Vijender

Vs

State of Delhi

Devinder Alias Bhinder

Vs

State of Delhi

Mukesh Kumar

Vs

State of Delhi

Criminal Appeals No. 769 of 1976 With Nos. 2017 and 2022 of 1996

(M. K. Mukherjee, B. N. Kirpal JJ)

12.02.1997

JUDGMENT

M. K. MUKHERJEE, J.

1. Vijender, Devinder @ Bhinder and Mukesh Kumar, the appellants in these three appeals, were placed on trial before the Judge, Designated Court No. 111 (Karkardooma Courts), Delhi to answer common charges under Sections 364/34, 302/34 and 201/34 IPC. The charges were based on the allegations that on 26-6-1992, at or about 11 a.m. they, in furtherance of their common intention, kidnapped Khurshid Ali from Village Johripur, within the jurisdiction of Gokalpuri Police Station, in a Maruti car bearing Registration No. DDB 5067 in order to put him in danger of being murdered; and after committing his murder on the same night they concealed his dead body in Village Banthala, within the jurisdiction of Loni Police Station, to escape from legal punishment. Against Vijender and Devinder separate charges under Section 25 of the Arms Act, 1959 read with Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ("TADA") were also framed for illegal possession of country-made pistols and cartridges. The trial ended with an order of conviction and sentences recorded against all the appellants under Sections 364 and 362 IPC and also under Section 25 of the Arms Act, 1959 read with Section 5 of TADA against appellant Vijender. Aggrieved thereby the three convicts have filed these appeals under Section 19 of TADA which have been heard together and this judgment will dispose of them.

2. Shorn of details, the prosecution case is as under :

> (a) On 26-6-1992 at or about 11 a.m. Raj Kumar (PW 4), a resident of Johripur, went to the house of Shaikh Raful Hassan (PW 5) of their locality and informed him that he had just seen Vijender, Mukesh and Devinder (the three appellants) taking away his son Khurshid in Maruti Car No. DDB 5067. On getting that information, PW 5

called up the police control room over telephone and reported the kidnapping of his son. Lady Constable Urmila, who was then on duty in the Police Control Room, received that message and communicated it to Gokalpuri Police Station as Village Johripur fell under its jurisdiction. On receipt of that communication SI Shivraj Singh (PW 8) recorded the same in the daily diary book under Entry No. 13-A (Ext. PW 8/A) and proceeded to Johripur. There he met PW 5 and assured him that his son would be traced out soon. Since in spite of such assurance his son remained untraced till evening, PW 5 went to the Police Vigilance Cell and lodged a report there (Ext. PW 15/A). On the following morning PW 5 went to Gokalpuri Police Station and lodged another report which was recorded by PW 8 (Ext. PW 5/A). Treating this report as the FIR PW 8 registered a case and Shri R.S. Chauhan (PW 19), the Station House Officer of Gokalpuri Police Station, took up its investigation;

(b) In the meantime some officers of Loni Police Station in the district of Ghaziabad (U.P.), while on patrol duty in the afternoon of 27-6-1992, found the dead body of a young boy aged about 17/18 years lying by the side of railway lines in Village Banthala. Sub-Inspector Santosh Kumar (PW 20) got photographs of the dead body taken (Ext. PW 20/B) and, after holding inquest thereupon, sent it to the Ghaziabad mortuary for post-mortem examination;

(c) On getting that information Saddiqan (PW 6), mother of Khurshid, went to the mortuary on 28-6-1992 and identified the dead body as that of her son from the wearing apparel and an injury on his finger which he had sustained earlier;

(d) On the same day, i.e., 28-6-1992, Constable Meghraj Singh (PW 17) of Police Station Khekhra in the district of Meerut (U.P.) found, while coming back from patrol duty, a red-coloured Maruti car bearing No. DDB 5067 lying abandoned near a field in Village Ahmadnagar with its front door glass broken and bloodstains inside the car. He made necessary arrangement to take the car to the police station and deposited it there as unclaimed property;

(e) On getting information that Car No. DDB 5067 was lying in Khekhra Police Station PW 19 went there on 29-6-1992 along with a fingerprint expert and a photographer. The expert took impressions of the fingerprints found on the car and PW 19 seized sample of bloodstains found inside the car after scratching;

