Prevention) Act (herein after TADA) Act is wholly unjustified. A bare perusal of Section 3 of TADA would reveal that none of the ingredients of that section have been alleged and established in this case. None of the prosecution witnesses, not even the investigating officer, implicated any of the appellants for committing an offence under Section 3 of TADA and the prosecution led no evidence whatsoever to bring the charge under the section. Merely because the investigating agency had charge sheeted the appellants for an offence under section 3 of TADA, it did not mean that the Designated Court had to act mechanically and not even examine whether or not from the evidence led by the prosecution, an offence under Section 3 of TADA had been made before recording conviction under the said provision. [1071-C-F]

2. The circumstantial evidence relied upon by the prosecution to connect the parents of the first appellant with the crime have not been established beyond a reasonable doubt. They are the landlords of the house, a portion of which was under the tenancy of the deceased's parents. The story of getting the house vacated appears to be a clumsy concoction. There is not an iota of material to support it. [1072-A-F]

3. Under Section 27 of the Evidence Act, only so much of the statement of an accused is admissible in evidence as distinctly leads to the discovery of a fact. Therefore, once the fact has been discovered, Section 27 of the Evidence Act cannot again be made use of to 're-discover' the discovered fact. It would be a total misuse even abuse of the provisions of Section 27 of the Evidence Act. [1073-B]

4.1 Section 73 of the Evidence Act cannot be made use of for collecting specimen writings during the investigation and recourse to it can be had only when either the Court holding an enquiry or the trial court, before which proceedings are pending, requires the writing for the purpose of 'enabling it to compare' the same. [1076-D]

4.2. A Court holding an enquiry under the Code of Criminal Procedure is indeed entitled under Section 73 of the Evidence Act to direct an accused person appearing before it to give his specimen handwriting to enable to court by which he may be subsequently tried to compare it with the disputed writings. A court which is not holding an enquiry under the Code of Criminal Procedure or conducting the trial is not permitted, on the plain language of Section 73 of the Evidence Act, to issue any direction of the nature contained in the second paragraph of Section 73 of the Evidence Act. The words 'any person present in the court' in Section 73 has a reference only to such persons who are parties to a cause pending before the court and in a given case may even include the witnesses in the said cause but where there is no cause pending before the Court for its determination, the question of obtaining for the purposes of comparison of the handwriting of a person may not arise at all and therefore, the provisions of section 73 of the Evidence Act would have no application. [1076-E-H & 1077-A]

4.3 In the instant case, on the basis of the evidence on record and the infirmity in the matter of taking of the specimen handwriting of one of the appellants it could be concluded that the prosecution has failed to establish that the letters Ex.PA & PC were authored by Sukhdev Paul.

- A There is no other circumstance relied upon by the prosecution either before the Designated Court or before this Court to connect Sukhdev Paul with the crime. The Designated Court has not adverted to this aspect of the case and it appears to have been blissfully ignorant of the provisions of Section 73 of the Evidence Act. Therefore, the case against appellant Sukhdev Paul has not been established by the prosecution beyond reasonable doubt. [1078-B-F]

5. The disclosure statement Ex.PW 10/B made by the first appellant and the recovery of the dead body pursuant to that disclosure statement vide recovery memo Ex.PW 10E are both highly incriminating circumstances in so far as the first appellant is concerned and both the circumstances have not only been successfully established by the prosecution but they also connect definitely and positively the first appellant with the crime. There is no infirmity in so far as the evidence regarding the disclosure statement or the recovery of the dead body is concerned. The chain of circumstances against the first appellant is so complete that it excludes the possibility of any hypothesis other than the one which is consistent only with the guilt of the first appellant and inconsistent with his innocence. All the circumstances relied upon by the prosecution against the first appellant definitely and unerringly point towards his guilt and, taken cumulatively form a chain so complete that there is no escape from the conclusion that the crime was committed by the first appellant and none else. [1080-D-H]

6. The conviction and sentence in respect of the appellants other than the first appellant, are set aside. The conviction and sentence of the first appellant under s.3 of TADA Act and s.120-B IPC are set aside, but he is convicted for an offence under s.302 IPC and the sentence of imprisonment for life and a fine Rs. 5000 is maintained. [1081-C-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1 of 1994.

- G From the Judgment and Order dated 1.12.93 of the Designated Court, Kapurthala at Jalandhar in T.D. Sessions Case No. 60 of 1992.

R.S. Sohdhi for the Appellant.

Randhir Yadav and R.S. Suri for the Respondents.