(f) On the following day i.e. 30-6-1992 PW 19 went in search of the accused persons and ultimately apprehended them from a house in Khajani Nagar behind Johripur. On search of their persons, a .315 bore country-made pistol with a cartridge inside was recovered from the trousers' pocket of Vijender and 0.12 bore broken country-made pistol and a cartridge from underneath the bed of Devinder. Besides, a key of a Maruti car was also recovered from Vijender. PW 19 seized all those articles and sealed them. The seized arms and ammunition as also the wearing apparels of Khurshid earlier seized were sent for examination by Ballistic Expert and the bloodstained articles to the Forensic Science Laboratory. After receipt of the reports of the post-mortem examination (Ext. PW 21/A) and of the Experts (Ext. PW 19/J.K.L.) and completion of investigation PW 19 submitted charge-sheet against the appellants.

3. The motive that was ascribed by the prosecution for the kidnapping and murder of Khurshid was that he used to send love letters to the sister of Vijender who was the driver of the Maruti car in question and lived in the same locality. When Vijender learnt about the same he warned PW 5 that if his son did not stop such undesirable activity he would be compelled to take dire steps.

4. The appellants pleaded not guilty to the charges levelled against them and contended that they had been falsely implicated. Vijender took a plea of alibi also.

5. To prove its case the prosecution examined twenty-two witnesses and the defence four.

6. The learned counsel for the appellants submitted that having discarded the testimony of Mirza Ali (PW 9), who was examined by the prosecution to prove the kidnapping of Khurshid by the three appellants, as wholly untrustworthy the trial Judge could not have held the three appellants guilty of the offences of kidnapping and murder as there was no other legal evidence on record to connect them with the above offences. In elaborating this contention the learned counsel submitted that in his anxiety to convict the appellants, the trial Judge permitted the prosecution to adduce evidence which was not legally admissible and based his judgment primarily on such evidence. Once the inadmissible evidence was left out of consideration there was not an iota of evidence to connect the appellants with the alleged kidnapping and murder of Khurshid, argued the learned counsel. Besides, the learned counsel submitted that the trial Judge failed to notice that there was no legal evidence to even prove that Khurshid was murdered. As regards the conviction of Vijender for unlawful possession of the country-made pistol and cartridge the submission of the learned counsel was that Vijender could not have been jointly tried for that offence along with the offences of kidnapping and murder of Khurshid for, on the own showing of the prosecution, the latter offence was not part of the former transaction. According to the learned counsel the joint trial seriously prejudiced Vijender in his defence inasmuch as the trial Judge relied upon the evidence adduced by the prosecution for the offences of kidnapping and murder to convict him for the other offences. It was lastly submitted that the evidence of the prosecution witnesses to prove the recovery of the pistol and cartridge from Vijender was unworthy of credit. The learned counsel for the State however fully supported the impugned judgment.

7. To appreciate the contentions raised before us we have carefully gone through the entire materials on record and the impugned judgment. Our such exercise persuades us to unhesitatingly hold that the trial Judge permitted the prosecution to lead evidence on some vital issues in utter breach of the rudimentary and fundamental principles of criminal jurisprudence and that the impugned judgment is a perverse one for it is not only based on conclusions drawn from such inadmissible evidence but suffers from the vice of non-consideration of evidence which materially impaired the prosecution case. The impugned judgment cannot be sustained for other reasons also to which we will advert at the appropriate stage. Before, however, we proceed to consider the judgment it will be apposite to detail and discuss the evidence adduced during trial and point out the legal infirmities in reception of material parts of it.

8. To prove the ocular version of the kidnapping the prosecution examined Raj Kumar (PW 4) and Mirza Ali (PW 9). As earlier stated the trial Judge held - in our view rightly - that PW 9 could not at all be believed. So far as PW 4 is concerned we find that he was declared hostile by the prosecution as he did not fully support its case and was permitted to be cross-examined with reference to his purported statement recorded under Section 161 CrPC wherein he detailed and described the manner in which Khurshid was kidnapped by the appellants in a red-coloured Maruti car. He however denied having made any such statement to the police. Scanning the entire testimony of PW

4 we gather that the only substantial piece of his evidence which the prosecution can fall back upon is that he saw Khurshid being pulled into a van of red colour and that he gave that information to his parents. On being questioned by the Public Prosecutor whether he knew the three accused persons present in Court (the appellants) he answered in the negative. In answer to another question as to whether he could note the number of the vehicle he stated that being illiterate he could not do so. There being no other eyewitness to the kidnapping and murder we may now advert our attention to the circumstantial evidence led by the prosecution in proof thereof.

9. To prove that Vijender was the driver of the car in question and it was in his custody at the material time the prosecution examined its owner Bhim Singh (PW 1). He however categorically stated that the appellant Vijender was not his driver and that his driver was living in Dayalpur in a rented house of Om Prakash. In view of his such assertion he was declared hostile and contradicted with reference to his statement recorded under Section 161 CrPC. The other two witnesses examined by the prosecution to prove the above circumstance namely, Jitender (PW 2) and Om Pal (PW 3) also turned hostile.

10. Raful Hassan (PW 5), father of Khurshid, firstly stated that on 25-6-1992 Vijender came to their house in a red Maruti car and asked him why his son Khurshid was sending letters to his sister. He replied that all his children were illiterate and his allegation was untrue. Vijender then went away threatening that if Khurshid did not stop such practice, he would have to suffer the consequence. He next stated that on 26-6-1992 at 11 a.m. Raju (PW 4) came to his house and told him that Khurshid had been forcibly taken away by Vijender, Mukesh and Devinder (the three appellants) in a car bearing No. DDB 5067. He lastly testified about his having given three reports to the police; one to the Police Control Room immediately thereafter (Ext. PW 8/A), to the Police Vigilance Cell (Ext. PW 15/A) on the same night and to the Station House Officer, Gokalpuri Police Station (Ext. PW 5/A) next morning.

11. The evidence of PW 5 that Raju gave him the number of the vehicle and the names of the three appellants as the miscreants was not legally admissible for Raju (PW 4) did not state that he had seen the three appellants kidnapping Khurshid nor did he give the number of the vehicle in which Khurshid was taken away. In the absence of such direct evidence of Raju (PW 4), the testimony of PW 5 to that extent would be hit by Section 60 of the Evidence Act. The said section, so far as it is relevant for our present purpose lays down that oral evidence must, in all cases whatever, be direct; that is to say - if it refers to a fact which could be seen it must be the evidence of a witness who says he saw it. In the instant case the facts which could be seen were that Khurshid was kidnapped, that the appellants kidnapped him and that he was kidnapped in Car No. DDB 5067 and therefore PW 4 was the only person (in absence of any other eyewitness) who was legally competent to testify about these facts. Since PW 4 did not testify to two of the above facts, namely the car number and the persons who kidnapped him, the statement of PW 5 that he was also told about the above two facts would not be admissible being "hearsay", but his testimony that PW 4 told him that Khurshid was kidnapped would be admissible as corroborative evidence under Section 157 of the Evidence Act. While on this point it need be mentioned that in the facts of the present case Section 6 of the Evidence Act also does not come in aid of the prosecution.

12. Smt. Saddiqan (PW 6), mother of Khurshid, corroborated PW 5 regarding the threat meted out by Vijender on 25-6-1992 and the information that Raju (PW 4) gave to them on 26-6-1992 regarding kidnapping of their son Khurshid by the appellants. It is her further evidence that three days after her son was kidnapped she was taken to the mortuary of Ghaziabad in order to identify a dead body and she identified it as that of her son from the wearing apparel and a scar he had on his

finger owing to an injury he sustained earlier. On being shown a shirt and a pair of trousers, which were seized by the police during investigation from the person of the deceased, she identified them to be those of her son. To the extent she testified that Raju had told them that the three appellants kidnapped her son must be said to be inadmissible in view of our foregoing discussion. So far as the probative value of her evidence on the other points is concerned we will advert to the same at the appropriate stage.

13. Sequentially stated, the next circumstance relates to the recovery of a dead body which was later on identified by PW 6 as that of her son Khurshid. Evidence on this point was furnished by SI Santosh Kumar (PW 20), Constable Suresh Kumar (PW 18) and Ravinder Singh (PW 11), all of Loni Police Station. Their evidence proves that on 27-6-1992 they found the dead body of a young boy aged about 17/18 years lying near the railway lines in Village Banthala. There PW 20 got photographs of the dead body taken (Ext. PW 20/B), held inquest thereupon and then sent it to Ghaziabad mortuary for post-mortem examination, through PW 11 and PW 18. It is the further evidence of PWs 11 and 18 that on the following day, i.e., 28-6-1992, the relatives of the deceased reached the mortuary and identified the dead body.