- H The Judgment of the Court was delivered by

**DR. ANAND, J.** This appeal under Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter 'TADA') is directed against the judgment and order of the Designated Court. Kapurthala, whereby the appellants have been convicted for offences under Section 302 read with Section 149/120B IPC and Section 3 of TADA and sentenced under Section 302/149 IPC to suffer imprisonment for life and to pay a fine of Rs. 5000 each and in default to undergo further rigorous imprisonment for 4 years; under Section 120B to undergo rigorous imprisonment for life and to pay a fine of Rs. 1000 each and in default of payment of fine to undergo further imprisonment for one year and under Section 3 of TADA to undergo rigorous imprisonment for life and to pay fine of Rs. 4000 each and in default of payment of fine to undergo further rigorous imprisonment for 3 years each. All the substantive sentences were, however, directed run concurrently.

The prosecution case is as follows :

Rakesh Kumar PW2 father of deceased Varun Kumar, made a statement to the police on 16th of May, 1992 to the effect that on 12th of May, 1992 his wife and son had gone to Phagwara earlier in the day and on their return met him at his shop in the evening at about 6.15 p.m. His son went away to play while his wife went to the house to prepare meals. She shortly returned to the shop of Rakesh Kumar PW2 bringing along with her a letter which she had picked from her house. In that letter, which was a ransom note written in Hindi, it was stated that Varun Kumar Mittal was in the custody of the persons writing the letter and that in case Rakesh Kumar wanted to see him alive, he should bring Rs. 60,000 on Thursday, exactly at 10.00 a.m. at Jalandhar Road ahead of Convent School and that he should come all alone and that in case of any mischief, his son and his wife would be lost to him for ever. The ransom letter also stated that after the receipt of money, Varun Kumar would reach either the house or the shop within half an hour and that in case he tried to inform the police he should understand the consequences. PW2 was advised through the letter to keep the matter confined between himself and his wife and not to let anybody else known about it. Rakesh Kumar PW2 acted accordingly and on 14th of May, 1992, around 10.00 a.m., went to the specified place along with the money but no one came to the spot. He then conducted search for his son but could not trace him at all and on 16th of May, 1992 he lodged a complaint before the police, stating therein that some unknown

A persons had abducted his son with intent to get some ransom and that the abductors had threatened to kill his son. A case on the basis of the complaint, FIR Ex.PB/1 was registered at police station Nakodar for offences under Section 354/149 IPC. The ransom letter Ex.PA was produced by the complainant before the police who took it into possession vide recovery memo Ex.PD. Subsequently, another letter Ex.PC was also received at the house of PW2 and was handed over to the police. SI Amar Singh took upon the investigation and prepared a rough site plan of the spot, Ex.PW10/A.

C It is further the prosecution case that PW6, Bhajan Singh, President of Truck Union, Nakodar and PW7 Kiran Deep Dhir, Secretary of BJP were approached at Patel Chowk, Jalandhar by Sukhvinder Singh son of Mohan Singh, Puran Chand and Sukhdev Paul, who told the witnesses that on 12.5.1992 at about 6.45 p.m. they had kidnapped Varun Kumar Mittal from the street while he was playing and took him to the house of Sukhvinder Singh and killed him by throatting him and have buried his body under the chaff. The three accused further told the witnesses that Sukhdev Paul wrote two letters at the instance of Sukhvinder Singh which were thrown in the portion of the house occupied by the father of deceased Varun, Rakesh Kumar PW2, on 12.5.1992 and 14.5.1992 respectively. According to the prosecution case, the accused also disclosed to the witnesses that Sukhvinder Singh had told them that he had done so at the instance of his father Mohan Singh and mother Surjit Kaur. The accused requested the witnesses to produce them before the police, since they knew the police. After the investigation of the case all the five appellants, Sukhvinder Singh, his father Mohan Singh mother Surjit Kaur alongwith Puran Chand and Sukhdev Paul were challaned and prosecuted for the murder of Varun Kumar who was living alongwith his parents as a tenant in a portion of the house belonging to Sukhvinder Singh and his parents.

G On 25th of May, 1992 a police party headed by SI Amar Singh, PW10 interrogated Sukhvinder Singh, Sukhdev Paul and Puran Chand, after taking them into custody. Sukhvinder Singh, Sukhdev Paul and Puran Chand suffered disclosure statements, separately, Ex.PW10/B, Ex. PW10/C and Ex. PW10/D respectively. These disclosure statements were attested by Hari Dutt and Jugal Kishore witnesses. The disclosure statement of Sukhvinder Singh and Puran Chand were also attested by Kashmir Singh, H SI. In these disclosure statements, the three accused are alleged to have

separately disclosed that they had kidnapped Varun Kumar on 12.5.1992 at 6.45 a.m. and later on strangled him and put his body in a gunny bag, which they had concealed in the *turiwala* room of the residential house of Sukhvinder Singh and that they could point out that place and get the dead body recovered. The three accused then led the police party to the place mentioned by them and got recovered the dead body of Varun Kumar from that place after pointing it out. The dead body, after preparation of the inquest report, was sent for post-mortem examination and Dr. J.S. Bajwa, PW11 who conducted the autopsy on the dead body opined that the cause of death was due to asphyxia which was sufficient in the ordinary course of nature to cause death. It was no receipt of this post-mortem report, Ex. PW11/A, that the offence was converted to one under Section 302/149 IPC read with Section 120B IPC and Section 3 of TADA.

The two letters Ex. PA and Ex. PC allegedly written by Sukhdev Paul appellant were earlier seized and taken into possession. To determine their authorship, the specimen handwriting of Sukhdev Paul was obtained before Shri S.P. Garg, PW13. The specimen writing alongwith the original letters, Ex. PA and Ex. PC, were then sent to the Director, Forensic Science Laboratory, Punjab, Chandigarh for comparison. The Asstt. Director (Documents) after comparing, the specimen writings with the disputed writings in letters Ex. PA and Ex. PC. opined that there was similarity between the two and that there were no characteristic differences between the disputed writings and the specimen writings. The Asstt. Director (Documents) Forensic Science Laboratory opined that the similarities found between the questioned and the standard writings were significant and sufficient and when considered collectively led him to the opinion of their common authorship.

The appellants were sent up for trial and after conclusion of the prosecution evidence, in their statements recorded under Section 313 of the Code of Criminal Procedure, they pleaded false implication and denied the prosecution allegations against them.

Since, there are no eye witnesses to the actual murder of Varun Kumar, the prosecution has relied upon the following pieces of circumstantial evidence to connect the appellants with the criminal conspiracy the murder of Varun Kumar. The circumstances relied upon by the prosecution both before the Designated Court and before us in short are :

A (a) Conduct of the appellants and particularly of Sukhvinder Singh appellant as deposed to by PW1, Raj Kumar;

(b) Letters Ex. PA and Ex. PC written by Sukhdev Paul as per the opinion of the handwriting expert by which demand for ransom was made for release of Varun Kumar;

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(c) Making of disclosure statements by Sukhvinder Singh, Sukhdev Paul and Puran Chand, Ex. PW10/B, PW10/C and PW/D to the effect that they had put the dead body in a gunny bag and concealed the same in the turiwala room in the house of Sukhvinder Singh owned by Mohan Singh and Surjit Kaur and that they could get the same recovered;

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(d) recovery of the dead body of Varun Kumar from the house of Sukhvinder Singh, Mohan Singh and Surjit Kaur on the pointing out of the three appellants pursuant to their disclosure statements;

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(e) The deceased alongwith his parents was living as a tenant in the house of Mohan Singh and the landlord wanted to get the portion of the house under their tenancy vacated.

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The learned Designated Court after recording the evidence found all the circumstances established and opined as follows :

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"In view of my above detailed discussion to observe here that accused Sukhvinder Singh, Puran Chand and Sukhdev Paul succeeded in murdering a minor child of 4-1/2 year, for obvious reasons as is apparent after going through the disclosure statements suffered by them Ex. PW10/B to Ex. PW10/D and also the recovery of the dead body vide Ex. PW10/E from the turiwala room of the residential house of accused Mohan Singh, Surjit Kaur and Sukhvinder Singh. Similarly, the prosecution has succeeded in establishing the guilt of Mohan Singh and Surjit Kaur as per statement of their son Sukhvinder Singh necessary intimation was given by them for execution of the crime. I would not be going out of the record if I observe here that in fact accused Sukhvinder Singh, Puran Chand and Sukhdev Paul were having the blessings of accused Mohan Singh and Surjit Kaur to execute the crime which was executed in minute detail because had Mohan Singh

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and Surjit Kaur accused not been the active participants in this unlawful criminal conspiracy then they would have told the whole fact to the police or lodged the protest to the police against their son. They did not act in such manner and from this an irresistible inference can be drawn that Sukhvinder Singh, Puran Chand and Sukhdev Paul accused in active connivance with Mohan Singh and Surjit Kaur did the unlawful act in murdering Varun Kumar with the help of a fertile brain, carved out after much thought, consultations and deliberations.

When two or more persons agree to do, or cause to be done.:

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.

In the instant case all the accused formed an assembly which can conveniently be designated as unlawful assembly and all of them were having the common object and this unlawful assembly committed an offence in prosecution of the object of that assembly, therefore, every member of that unlawful assembly is guilty of the offence. Further it be seen that all the accused in furtherance of the common object committed terrorist act by committing the murder of Varun Kumar with an intention to strike terror in the minds of the people. (*Emphasis ours*)

Thus, I am of the considered opinion that the prosecution has been able to prove the guilt of accused Sukhvinder Singh, Mohan Singh Surjit Kaur, Puran Chand and Sukhdev Paul beyond the possibility of doubt. Thus the above mentioned accused are held guilty of the offences under Sections 120B, 302 read with Section 149 of the Indian Penal Code and under Section 3 of the Terrorist & Disruptive Activities (Prevention) Act, 1987."