14. As regards the recovery of the Car No. DDB 5067 the prosecution relied upon the evidence of Constable Megh Raj Singh (PW 17) of Khekhra Police Station in the district of Meerut (U.P.). He stated that on 28-6-1992 when after his patrol duty he was returning from Village Ahmadnagar he found a Maruti car bearing No. DDB 5067 lying abandoned. He found the left side front door glass and the rear right side triangular glass of the car broken and bloodstains inside it. He brought the car to the police station and deposited it there. The next piece of evidence on this point is that of Ram Singh (PW 19), the Investigating Officer. He stated that on getting information that Car No. DDB 5067 was lying at Khekhra Police Station he went there on 29-6-1992 along with a fingerprint expert and a photographer and got fingerprint impressions found on the car photographed. Besides, he claimed to have seized the bloodstains found on the body of the car after scratching and the seat covers which were also bloodstained.

15. The next circumstance on which the prosecution relied to establish the complicity of the three appellants relates to their arrest and their subsequent conduct. The witnesses to prove this circumstance were Inspector Ram Chander (PW 14) and SHO Ram Singh (PW 19). On perusal of their testimonies we are surprised to find that the trial Judge permitted the prosecution to let in statements made by Jitendra (PW 2) to them in utter disregard of the provisions of Section 162 CrPC, which lays down an elementary but fundamental principle to be followed in criminal trial that a statement made before a police officer during investigation cannot be used for any purpose whatsoever, except when it attracts the provisions of Section 27 or Section 32(1) of the Evidence Act. If, however, such a statement is made by a witness examined by the prosecution it may be used by the accused to contradict such a witness, and with the permission of the Court, by the prosecution in accordance with Section 145 of the Evidence Act. To eschew prolixity, we quote below only the relative portion of the evidence of PW 13 in this regard :

> "One boy named Jeetu @ Jitender met us at Johripur and told Gyanender was having one house at Khajani Nagar which was less known to the people. We then went to Khajani Nagar and reached there at 4.45 p.m. along with Jeetu. Jeetu pointed out to the house and then he went inside the premises and peeped into the room. After peeping inside the room he told the police party that Vijender Devinder and Mukesh, the three boys, were present inside the room and they were the same persons who had kidnapped and killed the deceased."

16. Incidentally, it may be mentioned - though not relevant for our present purpose - that PW 2 did not at all support the prosecution case and he was declared hostile.

17. Another elementary statutory breach which we notice in recording the evidence of the above witnesses is that of Section 27 of the Evidence Act. Evidence was led through the above three police witnesses that in consequence of information received from the three appellants on 30-6-1992 they discovered the place where the dead body of Khurshid was thrown. As already noticed, the dead body of Khurshid was recovered on 27-6-1992 and therefore the question of discovery of the place where it was thrown thereafter could not arise. Under Section 27 of the Evidence Act if an information given by the accused leads to the discovery of a fact which is the direct outcome of such information then only it would be evidence but when the fact has already been discovered as in the instant case - evidence could not be led in respect thereof.

18. However, the most glaring infirmity appearing on the record relates to the evidence led by the prosecution to prove the homicidal death of Khurshid. The only witness examined by the prosecution in this regard was Satish Kumar (PW 21), a record clerk of the District Hospital, Ghaziabad. His testimony reads as follows :

> "I have brought the post-mortem report of an unknown male sent by PS Loni, Ghaziabad on 28-6-1992. Post-mortem was conducted on 28-6-1992 by Dr. U.C. Gupta. The date of sending is not known to me and is not given on record. Dr. U.C. Gupta was transferred from District Hospital earlier. He has been now transferred back. I identify his signature and handwriting from the post-mortem report. The copy of P/M report is Ext. 21/A (objected to). I have seen Dr. U.C. Gupta writing and signing.

Cross-examination :

> Original copy is not on record. The original copy is sent to SSP, Ghaziabad. Second copy is sent to PS and third copy is maintained in the record."