Learned counsel for the appellants submitted before us that non of the five circumstances relied upon by the prosecution had been established in the case and that even otherwise all the alleged circumstances could not be said to be not compatible with the innocence of the accused and consistent only with the hypothesis of their guilt. It was submitted that the

- A Designated Court fell in serious error in relying upon the disclosure statements of Sukhvinder Singh, Sukhdev Paul and Puran Chand Ex. PW10/B, Ex. PW10/C and Ex. PW10/D, leading to the recovery of the dead body of the deceased, because a mere search of the house of accused Mohan Singh, Surjit Kaur and Sukhvinder Singh by the investigating officer would have led him to the recovery of the dead body and, therefore
- B recourse to the provisions of Section 27 of the Evidence Act was an abuse of the process of law. In this connection, learned counsel referred to the statement of Bhajan Singh PW 6 who stated that he had disclosed to the police about the presence of dead body in the house of Mohan Singh, as disclosed to him by the accused and argued that the ritual of recovery
- C under Section 27 of the Evidence Act was introduced to support a false case. Even, otherwise learned counsel submitted, that the recovery was doubtful and the disclosure statements pursuant to which the recovery is said to have been made, did not inspire confidence and that the three disclosure statements were not admissible in evidence. Learned counsel
- D vehemently argued that the evidence relating to the conduct of the appellants, which is the first circumstance relied upon by the prosecution, does not bear scrutiny and the testimony of Raj Kumar PW1 in any even does not implicate all the appellants. He further submitted that Mohan Singh and Surjit Kaur had been implicated on misguided suspicion and the prosecution had failed to prove that letters Ex. PA and Ex. PC were
- E written by Sukhdev Pal. It was then argued that the specimen writings of the appellants were not taken in accordance with the provisions of law and, therefore, the report of Asstt. Director (Documents) Forensic Science Laboratory, Chandigarh relied upon by the prosecution could not to the aid to the prosecution to connect Sukhdev Paul appellant with the crime.
- F Reference in this connection was made to the testimony of PW8 and PW2.

- Learned counsel for the State in reply submitted that the circumstances relied upon by the prosecution were consistent only with the hypothesis of the guilt of the appellants and that each of the circumstance had been positively established by the prosecution and all the circumstances taken together unmistakably established that they were the appellants and appellants alone who had committed the crime, that since the appellants had not raised any objection, at the time when their specimen writings were taken, they could not be heard at this stage to complain about it, that the recovery of the dead body from the house of one of the accused on the
- G disclosure statements made by some of the accused connected all the
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appellants with the crime; and the law did not bar more than one disclosure statements to be made leading to one and the same discovery and therefore urged that the disclosure statements did not suffer from any infirmity whatsoever.

We have given our anxious consideration to the submissions made at the bar and have gone through the evidence with the assistance of learned counsel for the parties.

The Designated Court convicted all the appellants for an offence under Section 3 of TADA and sentenced them to rigorous imprisonment for life and to pay a fine of Rs. 4000 each and, in default of payment of fine they were directed to further undergo rigorous imprisonment for 3 years each. It appears to us that the conviction recorded by the learned Designated Court under Section 3 of TADA is wholly unjustified. A bare perusal of Section 3 of TADA would reveal that none of the ingredients of that Section have been alleged and established in the case. The prosecution evidence is totally insufficient to bring home the charge under Section 3 of TADA on any of the appellants. We must express our concern that the learned Designated Court recorded conviction of all the appellants under Section 3 of TADA without any discussion whatsoever in the judgment as to how the said provision was attracted to the facts of the case. Merely because the investigating agency had charge sheeted the appellants for an offence under Section 3 of TADA, it did not mean that the Designated Court had to act mechanically and not even examine whether or not from the evidence led by the prosecution, an offence under Section 3 of TADA had been made before recording conviction under the said provision. None of the prosecution witnesses, not even investigating officer, implicated any of the appellants for committing an offence under Section 3 of TADA and the prosecution led no evidence whatsoever to bring the charge under that Section. Learned counsel for the respondents in all fairness conceded that the conviction of all the appellants for an offence under Section 3 of TADA was not made out. We, accordingly set aside the conviction and sentence of all the appellants for the offence under Section 3 of TADA and acquit them of the said charges.

So far as Mohan Singh and Surjit Kaur appellants are concerned, the only piece of circumstantial evidence relied upon by the prosecution against them is the recovery of the dead body of Varun Kumar from their

A house. Though, the prosecution initially made an effort to show that in hatching the conspiracy to kidnap Varun Kumar and then to murder him, Mohan Singh and his wife Surjit Kaur, were instrumental, because as landlords of the house they wanted to get the portion of the house under the tenancy of the parents of Varun Kumar vacated and had instigated their son Sukhvinder Singh to commit the crime, but a bare reference to the statements of PW8 and PW12 would show that this part of the prosecution case has not been established, let alone proved beyond a reasonable doubt. The story of getting the house vacated appears to be a clumsy concoction. There is not an iota of material to support it.

C The recovery of the dead body of Varun was made, on the basis of the disclosure statements Ex. PW10/B, Ex. PW10/C and Ex. PW10/D made by Sukhvinder Singh, Sukhdev Paul and Puran Chand respectively and therefore, to presume that Mohan Singh and Surjit Kaur "must also be a party to it" as opined by the Designated Court is too much of a strain on intelligence and certainly the prosecution cannot be permitted the liberty to rely on such fanciful presumptions against Mohan Singh and Surjit Kaur on mere conjecturisation. Our independent analysis of the evidence on the record shows that there is no material worth mentioning, to demonstrate that Mohan Singh appellant wanted the house vacated from PW2 or that it was at the instance of Surjit Kaur or Mohan Singh that Sukhvinder Singh had acted or that Mohan Singh and Surjit Kaur has any *knowledge* about the concealment of the dead body of the deceased in the 'Turiwala' room in their house. The finding of the Designated Court regarding the implication of Mohan Singh and Surjit Kaur is based on mere conjectures and surmises and not on any admissible evidence. The circumstantial evidence relied upon the prosecution to connect Mohan Singh and Surjit Kaur with the crime is hopelessly deficient and the circumstance relied upon by the prosecution to connect Mohan Singh and Surjit Kaur with the crime have not been established beyond a reasonable doubt.

G We shall now take up the case of the three remaining appellants, namely, Sukhdev Paul, Puran Chand and Sukhvinder Singh.

H The first piece of circumstantial evidence relied upon against them revolves around the recovery of the dead body of Varun Kumar from the house of Sukhvinder Singh and his parents on the disclosure statement made by Sukhvinder Singh, Sukhdev Paul and Puran Chand Ex. PW.10/B,

EX. PW10/C and Ex. PW10/D respectively. We are surprised at the manner in which the disclosure statements were recorded by the investigating agency and relied upon by the Designated Court. That Section 27 of the Evidence Act is an exception to the general rule that a statement made before the police is not admissible in evidence is not in doubt. However, vide Section 27 of the Evidence Act, only so much of the statement of an accused is admissible in evidence as distinctly leads to the discovery of a fact. Therefore, once the fact has been discovered Section 27 of the Evidence Act cannot again be made use of to 're-discover' the discovered fact. It would be a total misuse - even abuse-of the provisions of Section 27 of the Evidence Act. From the testimony of PW14, SI Kashmir Singh it transpires that in the presence of PWs Hari Dutt and Jugal Kishore during the interrogation by SI Amar Singh, Sukhvinder Singh appellant made a disclosure statement to the effect that he *alongwith others* had concealed the dead body of Varun Kumar in the stack of hay in the room and that he could get the same recovered. His disclosure statement Ex. PW10/B was accordingly recorded which was signed by him and attested by the panch witnesses. Except for the discovery of the dead body of Varun Kumar on the basis of the disclosure statement of Sukhvinder Singh, EX.PW10/B, no other portion of the statement of Sukhvinder Singh implicating himself and others with the commission of the crime is admissible in evidence. After the disclosure statement was made by Sukhvinder Singh disclosing as to where the dead body of Varun Kumar had been concealed and from where it could be recovered, the recording of the disclosure statements of Sukhdev Paul and Puran Chand Ex. PW10/C and Ex. PW10/D was a wholly impermissible exercise and an obvious attempt to rope in Sukhdev Paul and Puran Chand with the aid of Section 27 of the Evidence Act. Since, the information had already been given by Sukhvinder Singh, appellant in his disclosure statement Ex. PW10/B, the two subsequent statements Ex. PW10/C and Ex.PW10/D were not admissible in evidence because at the best they were leading to the "re-discovery of a fact already disclosed and capable of discovery. It has been admitted by PW14 that the disclosure statement, Ex. PW10/B, made by Sukhvinder Singh was the first in point of time and that he had disclosed where the dead body had been concealed and that he could point out the place and get it recovered. The investigating officer should have immediately acted upon disclosure statement Ex. PW10/B, rather than wait and record two more disclosure statements, as if the authenticity of recovery of dead body could be achieved by the mere

- A number of disclosure statements leading to the discovery of one and the same fact. In the face of the admission of PW14 as noticed above, it is obvious that the so-called disclosure statements of Sukhdev Paul and Puran Chand Ex. PW10/C and Ex. PW10/D were not admissible in evidence and the Designated Court fell in error in relying upon the same. Admittedly, so far as Puran Chand is concerned, apart from the disclosure statement Ex. Pw10/D, there is no other piece of circumstantial evidence relied upon by the prosecution and once we rule out of consideration the disclosure statement allegedly made by Puran Chand Ex. PW10/D, the conclusion is inescapable that the prosecution has not been able to establish the case against Puran Chand beyond a reasonable doubt and there is no circumstance which can connect him with the alleged crime. The prosecution has led no evidence to show any connection *inter-se* so far as the three appellants are concerned.