19. It passes our comprehension how the trial Judge entertained the post-mortem report as a piece of documentary evidence on the basis of the above testimony of a clerk in spite of legitimate objection raised by the defence. In view of Section 60 of the Evidence Act, referred to earlier, the prosecution is bound to lead the best evidence available to prove a certain fact; and in the instant case, needless to say, it was that of Dr. U.C. Gupta, who held the post-mortem examination. It is of course true that in an exceptional case where any of the prerequisites of Section 32 of the Evidence Act is fulfilled a post-mortem report can be admitted in evidence as a relevant fact under sub-section (2) thereof by proving the same through some other competent witness but this section had no manner of application here for the evidence of PW 21 clearly reveals that on the day he was deposing Dr. Gupta was in that hospital. The other reason for which the trial Judge ought not to have allowed the prosecution to prove the post-mortem report is that it was not the original report but only a carbon copy thereof, and that too not certified. Under Section 64 of the Evidence Act document must be proved by primary evidence, that is to say, by producing the document itself except in the cases mentioned in Section 65 thereof. Since the copy of the post-mortem report did not come within the purview of any of the clauses of Section 65 it was not admissible on this score also.

20. After excluding the prosecution evidence, oral and documentary, to the extent its reception was legally impermissible, and culling the rest we find that the prosecution has led evidence to prove the

following facts and circumstances :

> "(i) On 26-6-1992 at or about 11 a.m. PW 4 saw Khurshid being dragged into a red-coloured Maruti car and he gave that information to his parents (PWs 5 and 6);
>
> (ii) Over the kidnapping of his son PW 5 lodged three reports before the police : first on telephone to the Police Control Room (Ext. PW 8/A) at or about 1.40 p.m., next on the same night in the Police Vigilance Cell (Ext. PW 15/A), and lastly on the following morning at Gokalpuri Police Station (Ext. PW 5/A) which was treated as the FIR;
>
> (iii) On 27-6-1992 the dead body of a young boy was found lying by the side of railway lines in Village Banthala within the jurisdiction of Loni Police Station in the District of Ghaziabad (U.P.) which was photographed and later on identified by PW 6 at the mortuary as the dead body of her son Khurshid;
>
> (iv) On 28-6-1992 officers of Khekhra Police Station in the district of Meerut (U.P.) found a red-coloured Maruti car bearing No. DDB 5067 lying abandoned near a field with window glasses broken and bloodstains inside the car;
>
> (v) After the car was brought to the Khekhra Police Station fingerprint impressions found on it were photographed and samples of bloodstains found inside were seized after scratching;
>
> (vi) On 30-6-1992 the appellants were arrested from a house in Khajani Nagar behind Johripur and on search of the persons of Vijender and Devinder country-made pistols were recovered. A key of a Maruti car was also recovered from Vijender and Constable Suresh Chand (PW 22) found that the key could be used for ignition of the engine of the car bearing No. DDB 5067;
>
> (vii) The pistol and cartridge seized from Vijender were in working order and live respectively;
>
> (viii) The shirt, that the deceased was wearing had a hole/tear mark on it and it was caused by a firearm which was fired from a close range;
>
> (ix) The stains found in the seat covers of the car were of human blood; and
>
> (x) Vijender was annoyed with Khurshid as he wrote love letters to his sister".

21. Without going into the probative value of the evidence adduced by the prosecution witnesses and fully relying upon the same if we proceed on the assumption that the above facts and circumstances stand established, it can be said that the prosecution has succeeded in only proving that Khurshid was kidnapped. As regards the proof of his murder, the evidence relied upon by the prosecution is that of PW 6, who identified the dead body, found by the officers of Loni Police Station near the railway lines and later on brought to the Ghaziabad mortuary, as that of his son and the report of the post-mortem examination (Ext. PW 21/A) which we have found to be legally inadmissible for non-examination of the doctor who held the autopsy. Even if we accept the post-mortem report as a valid piece of documentary evidence, we notice therefrom that it relates to an unknown male aged about 25/30 years and not to a boy aged 17/18 years. We next get that on the

person of the dead body the doctor found three external injuries : one large swelling on the right side of the head, another large swelling over the right side of the jaw and fracture of right parietal bone. The opinion given by the doctor therein is that death was caused by shock and haemorrhage as a result of the injuries. In the absence of any medical opinion that the injuries were homicidal, accidental death of the victim cannot therefore be ruled out.

22. However, to prove that the death was homicidal the prosecution relied - and the trial Judge gave much emphasis - upon the presence of a hole/tear mark upon the back of the shirt found on the dead body and the opinion of the Ballistic Expert that it (hole/tear) was caused by a firearm which was fired from a close range. The above opinion of the Ballistic Expert shows that the post-mortem report could not be related to Khurshid for there is no reference to any injury on the back, much less with blackening or charring which was expected in case of close range firing. The fact that the report relates to a person aged 25/30 years and not a boy aged 17/18 years lends further assurance to our above inference. The only other inference that can be legitimately drawn from the preceding facts and circumstances is that the identification of the dead body by PW 6 as that of his son is incorrect. Even though photographs of the dead body were taken, she did not identify her son from the photographs but from the wearing apparel, which included the shirt referred to above. Since the injuries found on the dead body did not fit in with the hole/tear found on the shirt which could be caused by firing the shirt could not be that of her son. As, according to her, she saw the dead body after the post-mortem examination which necessarily needed dissection, her identification on the basis of a cut mark on the finger also loses its importance. In any view of the evidence, therefore, it must be said that the prosecution failed to prove that Khurshid met with a homicidal death. Surprisingly enough, this aspect of the matter was completely overlooked by the trial Judge.

23. Another circumstance that was pressed into service by the prosecution to prove the murder - and found favour with the trial Judge - was that the seat covers of the Maruti car bearing No. DDB 5067 were stained with human blood. In the absence of any evidence that Khurshid was kidnapped in that car it does not come in aid of the prosecution case. It is pertinent to point out here that though prosecution led evidence to prove that photographs of fingerprints found on the above car were taken by an expert, no attempt was made by the prosecution - as the record indicates - to prove that those fingerprints were of the appellants before us. Needless to say, evidence of the fingerprint expert in proof thereof would have gone a long way to sustain the prosecution case.

24. For the foregoing discussions, and in the absence of any reason to disbelieve PW 4, it can be said that the prosecution has been able to only prove the fact that Khurshid was kidnapped in a Maruti car. The next question is whether the prosecution has succeeded in proving that the appellants were the kidnappers. So far as appellants Mukesh and Devinder are concerned we find that there is not an iota of evidence to connect them with the above offence. Since, in spite thereof, the trial Judge convicted them we may now refer to the relevant portion of the impugned judgment wherein he has dealt with this aspect of the matter, while rejecting the contention of their learned counsel that there was no evidence to convict them. It reads as under :

> "In the statement recorded by Vigilance Cell which is Ext. PW 20/A it is stated by the father of the deceased that in the Maruti van there were at least two more persons, one Jeetu and the other Pappu. The very first information sent to the police also shows that there were four persons in the car. The identity of the three had come to the knowledge of the father of the deceased. They were namely Vijender, Jeetu and Pappu. From the investigation it is revealed that Jeetu was made to get down from the car before the boy was kidnapped. Jeetu @ Jitender has been examined in the

> court. He has turned hostile. He has admitted that he knew accused Vijender. He also stated that he was apprehended by the police of PS Gokalpuri and he was detained at the PS for about one week and he was interrogated by the police about the murder of Khurshid. This testimony of Jitender shows that Jitender was the first person to be caught by the police and it was only through Jitender that police could lay hands on the other accused persons. It has come in the testimony of PW 14 that it was Jeetu who had disclosed the place where the other accused persons were hiding themselves and he led the police party to the hiding place of Vijender, Mukesh and Devinder. Similar is the statement of PW 19 Inspector Ram Singh, who stated that after he took up the investigation he recorded the statements of Raful Hasan Mirza, Miraz Ali and other witnesses, and he conducted raids at different places in Johripur and Dayalpur. He learned about an unidentified dead body having been recovered in Ghaziabad and lying at Hindon mortuary. He stated that it was Jeetu who had disclosed the hiding place of the accused Vijender; Mukesh and Devinder; who were involved in the kidnapping."