- We shall now take up the case of Sukhdev Paul appellant. For the reasons already recorded while dealing with the case of Puran Chand, we hold that the so-called disclosure statement, Ex PW10/C, made by him is also inadmissible and cannot be used to connect him with the crime. The only other circumstance relied upon by the prosecution against him is that he is the author of the ransom letters Ex. PA and Ex. PC. To establish that the author of letters Ex. PA and PC is Sukhdev Paul. The prosecution has relied upon the report of the Asstt. Director (Documents), Forensic Science Laboratory, Chandigarh dated 12.6.1992 Ex. PW10/J. The specimen writing of Sukhdev Paul was taken by the Tehsildar Magistrate PW13. It would, therefore, be relevant to first notice the provisions of Section 73 of the Evidence Act. It reads :

73. *Comparison of Signature, writing or seal with others admitted or proved. :*

- "In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal *admitted or proved* to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

- The Court may direct any person present in Court to write any,

words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by a person." A

Under the Indian Evidence Act, two direct methods of proving the handwriting of a person are :

(a) by an admission of a person who wrote it; B

(b) by the evidence of some witness who saw it being written by that person.

Apart from these, there are some other methods of proof of handwriting by opinion. They are : C

(1) by the evidence of a handwriting expert (Section 45).

(2) by the evidence of a witness acquainted with the handwriting of the person who is said to have written the disputed writing (Section 47). D

(3) opinion formed by the Court itself on comparison made of the disputed writings with the admitted or specimen writings (Section 73).

We are concerned here primarily with the third mode. E

A subsequent writing of an accused taken under the direction of the court is in substance a specimen writing obtained for comparison of the disputed writing with it. Though, Section 73 does not specifically say as to who could make such a comparison but reading Section 73 as a whole, it is obvious that it is the Court which has to make the comparison and it may form the opinion itself by comparing the disputed and the admitted writings or seek the assistance of an expert, to put before the Court all the material, together with reasons, which induce the expert to come to a conclusion that the disputed and the admitted writings are of one and the same author so that the court may form *its own opinion* by its own assessment of the report of the expert based on the data furnished by the expert. The function of an handwriting expert is to opine after a scientific comparison of the disputed writing with the admitted (specimen) writing with regard to the points of similarity and dissimilarity in the two set of writings. F G

The second paragraph of Section 73 (*supra*) enables the court to H

- A direct any person *present before it* to give his specimen writing "for the purpose of enabling the court to compare" such writings with writings alleged to have been written by such person. The obvious implication of the words "for the purpose of enabling the court to compare" is that there is some proceeding pending before the court in which or as a consequence
- B of which it is necessary for the court to compare such writings. The direction is therefore required to be given for the purpose of "enabling the court to compare" and not for the purpose of enabling an investigating or a prosecuting agency to obtain and produce as evidence in the case the specimen writings for their ultimate comparison with the disputed writings.
- C Where the case is still under investigation and no proceeding are pending in any court in which it might be necessary to compare the two writings, the person (accused) cannot be compelled to give his specimen writings. The language of Section 73 does not permit *any court* to give a direction to an accused to give his specimen writing for comparison in a proceeding which may subsequently be instituted in some other competent court.
- D Section 73 of the Evidence Act cannot be made use of for collecting specimen writings during the investigation and recourse to it can be had only when the enquiry or the trial court before which proceedings are pending requires the writing for the purpose of 'enabling it to compare' the same. A court holding an *enquiry* under the Code of Criminal Procedure is indeed entitled under Section 73 of the Evidence Act to direct an accused person appearing before it to give his specimen handwriting to enable the court by which he may be subsequently *tried* to compare it with the disputed writings. Therefore, in our opinion the court which can issue a direction to the person to give his specimen writing can either by the
- E court holding the *enquiry* under the Code of Criminal Procedure or the court *trying* the accused person with a view to enable it to compare the specimen writings with the writings alleged to have been written by such a person. A court which is not holding an enquiry under the Code of Criminal Procedure or conducting the trial is not permitted, on the plain
- F language of Section 73 of the Evidence Act, to issue any direction of the nature contained in the second paragraph of Section 73 of the Evidence Act. The words "any person present in the court" in Section 73 has a reference only to such person who are parties to a cause pending before the court and in a given case may even include the witnesses in the said
- G cause but where there is no cause pending before the court for its deter-
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mination, the question of obtaining for the purposes of comparison of the handwriting of a person may not arise at all the therefore, the provisions of Section 73 of the Evidence Act would have no application.

The specimen writings in the instant case of appellant Sukhdev Paul were taken under the directions of Sh. S.P. Garg, Tehsildar executive Magistrate, PW 13. No enquiry or trial was admittedly pending in the court of the Tehsildar Executive Magistrate. The enquiry and trial in this case were pending under TADA before the Designated Court only. The direction given by the Tehsildar Executive Magistrate Sh. S.P. Garg to the appellant Sukhdev Paul to give his specimen writing was clearly unwarranted and not contemplated or envisaged by Section 73 of the Evidence Act. The prosecution has not disclosed as to at what stage of investigation or enquiry or trial was Sukhdev Paul appellant produced before the Executive Magistrate PW13 to take the specimen writing of the appellant and why the specimen writings were obtained under directions of PW13 and not of the Designated Court. It is a mystery as to how the specimen writings required to be used *at the trial* against the appellant were directed to be taken by PW13, who was not enquiring or trying the case. To a specific question during his cross-examination, PW13 admitted at the trial, that when he had issued the direction to the appellant there was not document on his file which could go to show as to under whose orders the appellant had been sent to him for taking his specimen handwriting. The manner in which the specimen writing of Sukhdev Paul was taken is totally objectionable and against the provisions of Section 73 of the Evidence Act. The Executive Magistrate PW13 appears to have been too obliging and did not even care to examine the provisions of law before issuing the direction to the appellant. The argument of the learned counsel for the State that since no objection was raised by the appellant when he was called upon to give his specimen handwriting by PW13 therefore he cannot be permitted to make a grievance now is only an argument of despair and the silence of the appellant, who admittedly on that day, was not even represented by an advocate, cannot certainly clothe PW13 with any jurisdiction to issue the directions as envisaged by Section 73 of the Evidence Act. The specimen writing of Sukhdev Paul could not, therefore, be made use of during the *Trial* and the report of the handwriting expert, when considered in the light of the foregoing discussion, is rendered of no consequence at all and

A cannot be used against Sukhdev Paul appellant to connect him with the crime.

B That apart it is relevant to point out that PW8 Sulaxana, the mother of the deceased Varun Kumar stated during her deposition in court that letters Ex.PA & PC "are not those letters which I had found near the door on that day". The prosecution made no effort to show s to how Ex. PA and Ex. PC saw the light of the day, when PW8 had totally discounted the theory that she had given those to the police. Thus considering on the basis of the evidence on the record and the infirmity in the matter of taking of the specimen handwriting of the appellant, we are of the opinion that the prosecution has failed to establish that the letters Ex. PA & PC were authored by Sukhdev Paul. Once, we rule out of consideration, letters Ex. PA & Ex.PC as having been written by Sukhdev Paul appellant. There is no other circumstance relied upon by the prosecution either before the Designated Court or before us survives to connect Sukhdev Paul appellant with the crime. The Designated Court has not adverted to much less considered this aspect of the case and it appears to have been blissfully ignorant of the provisions of Section 73 of the Evidence Act. In the peculiar facts and circumstances of the case as noticed above, the specimen writings of Sukhdev Paul obtain under the directions of PW13, who was not authorised to issue such a direction, could not be used by the Designated Court to hold by relying on the expert evidence, that the disputed and the admitted writings had a common author. We, therefore, find that the case against Sukhdev Paul, appellant has not been established by the prosecution beyond a reasonable doubt.

F It, now, takes us to the case of Sukhvinder Singh.

The circumstances relied upon by the prosecution to connect Sukhvinder Singh with the crime are :

G (1) The conduct of Sukhvinder Singh appellant as deposed to by PW1 Raj Kumar;

(2) the making of disclosure statement by Sukhvinder Singh Ex.PW10/B;

H (3) recovery of the dead body of Varun Kumar from the house of Sukhvinder Singh pursuant to the above disclosure statement on

the pointing out of Sukhvinder Singh.

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Though, at the trial another circumstance had also been pressed into aid against Sukhvinder Singh namely, the conspiracy between him and his parents with a view to evict Rakesh Kumar PW2 and have the portion of the house under his tenancy vacated but that circumstance was rightly not pressed before us and even otherwise in view of our findings regarding that circumstance while dealing with the case of Mohan Singh and Surjit Kaur it follows that the said circumstance cannot be used much less relied upon to connect Sukhvinder Singh with the alleged crime. Since, the witnesses to the alleged extra judicial confession turned hostile, no reliance was placed and rightly so on the so-called extra-judicial confession to connect this appellant with the crime. We are, therefore, left with the three circumstances as noticed above and shall consider them hereafter.