25. We are constrained to say that the above observations have been made by the trial Judge casting away the basic principles regarding reception and appreciation of evidence, and misreading the evidence. So far as the report of PW 5 before the Vigilance Cell is concerned the trial Judge failed to notice that it did not contain the names of the above two appellants, namely, Mukesh and Devinder @ Bhinder; and on the contrary therein the names of two other persons, namely, Jeetu and Pappu find place as the miscreants. Indeed, in none of the three reports that PW 5 lodged with the police he mentioned the names of the above two appellants. We hasten to add that even if he had so named it could not have been treated as legal evidence for reasons earlier mentioned. Then again, the trial Judge could not have relied upon the knowledge of PW 5 that the appellants were the miscreants as he was not a witness to the kidnapping and PW 4 did not state that he saw the miscreants and, for that matter, that the appellants were the miscreants. The reliance of the trial Judge on the result of investigation to base his findings is again patently wrong. If the observation of the trial Judge in this regard is taken to its logical conclusion it would mean that a finding of guilt can be recorded against an accused without a trial, relying solely upon the police report submitted under Section 173 CrPC, which is the outcome of an investigation. The result of investigation under Chapter XII of the Criminal Procedure Code is a conclusion that an Investigating Officer draws on the basis of materials collected during investigation and such conclusion can only form the basis of a competent court to take cognizance thereupon under Section 190(1)(6) CrPC and to proceed with the case for trial, where the materials collected during investigation are to be translated into legal evidence. The trial court is then required to base its conclusion solely on the evidence adduced during the trial; and it cannot rely on the investigation or the result thereof. Since this is an elementary principle of criminal law, we need not dilate on this point any further. Equally unsustainable is the trial Judge's reliance upon the statement made by Jeetu (PW 2) before the police in view of the express bar of Section 162 CrPC, which we have discussed earlier. Indeed, we find, the trial Judge placed strong reliance on the purported statement made by Jitender before the police that they (the appellants) were hiding and that they were involved in kidnapping and murder of Khurshid to convict them.

26. As regards the complicity of Vijender in the kidnapping the two circumstances on which the prosecution case now rests - after the inadmissible part of the evidence is excluded - are, that a key of a Maruti car which could be used for ignition of the engine of the seized car bearing No. DDB 5067 was recovered and he had a motive for the crime. These two circumstances, even taken together, do not prove the involvement of the appellant Vijender in the absence of any evidence that

Khurshid was kidnapped in the above car. In convicting Vijender the trial Judge however relied upon, apart from the evidence which we have found to be inadmissible, on the presence of hole/tear mark in the shirt of Khurshid and opinion of the expert that it could be caused by firearms, the recovery of a pistol from him, the purported statement of Bhim Singh (PW 1), the owner of Car No. DDB 5067 that Vijender (the appellant) was the driver of the car and that he was absconding till 30-6-1992 when he was arrested. So far the hole/tear mark is concerned, we have already found that it could not relate to the shirt of Khurshid; and as regards the testimony of PW 1 the trial Judge has misread the same for he categorically stated that appellant Vijender was not his driver. As regards his abscondence, we find that in his examination under Section 313 CrPC the only question the trial Judge asked him in this regard (Question No. 13) was that on 27-6-1992 PW 19 did not find him in his house. Even if we accept the evidence of PW 19 to be true, still from the absence on a day from the house the trial Judge was not justified in concluding that he had absconded. In any case, abscondence is a weak link in the chain of circumstantial evidence. Lastly, the question whether the motive stands proved or not need not detain us for in the absence of any other incriminating circumstance, it is of no moment.

27. That brings us to the conviction of Vijender under Section 25 of the Arms Act and Section 5 of TADA for illegal possession of the country-made pistol and a cartridge. The charge that was framed against Vijender in this regard was to the effect that on 30-6-1992 he was found in unlawful possession of a country-made pistol and a live cartridge in his house in Village Johripur - and not that he used that country-made pistol for kidnapping and/or murder of Khurshid. In other words, no charge was framed against him under Section 27 of the Arms Act on an allegation that he used it for the above offences. If such an allegation was made Vijender could have been tried for kidnapping and murder and for using the firearm under Section 27 of the Arms Act in the same trial as all the offences were a part of the same transaction. In the absence of such an accusation, he could not have been jointly tried for illegal possession of a firearm and ammunition on 30-6-1992 with the offences of kidnapping and murder that took place on 26-6-1992, in view of sub-section (1) of Section 218 CrPC and non-applicability of sub-section (2) thereof. The question then arises is whether such procedural irregularity caused any failure of justice. In the facts of the instant case this question must be answered in the affirmative for the statement made by PW 2 before the Investigating Officer has also been taken into consideration for this conviction also. To put it differently, the evidence led by prosecution relating to kidnapping and murder has been utilised for convicting the appellant for unauthorised possession of firearm. The conviction under Section 25 of the Arms Act must also fail for the simple reason that no previous sanction for such prosecution as required under Section 39 of the Arms Act was produced during trial. This aspect was also totally overlooked by the trial Judge. Since the convictions of Vijender for illegal possession of pistol and cartridge cannot be sustained on the above grounds we need not go into the question whether on facts it can be sustained.

28. On the conclusions as above we allow these appeals and set aside the impugned judgment. The appellants, who are in jail, be released forthwith, unless wanted in any other case.