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From the testimony of PW1, Raj Kumar, the maternal uncle of the deceased it transpires that when he was going to the first floor of his sister's house on the day when Varun was found missing, he had found three boys and had identified Sukhvinder Singh as one of them. He had found him to be in a perplexed state of mind. This conduct of Sukhvinder Singh, on the date when Varun was abducted, is quite indicative of the complicity of Sukhvinder Singh. Raj Kumar PW1 was not at all challenged during his cross-examination about his noticing the perplexed state of the mind of Sukhvinder Singh. Though, this conduct of Sukhvinder Singh by itself may not be of much consequence but when considered alongwith the other two circumstances, that is the disclosure statement Ex. PW10/B suffered by Sukhvinder Singh leading to the recovery of the dead body from his house on his pointing out, assumes much significance. From the evidence on the record, we are satisfied that the disclosure statement Ex. PW10/B was made by Sukhvinder Singh voluntarily. In that behalf the evidence of PW10 Amar Singh, SI and PW14 SI Kashmir Singh is cogent and trustworthy. They both deposed about the manner in which Sukhvinder Singh had made the disclosure statement Ex. PW10/B which was signed by Sukhvinder Singh and attested by the panch witnesses. That was the first disclosure statement in point of time giving any indication about the concealment of the dead body in the Turiwala room of Sukhvinder Singh's house. Their evidence also shows that Sukhvinder Singh had led the police party to the turiwala room of his residential house and pointed out the place from

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- A where the dead body of Varun Kumar was recovered from a gunny bag concealed under a heap of Turi. Despite lengthy cross-examination of PW10 and PW14, nothing has been brought from which any doubt could be cast on their testimony, regarding the disclosure statement Ex. PW10/B made by Sukhvinder Singh or the recovery of the dead body of Varun
- B Kumar on the pointing out of Sukhvinder Singh vide recovery memo Ex.PW10/E pursuant to the said disclosure statement. As a matter of fact the evidence of these witnesses which both cogent and inspires confidence, has remained totally unchallenged on any material aspect relating to the disclosure statement and the recovery of the dead body. The argument of
- C the learned counsel for the appellant that had the investigating agency been more vigilant and had searched the place before the disclosure statement was made, they would have been able to discover the dead body of the deceased from the house of Sukhvinder Singh, may go to show that the investigating agency was somewhat negligent but by no stretch of imagination can it be used to discredit. The disclosure statement Ex.PW10/B made
- D by Sukhvinder Singh and the recovery of the dead body pursuant to that disclosure statement vide recovery memo Ex.PW10/E. These are both highly incriminating circumstance in so far as Sukhvinder Singh is concerned and both the circumstances have not only been successfully established by the prosecution but they also connect definitely and positively
- E Sukhvinder Singh with the crime. Learned counsel for the appellant was unable to point out any there is no infirmity in so far as the evidence regarding the disclosure statement or the recovery of the dead body is concerned. Each one of these circumstances which has been established by the prosecution against Sukhvinder Singh has been successfully proved.
- F The chain of circumstances against Sukhvinder Singh is so complete that it excludes the possibility of any hypothesis other than the one which is consistent only with the guilt of Sukhvinder Singh and inconsistent with his innocence. All the circumstances from which the inferences have been drawn by us have been firmly established by the prosecution and have
- G remained unchallenged in the cross-examination of the prosecution witnesses. All the circumstances relied upon by the prosecution against Sukhvinder Singh definitely and unerringly point towards the guilt of Sukhvinder Singh appellant and taken cumulatively form a chain so complete that there is no escape from the conclusion that the crime was
- H committed by Sukhvinder Singh appellant and none else. The medical

evidence also lends credence to the prosecution case against Sukhvinder Singh. May be, he also had some accomplices but since the prosecution evidence is deficient, on that account, it is not possible to identify those accomplices. Nonetheless, we find that the prosecution has established the case against Sukhvinder Singh beyond every reasonable doubt. We accordingly convict him for an affiance under Section 302 IPC and maintain the sentence of imprisonment for life and a fine of 5000 and in default of payment of fine, to further undergo rigorous imprisonment for a period of four years as recorded by the Designated Court. The conviction and sentence of Sukhvinder Singh for the offence under Section 120 B IPC is, however, set aside.

As a result of the above discussion the appeal in so far as *Mohan Singh, Surjit Kaur, Puran Chand and Sukhdev Paul* appellants are concerned, is accepted and their convictions and sentences are set aside. The appeal of Sukhvinder Singh is partly allowed and his conviction and sentence under Section 3 of TADA and Section 120-B IPC is set aside. In all other respects his appeal fails. For his conviction for an offence under Section 302 IPC, he is sentenced to imprisonment for life and to pay a fine of Rs. 5000 and in default of payment of fine to suffer four years rigorous imprisonment.

The four acquitted appellants, other than Sukhvinder Singh, shall be released from custody forthwith, if not required in any other case.

B.V.B.D.

Appeal Partly allowed.